COMMON MISTAKES IN PUBLIC PROCUREMENT


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Employment:

• Legal Services Director, Texas Municipal League, Austin, 2002-present
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Education:

• St. Mary’s University School of Law, San Antonio, Texas (Juris Doctor)
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Area of Emphasis:

• Municipal Law, which includes advising Texas Municipal League members and others in all areas of city business, as well as providing legislative support services. Focus is on the preventative education of city officials in such areas as open government laws, types of city governments in Texas, ethics, purchasing and alternative delivery methods for city construction, incorporation, historic preservation, annexation, land use, and more.
II. PRELIMINARY MATTERS

A. About the Texas Municipal League

The Texas Municipal League (TML) is a voluntary-membership association that exists solely to provide legal, legislative, and educational services to Texas cities. Since its formation in 1913, the League's mission has remained the same: to serve the needs and advocate the interests of its members.

The TML constitution states that the purpose of the League is to "render services which individual cities have neither time, money nor strength to do alone." Following are TML's service statements:

- Represent the interests of member cities before state and federal legislative, administrative, and judicial bodies at the state and federal levels.
- Conduct and sponsor an annual conference and other educational events to facilitate the study and exchange of information on relevant city government issues.
- Publish and circulate an official magazine and other publications, reports, and newsletters of interest to member cities.
- Alert member cities to important governmental or private sector actions or proposed actions which may affect city operations.
- Promote the interests of League affiliates (departments) and regions by providing organizational and technical assistance as directed by the Board and consistent with financial resources.
- Promote constructive and cooperative relationships among cities and between the League and other levels of governments, councils of governments, the National League of Cities, educational institutions, and the private sector.
- Provide in a timely manner any additional services or information which individual members may request, consistent with the member cities' common interests and the League's resources.
- Provide administrative services to the League's risk pools so that quality coverages at reasonable and competitive prices are available to member cities and their employees.

TML’s Legal Services Department provides legal assistance to TML member cities. We answer legal questions, participate in educational seminars, and prepare handbooks, magazine articles, and written materials including legal opinions, comments on attorney general opinions and state agency rules, and amicus briefs. The staff of four lawyers serves close to 1,100 member cities and upwards of 15,000 city officials.

B. Introduction

Texas cities are major participants in the procurement of public works projects. From streets to utilities to buildings, cities are always engaging in projects to serve the needs
and wants of city residents. Over the years, the legislature has passed many laws, some beneficial and some not, that affect how cities go about procuring constructions services. The two main points that appear to be addressed by those who make the rules, both the federal and state legislative and administrative bodies, are the fear of corruption in the process and the unique ability to address either real or perceived social woes through the public procurement process. This paper is a very brief overview of the methods of, and restrictions on, city construction procurement in Texas.

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The information in this paper is provided for informational purposes and should never be substituted for the advice of local legal counsel. Please direct questions to the TML Legal Department at 512-231-7400 or legal@tml.org. An electronic version of this paper is available at www.tml.org.

III. Traditional Procurement (Design-Bid-Build)

A. Introduction

Up until 2001, Chapter 252 of the Texas Local Government Code mandated competitive bidding for any contract that required the expenditure of more than $15,000 in city funds. Chapter 252, prior to 2001, severely limited the manner in which cities could construct public works projects. Typically, a city hired an architect and engineer to design a project. When the design was fully completed, a city invited general contractors to bid on the project. The bids were opened publicly, and the contract was awarded to the lowest responsible bidder. This traditional method is commonly known as “design-bid-build.”

The traditional design-bid-build process has advantages. The most important of these is familiarity. City engineers, attorneys, public works directors, purchasing officers, and other city employees are knowledgeable in this type of procurement. Elected officials like this method because of its political simplicity. When a contract is awarded to the lowest responsible bidder using an objective standard, there is, at least in theory, little room for suggestions of impropriety, cronyism, or favoritism. Also, this process provides a single point of responsibility for design and construction.

However, the assumption has always been that this method will always yield the best value and quality, which is not necessarily true. A design-bid-build project will often have many change orders. These change orders can end up lessening initial value. Quality may suffer because a city generally may not consider factors other than price except in specific, narrowly-drawn, circumstances. Additionally, design-bid-build, by its very nature, is a time consuming process.
B. Texas Local Government Code Chapter 252

1. Competitive Bidding

Currently, the Texas Local Government Code requires that all city contracts over $25,000 must be either competitively bid or must comply with a method described by Subchapter H, Chapter 271. TEX. LOC. GOV’T CODE §252.021(a). Subchapter H adds several alternatives to competitive bidding and is discussed below.

If a city chooses to award a contract based on the traditional competitive bidding scenario, §§252.041 and 252.043 prescribe the procedures for notice and award of the contract. If a city chooses to utilize the competitive sealed bidding requirement, notice of the time and place at which the bids will be publicly opened and read aloud must be published at least once a week for two consecutive weeks in a newspaper published in the city, and the date of the first publication must be before the fourteenth day before the date set to publicly open the bids and read them aloud. Id. at §252.041. If no newspaper is published in the city, the notice must be posted at the city hall for 14 days before the date set to publicly open the bids and read them aloud. Id.

According to §252.043, the contract must be awarded to the lowest responsible bidder or to the bidder who provides goods or services at the best value for the city. Id. at §252.043(a). The city is required to indicate in the bid specifications that the contract may be awarded either to the lowest responsible bidder or to the bidder who provides goods or services at the best value for the municipality. Id. at §252.043(c). This requirement is somewhat misleading because §252.043(e) provides that, if the competitive sealed bidding requirement applies to the contract for a construction project, the contract must be awarded to the lowest responsible bidder or awarded using an alternative delivery method described by Subchapter H of Chapter 271. Subchapter H authorizes what is essentially “best value” competitive bidding. Thus, a city has the authority to construct a project using best value competitive bidding, but the authority does so comes from Chapter 271 instead of §252.043.

A city must use traditional competitive bidding when awarding a contract for the construction of highways, roads, streets, bridges, utilities, water supply projects, water plants, wastewater plants, water and wastewater distribution or conveyance facilities, wharves, docks, airport runways and taxiways, drainage projects, related types of projects associated with civil engineering construction, or buildings or structures that are incidental to projects that are primarily civil engineering construction projects. Id. at §252.043(d).

Note that § 252.021 has two subsection (a)s. This codification was necessary pursuant to two bills that passed the Seventy-Seventh Legislative Session. S.B. 510 added the alternative delivery systems, and S.B. 221 added the option to use a reverse auction. Because the conflicting provisions can be harmonized, no conflict exists.
If a city chooses to award the project under the traditional method, it must choose the lowest responsible bidder, but it may reject all bids if it chooses. Id. at §252.043(a) & (f).

A city has the right to reject a bid that does not comply with the bid specifications, and the courts will generally not overrule this type of legislative act. See Corbin v. Collin County Commissioners Court, 651 S.W.2d 55, 57 (Tex. App.—Dallas 1983, no writ).

Some home rule cities have older, restrictive, charter provisions that govern procurement. Any provision in the charter of a home rule city that relates to the notice of contracts, advertisement of the notice, requirements for the taking of sealed bids based on specifications for public improvements or purchases, the manner of publicly opening bids or reading them aloud, or the manner of letting contracts that is in conflict with Chapter 252 controls over this chapter, unless the governing body of the municipality elects to have Chapter 252 supersede the charter. Id. at §252.002. This provision has allowed a city to select a bidder who was not the low bidder based on controlling charter provisions. See Associated General Contractors of Texas v. City of Corpus Christi, 694 S.W.2d 581, 583 (Tex. App.—Corpus Christi 1985, no writ).

Several courts have held that a contract is not created by the mere submission of a bid. The submission by the contractor, and not a city’s solicitation to bid, is generally held to be the offer. Thus, a city probably has no mandate to enter into a contract with the lowest bidder because Chapter 252 grants the right to reject any and all bids. Id. at §252.043(f). However, a city is probably subject to challenge if it simply rejects the bid that it has chosen and chooses another without repeating the procurement process.

2. Exemptions

Section 252.022 of the Local Government Code provides for exemptions from the competitive bidding process. When deciding whether a city construction project must be competitively bid, the most notable exemptions are:

1. a procurement made because of a public calamity that requires the immediate appropriation of money to relieve the necessity of the municipality's residents or to preserve the property of the municipality - Subsection (a)(1);

2. a procurement necessary to preserve or protect the public health or safety of the municipality's residents - Subsection (a)(2);

3. a procurement necessary because of unforeseen damage to public machinery, equipment, or other property - Subsection (a)(3);

4. a procurement for personal, professional, or planning services - Subsection (a)(4);
5. paving drainage, street widening, and other public improvements, or related matters, if at least one-third of the cost is to be paid by or through special assessments levied on property that will benefit from the improvements - Subsection (a)(9);

6. a public improvement project, already in progress, authorized by the voters of the municipality, for which there is a deficiency of funds for completing the project in accordance with the plans and purposes authorized by the voters - Subsection (a)(10);

7. a payment under a developer participation contract authorized by Subchapter C, Chapter 212 - Subsection (a)(11);

8. a city may use an alternative delivery method - Subsection (d).

3. Change Orders

As mentioned previously, the assumption has always been that traditional competitive bidding will always yield the best value and quality, which is not necessarily true. In reality, a design-bid-build project will often have many, many change orders. These change orders can end up lessening initial value and often add substantial lag-time to a project due to internal and statutory administrative requirements of a city, which contractors should be aware of prior to engaging in public works.

Chapter 252 provides the authority for cities to allow change orders. TEX. LOC. GOV’T CODE §252.048(a). Cities should be careful not to abuse change-order authority. For example, if a city knows early in the bid process that it wants to make a large change to a project, and makes that change immediately after awarding the contract, it may create an appearance of impropriety and possibly subject the city to suit. The Texas Attorney General has addressed this issue by stating that an entity subject to a competitive bidding statute must act only to promote the unmistakable legislative policy favoring unrestricted competition for public contracts. See, e.g., Ops. Tex. Att’y Gen. MW-439 (1982); MW-344, MW-296 (1981), MW-139 (1980); H-1219 (1978); H-1086, H-972 (1977).

Change orders may not increase the original contract price by more than twenty-five percent and should not be used to create an entirely new project with a contractor. Id. at §252.048(d). In any case, cities should be aware of the perils of “back-dooring” the competitive bidding requirements in this manner or any other.

4. Local Preference

Section 271.905 of the Local Government Code was added in 1999 and allows the consideration of a bidder’s principal place of business when a city awards a contract. The provision is only available to a city with a population of less than 400,000. TEX. LOC. GOV’T CODE §271.905(a). The statute states that:
“In purchasing under this title any real property or personal property that is not affixed to real property, if a local government receives one or more bids from a bidder whose principal place of business is in the local government and whose bid is within three percent of the lowest bid price received by the local government from a bidder who is not a resident of the local government, the local government may enter into a contract with [either]...the lowest bidder; or...the bidder whose principal place of business is in the local government if the governing body of the local government determines, in writing, that the local bidder offers the local government the best combination of contract price and additional economic development opportunities for the local government created by the contract award, including the employment of residents of the local government and increased tax revenues to the local government.”

Id. at §271.905(b). This is a useful provision for awarding contracts, but it appears to be geared more towards purchases of tangible items. The provision may not fit exactly in the context of the procurement of construction services.

However, another provision, §2252.002 of the Texas Government Code, states that:

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

This section is a “tit-for-tat” that somewhat protects Texas contractors from discrimination based on whether another state discriminates against non-resident contractors.

5. Historically Underutilized Businesses

When a city makes an expenditure of more than $3,000 but less than $25,000, the city is required to contact at least two historically underutilized businesses on a rotating basis, based on information provided by the Texas Building and Procurement Commission (formerly the General Services Commission) pursuant to Chapter 2161 of the Government Code. TEX. LOC. GOV’T CODE §252.0215. If the list fails to identify a historically underutilized business in the county in which the city is situated, the city is exempt from this section. More information on HUBs is available at http://www.tbpc.state.tx.us/hub/index.html.

6. Penalties

If a contract is made without complying with Chapter 252, it is void and the performance of the contract, including the payment of any money under the contract, may be
enjoined by any property tax paying resident of the city. TEX. LOC. GOV'T CODE §252.061.

A city officer or employee may be charged with a Class B misdemeanor if he intentionally or knowingly makes or authorizes separate, sequential, or component purchases to avoid the competitive bidding requirements. Id. at §252.062. In addition, the final conviction of an officer or employee for violating Chapter 252 results in the immediate removal from office or employment of that person. For four years after the date of the final conviction, the removed officer or employee is ineligible: (1) to be a candidate for or to be appointed or elected to a public office in this state; (2) to be employed by the city with which the person served when the offense occurred; and (3) to receive any compensation through a contract with that city. Id. at. §252.063.

IV. Alternative Procurement and Delivery Systems (S.B. 510)

A. Introduction

In 1995, the Texas Legislature gave public school districts the authority to use procurement and delivery methods other than competitive bidding that provide the “best value” for their construction projects. In 1997, this ability was extended to institutions of higher education. The innovative Texas Education Code provisions have become a model for states throughout the country. In 2001, Subchapter H of Chapter 271 was added to the Texas Local Government Code and extended the authority to use alternative delivery systems, including best-value competitive bidding, competitive sealed proposals, design-build, construction management, and job order contracting, to Texas cities.

Alternative procurement and delivery methods have many advantages over traditional competitive bidding. In the traditional competitive bidding process, a contract must be awarded to the lowest responsible bidder. Subjective considerations such as the contractor’s track record on a particular type of project, anticipated use of minority and local contractors, and other factors generally cannot be taken into account. When subjective criteria are used in the selection process, contractors are put on their toes and encouraged to provide maximum quality on every project. Additionally, contractors may be less likely to bring suit against a city because litigiousness and relationships with prior customers may be taken into account in the selection process. A city utilizing a traditional design-bid-build process via competitive bidding arguably cannot reject the lowest responsible bid even if the contractor is presently involved in a lawsuit with the city for a past project.

Further, alternative delivery systems are particularly advantageous on projects where time, flexibility, or innovation is critical. The design and construction phases overlap, as opposed to the sequential design-bid-build method. Once a firm is chosen, construction can begin even before all the plans are completed. The time savings are clear. Land can be cleared before the foundation is fully designed, and pier holes can be drilled before the interior colors are picked. Increased flexibility throughout the process allows
the number of offices or rooms in a building to be changed relatively easily during the construction. Instead of following the old method of having an engineer design a project in the traditional way, alternative delivery systems can and do encourage innovation. A city can present a request for proposals with an end in mind, and allow a firm to develop a plan whereby the most efficient and innovative materials and procedures are used.

Of course, alternative procurement and delivery systems also have drawbacks. The first is overcoming the deep-seated traditions in public procurement. In the political arena, a legitimate fear may exist that picking a contractor based on criteria other than the lowest price will promote cronyism and favoritism. Also, it is often difficult for a governing body to pick between competing firms. From the staff perspective, public procurement employees and officials are used to an adversarial process. Alternative delivery systems require trust and team building to be successful.

At any rate, alternative delivery methods are a part of the natural evolvement of the construction of public works projects. New legislation allowing for these methods certainly does not mandate their utilization, but simply allows for greater flexibility in the design and construction processes. These best-value methods yield time savings, quality, and value, and attorneys for school districts, universities, and construction companies around the state have struggled to fairly and legally implement their newfound authority. Cities can learn much from their experiences. Following is brief overview of city authority to use alternative delivery systems.

The Texas Municipal League (TML) has sample “packets” of information that include more detail than is covered here and also have sample forms and documents. Please contact the TML Legal Department for copies of those materials.

B. Preliminary Matters

Section 252.021(a) of the Local Government Code authorizes cities to use the alternative delivery systems outlined in Subchapter H of Chapter 271 in lieu of traditional competitive bidding. However, it is important to note that these methods have certain restrictions.

First, the new methods are only available for “facilities.” Thus, a city project must meet the definition of a facility prior to utilizing any of them.

"Facility" means buildings the design and construction of which are governed by accepted building codes. The term does not include:

(A) highways, roads, streets, bridges, utilities, water supply projects, water plants, wastewater plants, water and wastewater distribution or conveyance facilities, wharves, docks, airport runways and taxiways, drainage projects, or related types of projects associated with civil engineering construction; or
(B) buildings or structures that are incidental to projects that are primarily civil engineering construction projects.

TEX. LOC. GOV'T CODE §271.111(7). In addition, a city must choose which, if any, of the new methods will produce the best value for the city. Id. at §271.114(a). In some circumstances, traditional competitive bidding may remain the most appropriate choice.

Further, any provision in the charter of a home rule city that requires the use of competitive bidding or that prescribes procurement procedures and that is in conflict with Subchapter H controls unless the governing body elects to have Subchapter H supersede the charter or regulation. Id. at §271.112(a).

Finally, a city must post notice of bids or proposals, as applicable, in a newspaper of general circulation in the county in which the city’s central administrative office is located. In a two-step procurement process, the time and place the second step bids, proposals, or responses will be received are not required to be published separately. Id. at §271.112(d).

When a city understands and meets, as appropriate, these preliminary requirements, the Local Government Code expressly states that procurement procedures for each type of alternative delivery method may be used as briefly outlined below.2

C. Competitive Bidding

A city is authorized to use “best-value” competitive bidding to select a contractor to perform construction, rehabilitation, alteration, or repair services for a facility. TEX. LOC. GOV'T CODE §271.115. Under this method, a city is still authorized to reject any and all bids and may take into account the safety record of a bidder pursuant to a written definition and criteria for accurately determining the safety record of a bidder. Id. at §271.026 & 271.0275.

A city must award a competitively bid contract at the bid amount to the bidder offering the best value to the city according to weighted selection criteria established by the city. The selection criteria may include factors such as:

1. the purchase price;
2. the reputation of the vendor and of the vendor’s goods or services;
3. the quality of the vendor’s goods or services;
4. the extent to which the goods or services meet the governmental entity's needs;

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2 The specific procedures for procurement under each alternative delivery methods are clearly detailed in Subchapter H of Chapter 271 of the Local Government Code. For purposes of brevity, the details of each will not be fully covered here. Rather, this section is meant to be an overview.
5. the vendor’s past relationship with the governmental entity;

6. the impact on the ability of the governmental entity to comply with rules relating to historically underutilized businesses;

7. the total long-term cost to the governmental entity to acquire the vendor's goods or services; and

8. any other relevant factor specifically listed in the request for bids or proposals.

_Id._ at §271.113(b).

**D. Competitive Sealed Proposals**

A city that wishes to use competitive sealed proposals must first select or designate an engineer or architect to prepare construction documents for the project according to the Professional Services Procurement Act, discussed below. _Tex. Loc. Gov’t Code_ §271.116(b).

The city prepares a request for competitive sealed proposals that includes construction documents, selection criteria, estimated budget, project scope, schedule, and other information that contractors may require to respond to the request. The governmental entity shall state in the request for proposals the selection criteria that will be used to select the contractor. _Id._ at §271.116(d). The city may use the criteria listed previously in this paper under “competitive bidding.”

The city then receives, publicly opens, and reads aloud the names of the offerors and, if any are required to be stated, all prices stated in each proposal. Not later than the forty-fifth day after the date of opening the proposals, the city must evaluate and rank each proposal submitted in relation to the published selection criteria. _Id._ at §271.116(e).

Next, the city selects the offeror that offers the best value based on the published selection criteria and on its ranking evaluation. The city first attempts to negotiate a contract with the selected offeror. The city and its engineer or architect may discuss with the selected offeror options for a scope or time modification and any price change associated with the modification. If the city is unable to negotiate a contract with the selected offeror, the city must, formally and in writing, end negotiations with that offeror and proceed to the next offeror in the order of the selection ranking until a contract is reached or all proposals are rejected. _Id._ at §271.116(f).

Finally, the city must provide, independently of the contractor, the inspection services, the testing of construction materials engineering, and the verification testing services necessary for acceptance of the facility. _Id._ at §271.116(c).
E. Design-Build Contracts

Design-build is an alternative delivery method whereby a single company provides both design and construction under a single contract. A design-build firm consisting of a contractor, architect, and engineer contracts with, and is responsible to, the owner for delivery of the project. However, under §271.119(b), a city must designate its own independent architect or engineer to act as its representative for the project in accordance with the Professional Services Procurement Act, discussed below.

A design-build firm is picked using a two-phase procurement process. First, a project owner prepares a request for qualifications. The request includes information on the project scope, project site, budget, special systems, and other relevant information. In addition, the owner prepares a “design criteria package.” The package may include criteria such as description and survey information regarding the site, interior space requirements, quality standards, and other requirements as necessary. TEX. LOC. GOV’T CODE §271.119(c). Based on the request for qualifications, the owner selects a shortlist of no more than five potential firms based on the firms’ expertise, technical competence, capability to perform, past performance, and other factors submitted by the firm. Id. at §271.119(d)(1). At the next phase, the shortlisted firms submit additional information such as the technical approach, implementation plan, and the cost methodologies that each firm will use to reach the project goals. The city then ranks the firms and selects the firm that offers the best value. Id. at §271.119(d)(2). Subsequent to the choice, the city attempts to negotiate a contract with the selected firm. If the city is unable to negotiate a satisfactory contract with the selected firm, the city shall, formally and in writing, end negotiations with that firm and proceed to negotiate with the next firm in the order of the selection ranking until a contract is reached or negotiations with all ranked offerors end. Id.

Payment under the design-build contract is usually based on either a lump-sum or a guaranteed maximum price, and can be guaranteed at one of several stages throughout a project, including the preliminary design phase, detailed design phase, or anywhere in between.

F. Construction Manager

1. CM Agent

A construction manager-agent (CMA) is a legal entity that provides consultation to the governmental entity regarding construction, rehabilitation, alteration, or repair of the facility. TEX. LOC. GOV’T CODE §271.117(b). Utilizing a CMA allows a city to hire someone with the expertise to oversee a construction project on the city’s behalf and represents the governmental entity in a fiduciary capacity. Id.

Before or concurrently with selecting a CMA, a city must select or designate an engineer or architect to prepare the construction documents for the project. Id. at §271.117(c). The city then selects a CMA on the basis of demonstrated competence
and qualifications in the same manner as provided for the selection of engineers or architects under the Professional Services Procurement Act, except that notice must be published in a newspaper of general circulation in the county in which the city's central administrative office is located. *Id.* at §271.117(d).

After the selection of the CMA, the city procures, in accordance with applicable law (e.g., competitive bidding or an alternative delivery method), a general contractor, trade contractors, or subcontractors who will serve as the prime contractor for their specific portion of the work. In other words, the city usually contracts directly with the trades, with the CMA administering the work in lieu of a general contractor.

2. CM At-Risk

Construction management is oftentimes best suited to larger projects that are schedule sensitive, difficult to define, or subject to frequent change orders. A construction manager-at-risk (CMAR) is a legal entity that assumes the risk for construction, rehabilitation, alteration, or repair of a facility at the contracted price as a general contractor and provides consultation to the governmental entity regarding construction during and after the design of the facility. *Tex. Loc. Gov’t Code* §271.118(b).

Before or concurrently with selecting a CMAR, a city must select or designate an engineer or architect to prepare the construction documents for the project. *Id.* at (c).

A city may select the CMAR in either a one-step or two-step process. The city must prepare a request for proposals, in the case of a one-step process, or a request for qualifications, in the case of a two-step process, that includes general information on the project site, project scope, schedule, selection criteria, estimated budget, and the time and place for receipt of proposals or qualifications, as applicable, and other information that may assist the city in its selection of a CMAR. The city must state the selection criteria in the request for proposals or qualifications, as applicable. The selection criteria may include the offeror's experience, past performance, safety record, proposed personnel and methodology, and other appropriate factors that demonstrate the capability of the CMAR. If a one-step process is used, the city may request, as part of the offeror's proposal, proposed fees and prices for fulfilling the general conditions. If a two-step process is used, the city may not request fees or prices in step one. In step two, the city may request that five or fewer offerors, selected solely on the basis of qualifications, provide additional information, including the CMAR's proposed fee and its price for fulfilling the general conditions. *Id.* at (e).

At each step, the city must receive, publicly open, and read aloud the names of the offerors. At the appropriate step, the city must also read aloud the fees and prices, if any, stated in each proposal as the proposal is opened. Not later than the 45th day after the date of opening the proposals, the city must evaluate and rank each proposal submitted in relation to the criteria set forth in the request for proposals. *Id.* at (f).
The city then selects the offeror that submits the proposal that offers the best value for the governmental entity based on the published selection criteria and on its ranking evaluation and attempt to negotiate a contract. If the city and first offeror cannot reach an agreement, the city must, formally and in writing, end negotiations with that offeror and proceed to negotiate with the next offeror in the order of the selection ranking until a contract is reached or negotiations with all ranked offerors end. *Id.* at (g).

A CMAR must publicly advertise and receive bids or proposals from trade contractors or subcontractors for the performance of all major elements of the work other than the minor work that may be included in the general conditions. A CMAR may seek to perform portions of the work itself if the CMAR submits its bid or proposal for those portions of the work in the same manner as all other trade contractors or subcontractors and if the city determines that the CMAR’s bid or proposal provides the best value. *Id.* at (h).

If a selected trade contractor or subcontractor defaults in the performance of its work or fails to execute a subcontract after being selected, the CMAR may, without advertising, fulfill the contract requirements itself or select a replacement trade contractor or subcontractor to fulfill the contract requirements. *Id.* at (k).

The contract is usually paid by a fixed contract amount or a guaranteed maximum price.

**G. Job Order Contracts**

Job order contracting is a means to handle the minor construction, repair or alteration of facilities when work is of a recurring nature, but delivery times, type and quantities of work are indefinite. Examples may include things like carpet replacement and repainting. The usual contract term is for six months to two years with an option to renew. This type of contract is procured by a request for competitive sealed proposals based on experience, qualifications, past performance, technical ability, financial stability, reputation, and price that provide the overall best value. Job order contracting can be advantageous to a city because it eliminates the procedural requirements necessary to implement small projects and provides for a fast response by the contractor. It may, however, be perceived as a threat to in-house public works departments. For more detailed information, see TEx. LOC. GOV’T CODE §271.120.

**V. Local Government Corporations**

Subchapter D of Chapter 431, Texas Transportation Code, currently authorizes a city to create a local government corporation (LGC) to "aid and act on behalf of one or more local governments to accomplish any governmental purpose of those local governments." TEx. TRANS CODE §431.101(a). Subchapter D has been used by some local governments as an innovative and flexible tool to create non-profit corporations to aid in the construction of public works projects using alternative procurement and delivery methods, such as design-build and construction management.
An LGC is legally permitted to use alternative construction methods because it is exempted from many of the restrictive statutory requirements presently applicable to the local government that creates it. For example, an LGC is exempt from the competitive bidding provisions that apply to cities and counties. See Id. at § 431.101(e); Op. Tex. Att’y Gen. No. JC-206 (2000).

The main purpose of creating an LGC, the utilization of alternative procurement and delivery methods in construction, is expressly authorized by S.B. 510 (2001), which is now codified in Chapter 252 and Subchapter H of Chapter 271 of the Texas Local Government Code. S.B. 354, passed by the legislature but vetoed by Governor Perry, would have severely curtailed the flexible nature of LGCs. The bill imposed such harsh restrictions on LGCs that their usefulness would have become practically nonexistent.

Contrary to the belief of a few, LGCs are not being abused. Rather, they are providing, with necessary supervision and statutory constraints, yet another construction alternative to achieve the best value and quality for the taxpayers. These corporations are created differently from political subdivisions and, more importantly, do not possess governmental authority, but may only “aid and act on behalf of” a city or county to accomplish the city’s or county’s governmental purposes. LGCs are subject to control and supervision by the governmental entity that creates them because the governmental body approves the corporation’s articles of incorporation and appoints the corporation’s directors. In addition, a corporation is subject to both the Texas Public Information and Open Meetings Acts. Id. at §§431.004; 431.005; 431.101(a). Out of the over 1,200 cities in Texas, very few have utilized this method of construction, but the elected governing bodies of Texas cities retain the local control to use this tool when it provides the best procedure under the circumstances.

Whether the power to enter into alternative construction contracts comes from amendments to the Local Government Code by S.B. 510, from the continued utilization of LGCs, or from both, alternative delivery methods such as design-build and construction management are a part of the natural evolution of finding a balance between time, convenience, price, and quality for the construction of public works projects. Nothing mandates the utilization of these methods, but they do allow greater flexibility in public design and construction processes.

VI. Professional Services Procurement Act

Chapter 2254 of the Texas Government Code prohibits a city from selecting a professional on the basis of competitive bids. Professional services are defined as accounting, architecture, landscape architecture, land surveying, medicine, optometry, professional engineering, real estate appraising; or professional nursing. TEX. GOV’T CODE §2254.002(2). Section 2254.003 provides that awards for professional services be on the basis of demonstrated competence and qualifications and for a fair and reasonable price. To procure professional services, a city must first select the most highly qualified provider on the basis of demonstrated competence and qualifications and then attempt to negotiate a contract at a fair and reasonable price. Id. at §2254.004. If a satisfactory contract
cannot be negotiated with that provider, the next most highly qualified provider is selected and so on with the same process until an agreement is reached.

A contract entered into or an arrangement made in violation of Chapter 2254 is void as against public policy. *Id.* at §2254.005.

**A. Engineering Practices Act**

The Texas Engineering Practices Act (Act) provides that a city may not engage in the construction of any public work involving professional engineering, where public health, public welfare or public safety is involved, unless the engineering plans and specifications and estimates have been prepared by, and the engineering construction is to be executed under the direct supervision of, a licensed professional engineer. *Tex. Rev. Civ. Stat. art. 3271a, Sec. 19(a).*

The Act does not apply to:

1. a public work that involves structural, electrical, or mechanical engineering and for which the contemplated expenditure for the completed project does not exceed $8,000;

2. a public work that does not involve structural, electrical or mechanical engineering and for which the contemplated expenditure for the completed project does not exceed $20,000; and

3. road maintenance or betterment work undertaken by the commissioners court of a county.

*Id.* at Sec. 19(b).

**B. Architect Act**

The Texas Architects Act provides that a registered architect must prepare the architectural plans and specifications for:

1. a new building that is to be constructed and owned by a State agency, a political subdivision of this State, or any other public entity in this State if the building will be used for education, assembly, or office occupancy and the construction costs exceed $100,000; or

2. any alteration or addition to an existing building that is owned by a State agency, a political subdivision of this State, or any other public entity in this State if the building is used or will be used for education, assembly, or office occupancy, the construction costs of the alteration or addition exceed $50,000, and the alteration or addition requires the removal,
relocation, or addition of any walls or partitions or the alteration or addition of an exit.

TEX. REV. CIV. STAT. art. 249a, Sec. 16(a).

VII. Financial Considerations

A. Workers Compensation Coverage

In 1991, in the midst of a complete overhaul of the workers’ compensation insurance system, a new provision went into effect that has drastically affected public construction. It requires that each contractor and subcontractor involved in a “building or construction contract” with a governmental entity in Texas provide proof that it covers its employees through workers’ compensation insurance. TEX. LABOR CODE §406.096(a) & (b). This provision is not mandatory for the private sector. Detailed regulations implementing the statute are found in the Texas Workers’ Compensation Commission Rule 110.110.

The only case interpreting the Labor Code provision has held that the requirements are indeed mandatory. A public entity may not hire a contractor that does not subscribe to the state’s workers’ compensation system. Beldon Roofing & Remodeling Co. v. San Antonio Water System, 898 S.W.2d 351, 355 (Tex. App.—San Antonio 1995, writ denied). A public employer cannot opt out of the workers’ compensation system. TEX. LABOR CODE §406.002(a). The Beldon court found this statute was indicative of the Legislature’s intent to ensure coverage for all workers working for or with public bodies. 898 S.W.2d at 353.

The only stated exemption from the workers’ comp rule is for maintenance employees working for an employer whose primary business does not include building or construction. TEX. LABOR CODE §406.096(d). Attorney general opinions have defined “maintenance” generally as ordinary upkeep and repairs necessary to preserve something in good condition. Tex. Att’y Gen. Op. No. DM-469 (1998). However, the same office specifically refused to rule on whether some of the following contracts were subject to the workers’ comp rule: the installation of carpet for a single office, the replacement of a single glass window pane, or even annual service contracts for elevator and fire alarm maintenance. Tex. Att’y Gen. Op. No. DM-300 (1994).

The Texas Municipal League has advised cities to require workers’ comp for all contracts, period, regardless of the type or compensation involved. Why so broad an interpretation? DM-300 rules out several plausible attempts to develop further exceptions to the statutory rule. First, the opinion states that no “small contract” exception exists, even for fifty-dollar carpet repair jobs. It acknowledges that very small contracts will be substantially more expensive but states that “the legislature anticipated

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3 The majority of this section is from an article by Jonathan Graham, City Attorney, and Julian Grant, former assistant city attorney, from the City of Temple Legal Department that appeared in the Spring 2001 edition of the Texas City Attorneys Association Newsletter. The views expressed do not necessarily represent those of the Texas Municipal League.
this effect and determined that the added cost was justified by the benefits of requiring coverage.” It implies that “smaller and less expensive independent contractors” will have to pass on the cost of subscription to the workers’ compensation system.

The City of Temple has found it difficult to hire contractors for the least costly public projects. Many potential contractors for small municipal public works projects are local “ma and pa” companies with one (the owner) or two employees. A small project might be painting rooms, erecting a sign or a fence, or installing curtains. Cities find themselves either not receiving bids for these jobs, or more likely, receiving bids that are disproportionately high because the cost of acquiring workers’ compensation insurance for the city project has been added to the bid. Temple’s purchasing agent reports that on many small bids advertised by the City she receives only “no bids.” Large bidders simply are not interested, and smaller firms read the specification requiring workers’ compensation coverage for their employees and for all of the employees of their subcontractors, and “no bid” the specifications. It is simply too costly or too much of a hassle to comply. (Another section in the Labor Code states that a sole proprietor can be excluded from coverage “notwithstanding Section 406.096.” TEX. LABOR CODE §406.097(c)). When she does receive bids on small public works projects they are inflated by the cost of a one-time purchase of workers’ compensation insurance.

Second, DM-300 holds that the governmental entity may not enter into an agreement in which the workers’ compensation carrier for the entity adds the contractor’s employees onto the entity’s policy as covered employees. The entity is not a “hiring contractor” as defined by §406.141 of the Labor Code since it does not act as a contractor when it pays a company to do work on its public projects. Perhaps a city could hire a one or two person firm as temporary “employees” rather than contractors and cover them with its policy this way. Having cities go to this length, however, is probably not what the Legislature intended.

Finally, DM-300 opines that the statute is not met when a general contractor and its subcontractors enter into agreements that the subs are independent contractors and accordingly do not have to be covered by workers’ compensation insurance. This last holding addresses the most common argument cities encounter when dealing with contractors that do not carry workers’ compensation, yet still desire to bid on public projects.

According to the City of Temple, contractors and their attorneys should share the frustration that city attorneys feel when approached by purchasing agents, small contractors, and councilpersons who do not yet appreciate the draconian nature of the rule discussed above. House Bill 851 has already been filed during the Seventy-Eighth Legislative Session by Representative Fred Brown. H.B. 851 is endorsed by the Texas Municipal League and states that a city may require either workers comp or benefits for personal injuries or death in a stated amount.
While cities acknowledge the “public benefit” of a policy that requires workers employed on project funded with public dollars to be covered for on the job injuries, the rationale behind giving cities a local option on this issue is that the majority of very small jobs bid out by cities can best be handled by very small firms with one employee-owner or two employees. These individuals are either self-insured or carry only standard medical insurance for their employees. Some of them may not be able to purchase workers’ comp insurance even if they so desired.

B. Payment and Performance Bonds

A city entering into a public works contract must require the contractor, before beginning the work, to execute a payment bond to the city if the contract is in excess of $25,000. TEX. GOV’T CODE §2253.021(a)(2). The purpose of a payment bond is to protect subcontractors and suppliers providing goods or services to the prime contractor.

A city entering into a public works contract must require the contractor, before beginning the work, to execute a performance bond to the city if the contract is in excess of $100,000. TEX. GOV’T CODE §2253.021(a)(1). The purpose of a performance bond is to protect the interests of the city by ensuring the contractor’s faithful performance of his obligations under the contract.

C. Bond Rating

As a general rule, cities are not authorized to refuse to accept a payment and/or performance bond in the absence of an A.M. Best rating, nor can they impose financial requirements on a surety that is licensed in Texas and that has a certificate of authority from the United States Secretary of the Treasury to issue bonds for federal projects.

The Texas Insurance Code sets forth exclusive financial requirements for sureties furnishing bonds to cities in Texas. TEX. INS. CODE art. 7.19-1. Under this statute, a surety that is Treasury Listed and licensed in Texas to issue surety bonds may furnish any type of surety bond, including payment and performance bonds, so long as the surety provides the governmental entity with a certification that it has reinsured, with a Treasury Listed reinsurer licensed in Texas, that portion, if any, of the amount of the bond in excess of ten percent of the surety’s capital and surplus.

The Texas Attorney General has specifically stated in Letter Opinion No. 92-61, "unless specifically so authorized by law..., governmental entities may not impose additional financial criteria on authorized sureties issuing performance and payment bonds on public works or construction contracts beyond those in article 7.19-1 of the Insurance Code."

The Insurance Code states that compliance with the requirements set forth in that statute constitutes full and complete compliance with all other qualifications that may be imposed by law, charter, rule, or regulation. The authority to regulate sureties in Texas
lies in the hands of the Texas Department of Insurance. Thus, cities arguably should probably not impose additional requirements.

D. Prompt Pay

Chapter 2251 provides that a city must pay on contracts promptly. The law governs payments to any vendor that supplies goods or services to cities and generally requires payment within thirty days of receiving the goods, services, or an invoice, with several exceptions. TEX. GOV’T CODE §2251.021. The law defines a vendor as someone who supplies goods or a service to a city, and the attorney general has confirmed that it applies to construction contracts. Id. at §2251.001(10); Op. Tex. Att’y Gen. No. DM-88 (1992).

E. Prevailing Wage Rates

Chapter 2258 of the Texas Government Code provides that, when a city contracts to construct a public work, including building, highway, road, excavation, or repair work or other project development or improvement, a contractor must pay not less than the general prevailing rate of per diem wages for work of a similar character in the city in which the work is performed.

The governing body of the city is required to determine the prevailing wage by conducting a survey or by using the prevailing wage rate as determined by the United States Department of Labor. A city must specify in the call for bids for the contract and in the contract itself the wage rates determined under this section. TEX. GOV’T CODE §2258.002.

The burden is generally on the contractor to pay the prevailing wage as specified in the contract. Id. at §2258.023.

VIII. Miscellaneous

A. Architectural Barriers

The Texas Architectural Barriers statute is designed to further the policy of the State of Texas to encourage and promote the rehabilitation of persons with disabilities and to eliminate, insofar as possible, unnecessary barriers encountered by persons with disabilities, whose ability to engage in gainful occupations or to achieve maximum personal independence is needlessly restricted. TEX. REV. CIV. STAT. Sec.1, art. 9102. All plans and specifications for construction or for the substantial renovation, modification, or alteration of a building or facility that is built with public funds must be submitted to the Texas Department of Licensing and Regulation for review and approval. Id. at Sec. 5(j). The Texas Department of Licensing and Regulation is an excellent resource for questions. Their website is http://www.tdlr.state.tx.us.
B. Electronic Bidding

A city is now authorized to receive bids or proposals under Chapter 252 through electronic transmission if the governing body adopts rules to ensure the identification, security, and confidentiality of electronic bids or proposals and to ensure that the electronic bids or proposals remain effectively unopened until the proper time. TEX. LOC. GOV’T CODE §252.0415(a).

C. Reverse Auction

Cities are now authorized by §252.021 of the Local Government Code to use a reverse auction procedure in accordance with 2155.062(d) of the Government Code.

IX. Conclusion

As long as there are cities in Texas, those cities will be engaging in construction projects to serve the needs and wants of city residents. The laws that govern city procurement of construction projects are based on the fear of corruption in the process and the unique ability to address either real or perceived social woes through the public procurement process. This paper is meant only to provide a very brief overview of the major statutes that affect city procurement in this area. For specific questions, please contact the Texas Municipal League Legal Department at 512-231-7400 or visit our website at www.tml.org.