

PUBLIC WORKS CONTRACTS WITH TEXAS PUBLIC ENTITIES

Presented by:

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OVERVIEW OF LOCAL GOVERNMENT

1. MUNICIPALITIES

In Texas, municipalities are actually local “corporations” incorporated by a group of citizens who meet certain requirements for the creation of a municipality. Essentially, there are two types of municipalities in Texas: general law and home rule. General law cities will primarily be smaller cities with populations of less than 5,000. General law cities may only perform their tasks in accordance with the parameters laid out for governmental operations by Texas law. The governing body of a general law municipality is its city council or its board of aldermen.

Home rule municipalities may operate somewhat independently of the State. They are given broad powers, limited only by clearly conflicting constitutional or statutory provisions. Home rule municipalities will always have a city charter, which may set forth powers that differ from state regulations. While both general law and home rule municipalities must comply with the competitive bidding requirements set forth in the Texas Local Government Code, home rule municipalities may have additional requirements and/or restrictions on contracting. The governing body of a home-rule municipality is the city council, but often times, a home-rule city will also delegate management authority to an individual such as the City Manager, who will have some limited, independent spending authority.

2. SCHOOL DISTRICTS

Independent school districts are created and controlled by the State of Texas. Unlike municipalities, school districts are strictly governed by the state branch of government and the Texas Education Code. School districts and municipalities often differ in their contracting abilities and their procurement requirements. A school board is the governing body of a school district.

3. COUNTIES

Like school districts, counties are a subset of the State, and their powers are derived solely from state statutes. However, as with municipalities, most of the purchasing powers and restrictions of counties are found in the Texas Local Government Code. The governing body of a county is its commissioner’s court.

4. OTHER LOCAL GOVERNMENT ENTITIES

Other governmental units include water districts, community college districts, and various special purpose districts. When contracting with these entities, specific statutes and/or administrative codes may limit procurement methods. However, generally these districts must comply with rules similar to those followed by municipalities and counties.

OPEN RECORDS/OPEN MEETINGS ISSUES

1. INTRODUCTION

One critical factor governing the contracting and construction process for public entities is the fact that, as units of government, they must be open. With few exceptions, the process of decision-making, of contract negotiation, of contract administration, and of dispute resolution is open and public. Typically, any member of the public can make inquiries into these processes; this includes competitors, newspapers and other members of the media, and those who are of a mind to file suit or assert some grievance. Because government in Texas is open, public entities must conduct their operations in broad daylight, subject to critical inspection and review by anyone, regardless of purpose or motive, who has even a basic familiarity with applicable law.

2. THE TEXAS OPEN MEETINGS ACT

The essence of the Texas Open Meetings Act¹ is to require governmental bodies to provide advance notice to the general public of the subject of and topics to be discussed at an impending meeting and to grant to the public the right to attend and observe. The fundamental concept behind the Act is to make government, as an instrument of the people, accessible and to make open the workings of government. Every regular, special or called meeting of the governmental body must be open to the public and a notice of the meeting (identifying the topics) must be conspicuously posted not less than 72 hours in advance of the meeting.

A “meeting” under the Act is defined very broadly as including virtually any deliberation relating to public business or public policy over which a governmental body has supervision or control. A quorum of the membership of the governing body must be present throughout the duration of the meeting. A quorum is a majority of the membership, unless some rule of law establishes a different amount. In the event that members of a governmental body leave before the meeting is formally ended, leaving less than a quorum of the members present, then the meeting must immediately end.

As mentioned, some notice must be posted at least 72 hours in advance of the meeting in a conspicuous place that identifies the topics to be discussed at the meeting. This advance notice is generally done by means of posting the meeting’s agenda at or near the main office of the governmental body. With few exceptions, all meetings are open to the general public. One need not be a resident of the jurisdiction nor meet any special criteria for attending. Any person present may record or videotape the conduct of the meeting so long as this activity does not unduly disrupt the progress of the meeting.

However, the Act simply confers the right to the general public to attend the meeting and observe the proceedings of government. It does not entitle any member of the general public to participate in the meeting. Although not required by the Act, many governmental bodies typically reserve a portion of their agenda for citizen’s comments and allow members of the general public to sign up and speak on any topic relevant to the business of the public entity. However, restrictions exist on the level of interaction between members of the governmental body and the person speaking on the citizen’s agenda. Further, governmental bodies may limit the amount of time consumed by any person speaking on a citizen’s agenda.

Discussions and deliberations between members of a governmental body must be limited to the items enumerated on the posted agenda. This rule does not apply to a statement of specific factual

¹ Chapter 551, TEXAS GOV’T CODE

information given in response to an inquiry by a member of the public or of the governmental body, or a recitation of existing policy in response to the inquiry. In other words, a member of the public may make an inquiry during an open meeting about any subject which is not on the posted agenda. However, the response given, if any, must be limited to a statement of specific factual information or a statement of existing policy. Any discussion or deliberation regarding the subject of the inquiry must be limited to a proposal to place that subject on a future agenda for a future meeting.²

Governmental bodies may conduct closed meetings (also termed “executive sessions”) under certain limited circumstances. A governmental body may deliberate in private during a closed meeting to conduct a private consultation with its attorney but only when the governmental body is seeking the advice of counsel relating to pending or contemplated litigation, a settlement offer, or on a matter in which the attorney-client privileged may be invoked.³

The governing bodies of political subdivisions may also deliberate in closed session to discuss the purchase, exchange, lease or value of real property if an open meeting may have a detrimental effect on a position of the governmental body in negotiations with third parties.⁴ Executive sessions are also authorized when deliberating on the appointment, evaluation, duties or discipline of public officers or employees as well as to hear complaints or charges against an officer or employee of the political subdivision. Thus, for example, a city council may interview a job applicant in closed session and may discuss the terms and conditions of the appointment in closed session. However, any vote on the hiring of the applicant must be conducted in open session.

The opportunity to conduct deliberations in closed session only applies to public officers and employees. The Act does not allow a political subdivision to discuss or deliberate in closed session on the hiring of independent contractors. Contract negotiations and deliberations between the governing body and the successful bidder must be conducted in open session where any member of the general public may attend and observe.

The Act also does not require the governing board of a municipal hospital, a municipal hospital authority, a hospital district created under general or special law, or a non-profit health maintenance organization to conduct open meetings to deliberate on pricing or financial information relating to bids for the arrangement or provision of services or product lines where disclosure of the information may give advantage to competitors of the hospital, nor to deliberate on any information relating to proposed new services or product lines.⁵

Economic development corporations, non-profit corporations created by municipalities which are charged with the mission of promoting economic, industrial and commercial development within cities, are subject to the provisions of the Open Meetings Act.⁶ The Act has recently been amended to enable governmental bodies to conduct closed sessions to deliberate on commercial or financial information received from business prospects that the governmental body seeks to have locate, remain or expand in or near the jurisdiction of the political subdivision and with which the governmental body is conducting economic development negotiations.⁷ A political subdivision may also deliberate on the offer of a financial or other incentive to a business prospect when conducting economic development negotiations.

² §551.042, TEXAS GOV'T CODE

³ §551.071, TEXAS GOV'T CODE

⁴ §551.072, TEXAS GOV'T CODE

⁵ §551.085, TEXAS GOV'T CODE

⁶ Economic Development Corporations, termed 4A and 4B Corporations, are created under the authority of the Development Corporation Act of 1979 (Art. 5190.6, Tex.Civ.Stat. Ann.).

⁷ §551.086, TEXAS GOV'T CODE

If a closed meeting is permitted under the Act, a governmental body must first convene in open session, announce that a closed meeting will be held, and identify which section or provision of the Act the closed meeting is held under. A tape recording or certified agenda must be made of the proceedings of the closed meeting. Governing bodies are required to preserve the agenda or recording for at least two years following the meeting. However, the contents of the agenda or recording is not available for public inspection and must be held in confidence.

Compliance with the provisions of the Act is important for public officials for a variety of reasons. First and foremost, violations of certain provisions of the Act may give rise to criminal prosecution. The mere participation in a closed meeting which is not permitted by the Act is punishable by a jail sentence of as much as six months, a fine of up to five hundred dollars, or both. Similar criminal penalties exist if: 1) a member of a governmental body conspires to avoid the open meeting requirements by meeting in numbers of less than a quorum for the purposes of secret deliberations; 2) a member of a governmental body participates in a closed meeting where no certified agenda or tape recording is being kept of the meeting; or, 3) if any person discloses the certified agenda or tape recording of the closed meeting to any person other than a current member of the governing body. The Act also provides that any action taken by a governmental body in violation of the Open Meetings Act is voidable. The provisions of the Act may also be enforced by mandamus and injunctive relief.⁸

The relevance of the Open Meetings Act to both public officials as well as prospective contractors is that political subdivisions can rarely conduct negotiations or perform decision-making functions in private or confidence. A prospective contractor has the right and opportunity to attend and observe a city council, a school board or a county commissions court as they deliberate on the selection of a contractor as well as the negotiations of contract terms with the successful bidder. Briefing sessions conducted between the governing body and the staff of the public entity must be open to the public. It should be noted that pre-bid conferences and other meetings or discussions that are called or conducted solely by staff members of the political subdivision are not subject to the provisions of the Act. The Act only applies to the deliberations of the governing body and not the conduct of its staff.

3. THE TEXAS OPEN RECORDS/PUBLIC INFORMATION ACT

The Texas Public Information Act, originally referred to as the Open Records Act, was first adopted in 1973 and is now codified in chapter 552 of the Texas Government Code. With limited categories of exceptions, the Act requires the disclosure of virtually all information collected, assembled or maintained by governmental bodies.⁹

The definition of governmental body under the Act includes county commissioners courts, school district boards of trustees, city councils, governing boards of special districts, political subdivisions of counties and cities, as well as boards, commissions, agencies and departments of the state of Texas that are directed by one or more elected or appointed members.¹⁰ The Act also applies to entities that are supported in whole or in part by public funds or that spend public funds. This includes a chamber of commerce, volunteer fire departments, housing finance corporations, and economic development corporations. Based on recent amendments, the Act also applies to homeowner's associations in Harris County and in counties adjacent to Harris County. It should be noted that the Act does not apply to records or information kept or maintained by the judicial branch of government; records maintained by

⁸ See, Subchapter G, Chapter 551, TEXAS GOV'T CODE

⁹ §552.002(a), TEXAS GOV'T CODE

¹⁰ §552.003 (1)(A), TEX.GOV.CODE

the judiciary are, however, subject to disclosure under Rule 12 of the Texas Rules of Judicial Administration.

The Public Information Act applies to recorded information in virtually any medium including: paper; film; any magnetic, optical, or solid state device that can store an electronic signal; tape; mylar; linen; silk; and vellum. It includes books, papers, letters, documents, photographs, computer printouts, film, tape, sound recordings, maps and drawings, microfilm and microfiche, and voice, data or video representations held in computer memory. Disclosure is not required for tangible items that do not constitute "information" and some limited exceptions to disclosure exist with regard to personal notes of public officials.

Section 552.022 of the Act enumerates by example eighteen different categories of information deemed to be public by statute. This enumeration includes completed reports, audits and investigations made by or for governmental bodies, broad categories of information contained within personnel files of public employees, information in accounts, vouchers and contracts relating to the receipt or expenditure of public funds, final voting records of members of a governmental body, or working papers, research material and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, rules and statements of policy, administrative staff manuals, and settlement agreements.

The Act sets forth a series of exceptions and describes certain categories of documents or information which may be withheld from public disclosure.¹¹ Generally, these exceptions include personnel information in which would violate an employee's right to privacy, information relating to settlement negotiations or litigation, information relating to the location or price of property, information determined to be subject to the attorney-client privilege, certain law enforcement records, and geological or geophysical information relating to oil and gas.

Certain categories of exceptions are relevant with regard to contracting with public entities. Information is excepted from disclosure in the context of a competitive bidding or request-for-proposal process if the release of the information would give advantage to a competitor or bidder.¹² However, the confidentiality of information contained within an otherwise confidential bid or proposal will lose its confidential status once the bids are opened and the bidding process is completed. Trade secrets which are deemed confidential by statute or judicial decision are excepted from disclosure as is commercial or financial information but only when a demonstration is made on specific factual evidence that the disclosure would cause substantial competitive harm to the person from whom the information was obtained.

Section 252.049 of the Texas Local Government Code, applicable to municipalities, provides that trade secrets and confidential information in competitive sealed bids and proposals submitted in response to a request for proposal are not open for public inspection. This section also indicates that if so stated in a request for proposal, the proposals shall be opened in such a manner as to 1) avoid disclosure of the contents to competitors and 2) keep the information confidential during negotiations. Once the contract is awarded, all information becomes open and available for public inspection except that which may be considered as trade secrets and confidential information.

The exception to disclosure for trade secrets and confidential information is more limited than it appears. The Attorney General's Office has adopted a narrow interpretation of the Act's exceptions to disclosure and has historically ruled in favor of disclosure. "Trade secrets" may consist of any formula,

¹¹ Subchapter C, §552.101, *et seq.*, TEXAS GOV'T CODE

¹² §552.104, TEXAS GOV'T CODE

pattern, device or compilation which is used in one's business that may give one an opportunity to obtain an advantage over competitors who do not know or use it. It is defined as scientific or technical information, design, process, procedure, formula, or improvement that has value and that the owner has taken measures to prevent from becoming available to persons other than those selected by the owner to have access for limited purposes. Matters of general knowledge in an industry, methods of manufacture or design and details of construction which are matters of general scientific knowledge in the industry are not trade secrets.

The statutory exceptions to disclosure also encompass information submitted by potential vendors and contractors in connection with applications for certification as historically underutilized or disadvantaged businesses under governmental programs, some motor vehicle title and registration information, and information relating to economic development negotiations involving business prospects that a governmental body seeks to have locate, remain or expand in or near the territory of the governmental body which relate to trade secrets and commercial or financial information.

The procedures for disclosure are fairly strict. Any person may request that records be made available for inspection and review or may compel the public entity to produce copies. Public entities are required to designate an officer for public information and, in the absence of such designation, the chief administrative officer becomes by default the person responsible for ensuring disclosure. Typically, this would include a school superintendent, school board chairpersons, city managers, mayors, department heads, and each elected county officer. A request for public information need only be in writing and specifically identify the documents or categories of documents sought to be reviewed. The officer for public information is required to "promptly produce public information for inspection, duplication, or both on application by any person to the officer."¹³

The person seeking the inspection or copies of public documents need not explain or give any reason why he/she seeks disclosure. An officer for public information may only make an inquiry of the requestor to establish proper identification or to clarify the request. As noted, the requested information must be made available for inspection and copying promptly unless the information is in active use or in storage. If the information cannot be produced promptly, then the public entity is required to provide written certification of its active use or storage and must identify a date and hour within a reasonable time when the information will be made available.

If the public entity believes that the requested information fits within an exempted category, it must forward a copy of the request, a statement of the reasons why the public entity believes the documents are exempt, and copies of the actual documents sought to be disclosed, to the Texas Attorney General's Office for review. The Attorney General has statutory authority to review the information submitted and to rule on whether the information must be disclosed or may be withheld from production. If the public entity fails to forward this information to the Attorney General within 10 working days of the receipt of the request, then the information is deemed to be public and must be disclosed.

If a public entity fails to provide the disclosures required by the Public Information Act, the person making the request may sue for mandamus relief to compel the production of the information. Attorney's fees may be awarded to the prevailing party in such a suit.

The relevance that the Public Information Act bears to public works contracts is that once the competitive bidding process is completed and sealed bids or proposals are opened, all information submitted in connection with the bid may become public. If any person seeks to review the documents, the public entity has an obligation to respond fairly quickly but has no obligation to inform the bidder that

¹³ §552.221, TEXAS GOV'T CODE

someone has sought the document review. Information submitted to the public entity in connection with the construction of a project becomes public information unless it falls squarely within a categorical exemption and only if the public entity has timely and properly perfected a review by the Attorney General's Office.

A contractor and a public entity cannot agree by contract to maintain records, data or information confidential as a means of circumventing the disclosure requirements of the Act, nor can a public entity adopt a rule, order or ordinance that authorizes it to refuse to disclose information which is regarded as open under state law.

PROCUREMENT AND DELIVERY METHODS

Unlike contracts with most private entities, contracts with governmental entities are subject to special rules and restrictions. Whether a local government or federal government, both public policy and politics dictate that governmental entities avoid the labels of favoritism when spending the public's money. Thus, complex rules and regulations have been established that dictate when and how the public's money may be spent on third-party products and services. To a large extent, these regulations attempt to encourage diversity of contracts, as well as responsible spending. There are several "methods" used to ensure that this public policy is met, and it is important for governmental officials, as well as a contracting entity, to be aware of the different purchasing methods utilized by local governments.

1. CONTRACTS WITH MUNICIPALITIES

The contracting procedures of Texas cities are generally governed by Chapter 252 and Chapter 271 of the Texas Local Government Code. However, home rule cities, which will always have in place a charter, may have additional requirements or limitations imposed by that charter or ordinances.¹⁴ For example, some home rule charters will place more stringent standards upon bidding requirements, or provide threshold amounts which differ from that provided by state law. While the charter provisions and ordinances cannot obviate the requirements of state law, they may make it more stringent. Considering that any contract entered into with a city is void unless it complies with applicable state and local procedures, it is important for contracting entities to carefully abide by both state and local procedures.

2. COMPETITIVE BIDDING

While the actual procedures differ depending upon the governmental entity using them, the competitive bidding process is designed to promote the acquisition of services from (1) the lowest responsible bidder, and (2) in a fair and confidential manner. Generally, any contract which involves an expenditure of \$25,000 or more of a municipality's funds must comply with competitive bidding requirements.¹⁵ Further, it is illegal for a city to manipulate a contract so that it is divided into multiple contracts to avoid this \$25,000 threshold. While there are many exceptions to the competitive bidding requirement discussed in detail below, government entities and contractors should be familiar with the competitive bidding procedures, since they will most often apply to dealings with a government entity.

As noted, competitive bidding is required for contracts that require an expenditure of more than \$25,000 that involve the construction, renovation or repair of structures, roads, and improvements or additions to real property. If competitive bidding is required, the government entity has the right to reject any or all bids so long as the rejection is not illegal, arbitrary or an abuse of discretion. See, *Corbin v. Collin County Commissioner's Court*, 651 S.W.2d 55 (Tex.App.--Dallas 1983). The rejection of the lowest bidder must not be based on favoritism or an intent to circumvent the competitive bidding scheme, nor may it be arbitrary or an abuse of discretion.

The contract may not be awarded to a bidder who is not the lowest bidder unless, before the award, each lower bidder is given notice of the proposed award and is given an opportunity to appear before the governing body of the governmental entity or its designated representative to present evidence concerning the bidder's responsibility. In determining "responsibility," the governmental entity may take

¹⁴ The charter of a home rule city is analogous to the constitution of a state as it provides general guidelines and regulations to which all other actions of the city must abide, including the passage of additional ordinances and regulations.

¹⁵ TEX. LOC. GOV'T CODE § 252.021

into account the safety record of the bidder, of the firm, corporation, partnership, or institution represented by the bidder, or of anyone acting for such firm, corporation, partnership, or institution if: 1) the governing body of the governmental entity has adopted a written definition and criteria for accurately determining the safety record of a bidder; 2) the governing body has given notice to prospective bidders in the bid specifications that the safety record of a bidder may be considered in determining the responsibility of the bidder; and 3) the determinations are not arbitrary and capricious. See, §271.0275, TEX. LOCAL GOV'T CODE.

Contracts awarded in violation of the competitive bidding requirements are void.

A. COMPETITIVE BIDDING: NOTICE REQUIREMENTS

If a contract is subject to competitive bidding, 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 local newspaper.¹⁶ The first publication must occur at least fourteen days before the date set to open the bids. If a municipality does not have a newspaper, the notice should be posted at city hall. Further, if the contract is for the purchase of machinery or for the construction or maintenance of roads and streets, the notice for the bids must include the general specification of the machinery desired. If the municipality intends to use time warrants for the payment of any part of the contract, the notice must meet other requirements regarding a description of the time warrants.¹⁷ Finally, if a proposed contract is for the construction of public works or for the purchase of materials, equipment, and supplies, the municipality may let the contract on a lump sum basis or a unit price basis as the governing body of the municipality determines.¹⁸ If the contract is awarded on a unit price basis, the bid information must specify the approximate quantity needed and that payment to the contract will be based upon the actual quantity supplied.¹⁹

B. COMPETITIVE BIDDING: AWARDING THE CONTRACT

Once the sealed bids have been received and publicly opened by a municipality, the contract must be awarded to the lowest responsible bidder.²⁰ However, if it chooses, the municipality may reject any or all of the bids. In other words, the governmental entity has the option of simply rejecting all bids submitted, and either simply foregoing the project or taking a second stab at the bidding process. While Texas laws does allow a bidder to withdraw a bid after it has been opened if there is a material mistake in the bid, a bid cannot be withdrawn after it is opened simply for correcting an error in the bid price.²¹

The contractor or vendor must submit a sealed bid to the governmental body before a certain date. This sealed bid must comply with the request and requirements of the governmental body for the project in question. After the specified bid date, the governmental entity will open the sealed bids and review the offers made by the contracting entities. Ideally, this process results in the selection of the lowest bidder, and thus saves the taxpayers the most amount of money. In reality, many projects require consideration of more than just the lowest possible price, but also the quality of service.

¹⁶ TEX. LOC. GOV'T CODE § 252.041

¹⁷ TEX. LOC. GOV'T CODE § 252.041(d)

¹⁸ TEX. LOC. GOV'T CODE § 252.047

¹⁹ *Id.*

²⁰ TEX. LOC. GOV'T CODE § 252.043

²¹ TEX. LOC. GOV'T CODE § 252.043(a)

3. CONTRACTS EXEMPT FROM COMPETITIVE BIDDING

Texas law does recognize that there are some occasions in which it is either inefficient, or undesirable, to apply competitive sealed bidding requirements to a contract. This is not to say that the areas exempt by the law do not have other specific requirements, and to that extent these requirements are noted in the list provided below. General exemptions to competitive sealed bidding are set forth in Section 252.022 of the Texas Local Government Code, which should be consulted to make sure they are applicable to any particular contract. Generally, the following are exempted from the competitive sealed bidding process:

- (a) An emergency procurement made because of public calamity that requires the immediate appropriation of money.
- (b) An emergency procurement necessary to preserve and protect the health and safety of the municipality's residents.
- (c) A procurement made necessary due to sudden and unforeseen damage to public machinery, equipment, or other property.
- (d) A procurement made for personal, professional, or planning services. (Note: these procurements will still be subject to the requirements of the Professional Services Procurement Act discussed below.)
- (e) A procurement for work performed and paid for by the day as the work progresses.
- (f) The purchase of land or right-of-way. (These purchases are subject to additional requirements found in the Texas Local Government Code.)
- (g) A procurement of items that are available from a sole source, including films, manuscripts, books, gas, water, and other utility services, and items available from a sole source due to a patent or copyright.
- (h) The purchase of rare books, papers, and other library materials.
- (i) Paving and street improvements, and other public improvements, when at least one-third of the cost is paid through special assessments levied on a property that will benefit from the improvements.
- (j) Public improvement projects which were authorized by the voters of the municipality, but for which there is a deficiency of funds to complete the project.
- (k) Contracts with developers for construction of improvements related to the development. (See, TEX. LOC. GOV'T CODE § 212.071 for applicability and restrictions.)
- (l) Personal property sold at authorized auctions.
- (m) Services performed by blind or severely disabled persons.
- (n) Goods purchased by a municipality for subsequent retail sold by the municipality.
- (o) Purchase of electricity.

- (p) A project subject to the alternative procurement or delivery methods set forth in subchapter H of Chapter 271, TEX. LOCAL GOV'T CODE. (These alternative procurement and delivery methods are discussed in detail later this paper).

4. REQUEST FOR PROPOSALS

The request for proposal (RFP) process must be used by a municipality for the procurement of high-technology items if the expenditure of public funds will exceed \$25,000. This includes equipment, goods, or services highly technical in nature, which includes data processing equipment and software, telecommunications equipment, and radio systems.²² Further, a city's charter or other state law provisions may require a request for proposal process similar to that required for high-technology procurements or for contracts worth less than \$25,000. Needless to say, contractors should check with local regulations in this regard.

The RFP process is also required in cities with a population of less than 75,000 for insurance that will require an expenditure of over \$5,000. If the city has a population of at least 75,000, the process is optional.

The notice requirements for request for proposals under state law mirror those for competitive sealed bidding. Thus, the request for proposal must be published in a newspaper at least once a week for two consecutive weeks or posted at city hall. However, a request for proposal must specify the relative importance of price and other valuation facts and opportunity can be allowed for discussion with bidders about possible revision of proposals. These revisions and discussions may be permitted even after submission, so long as it is before the award of the contract.

Generally speaking, a governmental entity has broad discretion in who they award a contract to under the request for proposal process. The law provides that the contract must be awarded "to the responsible offeror whose proposal is determined to be the most advantageous to the municipality considering the relative importance of price and the other evaluation factors included in the request for proposals."²³ Thus, request for proposals allow much more flexibility to both the government and the contractor entering into the contract.

5. COOPERATIVE PURCHASING PROGRAMS

A cooperative purchasing program generally refers to an agreement between local governments or a cooperative, to make purchases of materials, supplies, services or equipment under that agreement. Texas law provides for certain purchasing programs to be created for local governments.²⁴ If certain conditions are met, the purchasing cooperative can establish a list of items that have previously been subject to competitive bidding requirements, and thus may be purchased by anyone in the cooperative. Generally, Texas law provides that the initial selection of contractors and vendors by the cooperative comply with competitive bidding requirements. Thus, the vendors of goods or services available to those members of the cooperative purchasing program have already undergone the competitive bidding process.

The Texas Office of General Services Commission also conducts a catalogue purchasing program pursuant to Section 2157 of the Texas Government Code. This statute applies to vendors of automated information systems including computers and telecommunications devices. Once a vendor has been

²² TEX. LOC. GOV'T CODE § 252.001(4)

²³ TEX. LOC. GOV'T CODE § 252.043(b)

²⁴ TEX. LOC. GOV'T CODE § 271.101, *et seq.*

qualified under the program and has submitted a list of items available at specified prices, local governments participating in this program can purchase the items from a catalogue kept by the General Services Commission without additional procurement procedures.

Other cooperative purchasing programs also exist at the state and federal level that authorize group purchases of items and products from governmental contractors. For example, a local government is authorized to make purchases from the federal supply schedules of the General Services Administration.²⁵

6. EMERGENCY PURCHASES

While public policy of obtaining goods and services for the lowest possible cost can be met through competitive bidding processes, there are many times when it is not practical to exhaust these procedures prior to making a purchase. In these “emergency” situations, governmental entities may make purchases without using the required procurement procedures. Emergency purchases are very limited in scope and must be utilized carefully by both governmental entities and contractors.

7. OTHER PURCHASING METHODS

Various statutes allow different types of local governments to make certain purchases without any, or with limited, competitive bidding procedures. These generally include purchases from “sole sources” for products that are only distributed or manufactured by a single company, as well as the procurement of professional services, such as architects and lawyers. As one might imagine, it is not always in the best interest of public policy to obtain the services of the lowest bidder of such professional services. Finally, there are other specific purchases that may be made by local governments which are not subject to procurement procedures. Local governments have different types of purchases and projects that fall under these “exemptions,” and both governmental entities and contractors should carefully review the law regarding these purchases prior to making them.

Historically, the competitive bidding process was mandatory for most public works projects. Often, accepting the lowest bid results in a lower quality project. Low bidders are not necessarily the most cost efficient. Although school districts have been authorized since 1995 to utilize a variety of different delivery and procurements methods, cities and counties have been limited in their options. School districts have traditionally been able to use a number of different methods depending on the one that provides the best value for the district.²⁶

Effective September 1, 2001, the Texas Legislature authorized cities and counties to employ alternative delivery methods for public facilities. These alternative methods include the design-bid-build concept, the design-build concept, the competitive sealed proposal approach, the construction manager-agent approach, the construction manager-at-risk approach, and the job order approach.

A. THE DESIGN-BID-BUILD CONCEPT

The design-bid-build concept is the traditional procurement method utilizing the competitive bidding process. Due to the pre-September 1, 2001 competitive bidding statutes in Texas and the statutory requirement that contracts be awarded to the lowest responsible bidder, municipalities and counties were limited to the standard “design-bid-build” concept for public works projects which involve expenditures of more than \$25,000. Under this structure, the public entity contracts with an architect or

²⁵ TEX. LOC. GOV'T Code § 271.103

²⁶ §44.031(a), TEX.ED.CODE.

engineer who prepares the design and specifications. When completed, the entity invites contractors to bid on the job and accepts the bid of the lowest responsible bidder.

Although this system reduces the possibility of favoritism or impropriety, it also does not necessarily yield the best value or the best quality. Lower bids often mean lower quality. It has often been said in jest that the lowest bidder is the one that made the largest mistake in preparing its bid. Change orders are common, the experience level of the contractor and its past track record cannot be considered, and the process can be time-consuming.

B. THE DESIGN-BUILD CONCEPT

The design-build concept is a system whereby a single company furnishes both design and construction under one contract. A design-build firm, consisting of a builder and architects or engineers, enters into a single contract with the public entity to deliver the project. The public entity prepares a request for qualifications that includes general information on the project scope, site and budget, special systems, selection criteria and other information that may assist bidders. The entity also prepares a design criteria package that includes detailed information on the project. If architectural or engineering services are required to prepare the design criteria package, the entity may use its internal staff architects or engineers or may contract with an outside company or person through the procedures set forth in the Professional Services Procurement Act.²⁷

The selection process involves two basic steps. The first involves the evaluation of the responses submitted to the request for qualifications based on each bidder's experience, technical competence, capabilities, past performance and other appropriate factors. Cost- and price-related factors are not considered. The entity then qualifies a maximum of five offerors to submit additional information and may choose to conduct interviews with each.

The second step involves ranking the competitors based on the interviews and any additional information submitted. Factors may include demonstrated competence, safety and durability considerations, feasibility, ability to meet deadlines, cost methodology, and other factors. Detailed project designs or plans are not required at this stage. The selection of the best offeror is based on the determination as to which may provide the best value to the public entity based on the published selection criteria and the ranking evaluations. The entity then attempts to negotiate a contract with the best offeror and, if unable to do so, must go to the next best offeror and again attempt to reach an agreement. This process continues until a contract is reached or all five offerors have been struck. If all are eliminated, the selection process must be reinitiated. The contract may contain a fixed contract amount or a guaranteed maximum price, i.e., a specific sum which the design-build firm guarantees to complete the project. Payment and performance bonds are required for the contract price, less the amount associated with design services. Once selected, the design-build firm then completes the project design and commences construction.

One key advantage to the design-build concept is that actual construction may begin before the plans are completed. Rough-in work can be commenced before the finish-out plans are prepared. By overlapping the design and construction phases, the duration of the project can be shortened. This approach also allows public entities to select builders based on predetermined selection criteria without being obligated to use the lowest bidder.

It is critical that testing and inspection be done by the public entity using either its own staff or the services of an independent third party. Since most standard public works contracts provide the

²⁷ Chapter 2254, TEX.GOV'T CODE.

engineer or architect with inspection, decision-making and dispute resolution authority, the public entity should avoid the use of the builder's employees to provide these functions.

C. THE COMPETITIVE SEALED PROPOSAL APPROACH

The competitive sealed proposal approach is similar in structure to the design-bid-build concept whereby the public entity uses an architect or engineer to design a project and then contracts with a contractor or builder to construct the public improvements. The critical difference is in the method of selection; the public entity need not retain the lowest responsible bidder.

The public entity will first use an architect or engineer to draft the project plans. It will then issue a request for proposal (as opposed to an invitation to bid) which should contain construction documents, selection criteria, estimated budget, project scope and schedule, and any other information that may be needed to enable contractors to submit accurate proposals. The proposals are sealed until the opening date, at which time they are opened and read aloud. The entity then selects the company that offers the best value, based on the established selection criteria and on the entity's ranking evaluation. The public entity must then attempt to negotiate a contract with the highest rated offeror and, if unable to do so, goes to the next highest offeror on the selection list until a contract is signed or all have been eliminated.

D. THE CONSTRUCTION MANAGER-AGENT

The use of the construction manager or construction manager-agent approach theoretically enables a public entity to pursue a project at lower costs. A construction manager provides project consultation, supervisory and management services without the use of a general or prime contractor. The public entity will continue to be obligated to select trade contractors and subcontractors under standard procurement methods (i.e., competitive bidding or competitive proposals, where applicable). Each of the trade contractors and subcontractors become prime contractors for their respective part of the project. Performance and payment bonds will be required to be furnished for each if the contract price exceeds the statutory minimums set forth in Chapter 2253 of the Texas Government Code.

The selection of the construction manager is done under the same procedures set forth in the Professional Services Procurement Act.²⁸ The construction manager has a fiduciary relationship with the public entity, a higher standard that requires more than good faith and fair dealing.

E. THE CONSTRUCTION MANAGER-AT-RISK

The construction manager-at-risk approach requires a construction manager to assume the risk of construction at the contract price as a general contractor. The construction manager-at-risk provides similar consultation, administrative and management functions as does a construction manager but guaranties that the project will be completed at some specified contract price. Project design is done by an independent engineer or architect retained by the public entity.

The selection of a construction manager-at-risk can be done in either a one-step or two-step process. The one-step selection process involves the submission of a request for proposal that, among other things, describes the project's general conditions and seeks proposed fees and prices. The two-step process involves the submission of a request for qualifications, the narrowing down of all offerors to a short list, then the selection of the offeror who provides the best value from that list.

²⁸ §2254.001, *et seq.*, TEX.GOV'T CODE.

Trade and subcontractors must still be selected under other standard procurement methods but the construction manager-at-risk, as opposed to the public entity, may assume responsibility for the competitive bidding process. The entity still has the duty to select the subcontractors. Payment and performance bonds are required to be furnished by the construction manager-at-risk based on the contract price. If no contract price has been fixed at the time the contract is awarded, then the bonds must be in the amount of the project budget.

F. THE JOB ORDER CONTRACT APPROACH

The job order approach, or job order contracts, are used for minor construction, alteration or repair projects where the work is of a recurring nature and delivery times are indefinite. Orders are awarded on the basis of prepriced and predetermined tasks. Unit prices should be fixed in advance of the job order contract. The selection of a contractor is done under the sealed competitive proposal method whereby the public entity may select contractors that provide the best value based on rates, experience, past performance and proposed personnel and methodology. More than one contractor may be selected.

Payment and performance bonds are required depending on the amount of each individual job order contract. Unless the request for proposal for the job order contract specifies otherwise, the standard term of a contract is for two years.

G. THE REVERSE AUCTION

A reverse auction is a method of procurement used to purchase goods and services. The process takes advantage of the use of the Internet to enable a public entity to acquire goods or services through a real-time reverse auction. Suppliers, rather than the buyers, bid for contracts to provide goods while prices start high and go lower as the bidding continues. The procedure is described as a reverse auction because, instead of the buyers bidding up the purchase of an item, the sellers of the goods bid down against each other until the lowest bid is received. The vendors must prequalify before being allowed to participate. The auction is staged through a secure web site where only the public entity, the vendors, and the company staging the event have access. At the conclusion of the process, the lowest bidder is awarded the procurement contract.

These alternative methods do not apply to: highways, roads and bridges; utilities; water supply projects and water plants; wastewater plants; wastewater and water distribution or conveyance facilities; wharves, docks and airport runways and taxiways; drainage projects; and related and incidental types of projects associated with civil engineering construction. For these types of projects, the competitive bidding process is still required.

8. PUBLIC WORKS IMPROVEMENTS FOR A DEVELOPER

Certain contracts for the construction of public works, including streets and drainage improvements, may be entered into without complying with the competitive bidding process when the improvements will be paid for, at least in part, by a developer. In turn, the developer's impact fees, or other consideration, may be credited against the money spent by the developer. Commonly, an arrangement is made pursuant to a Developer's Agreement, by which the developer actually contracts for and constructs the public works project for the appropriate consideration. Most often, that consideration is in the form of credits against impact fees or other fees that would otherwise be due.

An example of this arrangement occurs when a municipality and a developer enter into an agreement for the construction of a roadway adjacent to a new development, and at least one-third of the costs for that roadway improvement come directly from impact fees paid by the developer. Pursuant to

state law, if at least one-third of the costs for that roadway improvement come from money that was paid directly or indirectly by the developer, no competitive bidding is required.²⁹ Further, if the parties enter into a Development Agreement, the developer can actually do the hiring and supervision of the construction of the public works.

On a related note, there are many instances when construction is performed for private parties, and that construction will eventually become a public property. An example is the construction of streets in a residential subdivision. The contractor is hired directly by the developer for this type of construction, and the streets do not become the property of the municipality until the dedication is accepted and after it is confirmed that the streets have been built to city standards. Clearly, there is no competitive bidding requirement in this instance, since it is not a “public work” at the time of construction, but only later.

²⁹ Tex.Loc.Govt Code Secs. 212.071, 252.022(a)(9).

CONTRACTING WITH SCHOOL DISTRICTS

As previously noted, school districts are slightly different from municipalities in that they are created not by a local incorporation but are authorized by the State. Nonetheless, to a large extent the current law provides more flexibility to school districts in their purchasing and contracting. In general, the purchasing methods of school districts are governed by Chapter 44 of the Texas Education Code. This section provides flexibility to school districts by requiring procurement methods to be used only for purchases valued at \$25,000 or more. Further, generally speaking, a school district may choose which procurement method it wishes to utilize based on the “best value” to the district. For purchases valued at \$25,000 or more, a school district may choose from the following methods:

- (a) Competitive Bidding;
- (b) Competitive Sealed Proposals;
- (c) Request for Proposals;
- (d) “Catalog Purchases” under Chapter 2157 of the Government Code (the cooperative purchase program of the General Services Commission);
- (e) An interlocal contract with another governmental entity; or
- (f) A design/build contract.³⁰

School districts have traditionally enjoyed much more flexibility in applying procurement procedures than cities or counties. However, with the passage of subchapter H of Chapter 171 of the Local Government Code, cities and counties have been given similar choices in alternative procurement and delivery methods for specified projects. For school districts, some guidelines must be followed, as indicated below.

1. COMPETITIVE BIDDING

Contracts for the purchase or lease of one or more school buses must be submitted to competitive bidding when a contract is valued at \$25,000 or more.

2. EXCEPTIONS FOR SOLE SOURCE PURCHASES

A school district does not have to comply with any of the procurement methods listed above if the item is available from only one source.³¹ Examples might include copyrighted or patented items available from a single source, a film or book, and replacement parts or components for equipment. It is important to note that the law provides that the “single source” exemption cannot be used to apply to “mainframe data processing equipment and peripheral attachments” if the purchase price is in excess of \$15,000.³²

³⁰ As the law currently exists, municipalities may not enter into a design/build contract.

³¹ TEX. EDUC. CODE § 44.031(j)

³² TEX. EDUC. CODE § 44.031(k)

3. NOTICE AND SELECTION REQUIREMENTS

A school district must provide notice of the time when bids or proposals will be received in newspapers circulated in the county once a week for at least two weeks before the date is set. On a contract involving less than \$25,000, the school district may simply advertise the contract in two successive issues of the newspaper.

In determining to whom it might award a contract, a school district may consider the following factors:

- (a) The purchase price.
- (b) The reputation of the vendor and the vendor's goods or services.
- (c) The quality of the vendor's goods or services.
- (d) The extent to which the goods or services meets the district's needs.
- (e) The vendor's past relationship with the district.
- (f) The impact on the ability of the district to comply with laws and rules relating to historically underutilized businesses.
- (g) The long-term cost to the district to acquire the vendor's goods.
- (h) Any other relevant factor that a private business entity would consider in selecting a vendor.

TEX. EDUC. CODE § 44.031(b). As can be seen, the State has provided broad discretion to school districts in determining and choosing the appropriate vendor or contractor for the district.

4. OTHER EXEMPT PURCHASES

As with cities and counties, a school districts procurement requirements do not apply to a contract for professional services, including architects, attorneys, and fiscal agents.³³ However, the Professional Services Procurement Act, discussed below, does apply to some professional services.

Finally, the procurement requirements do not apply to emergency situations in which school equipment has been destroyed or severely damaged in and the processes would prevent or substantially impair the conduct of classes or other essential school activities.³⁴

5. PURCHASES OF PERSONAL PROPERTY BETWEEN \$10,000 AND \$25,000

If a school district chooses to purchase personal property with a value between \$10,000 and \$25,000 in the aggregate for a twelve-month period, the school district must comply with notice and selection provisions found in Section 44.033 of the Texas Education Code. This requires notice and two successive issues of the newspaper soliciting names, addresses, and telephone numbers of vendors interested in supplying any of the categories of personal property to the district. After this notice, the

³³ TEX. EDUC. CODE § 44.031(f)

³⁴ TEX. EDUC. CODE § 44.031(h)

school district shall create a vendor list for each category of personal property with those vendors who responded to the published notice, as well as additional vendors the district elects to include.

Before making any purchases from a category of personal property, the district must obtain written or telephone price quotations from at least three vendors on the vendor list for that category of personal property. Then the purchase is made from the lowest responsible bidder. Purchases of produce and fuel must be made in accordance with this section.

CONTRACTING WITH COUNTIES

Like school districts, counties are political subdivisions of the state. However, their competitive bidding requirements most closely follow those of municipalities, and appear in a separate section of the Texas Local Government Code. While the commissioner's court of a county is the governing body that is responsible for approving all contracts of the county, in most instances, commissioner's courts have the power to appoint an agent to make contracts.³⁵ Persons dealing with counties should request documentation showing the appointment of an agent, if final commissioner's court approval of the contract will not be sought.

Counties of all sizes have the ability to appoint a purchasing agent to oversee purchases of a county. However, expenditures greater than \$25,000 require competitive bidding or competitive proposal procedures set forth in Chapter 262. As with other entities, separate, sequential, or component purchases are not allowed if for the purpose of avoiding competitive procurement requirements.³⁶

1. COMPETITIVE BIDDING REQUIREMENTS

With some exceptions, sealed competitive bidding procedures are required for all county purchases exceeding \$25,000. The notice of proposed purchase by competitive bidding must be published at least once a week in a newspaper of general circulation, with the first day of publication occurring at least fourteen (14) days before the date of the bid opening. If no newspaper of general circulation exists, the notice must be posted at the courthouse for fourteen (14) days prior to the bid opening.³⁷ Generally, the notice must include specifications of the purchase, time and place for receiving and opening bids, bond requirements, and pricing information.

The commissioner's court has the authority to extend the time for the opening of bids, if "it is in the best interest of the county."³⁸ However, all bids must be open at the same time. State law provides that a county must award a contract to the lowest responsible bidder or reject all bids and public a new notice for the contract.³⁹ As with municipalities, the commissioner's court may consider the safety record of the bidder, but may also take into account the pick-up and delivery locations of the bidders and the cost of the county of delivering or hauling materials to be purchased.⁴⁰

2. EXEMPTIONS FROM COMPETITIVE BIDDING

As with municipalities, the law provides a laundry list of items that are exempt from the competitive bidding requirement for counties. The Texas Local Government Code provides an exemption from the competitive bidding requirement by counties for the following:

- (a) An item purchased in a case of public calamity.
- (b) Purchase of an item necessary to preserve or protect the public health or safety of the residents of the county.

³⁵ TEX. LOC. GOV'T CODE § 262.001

³⁶ TEX. LOC. GOV'T CODE § 262.023(c)

³⁷ TEX. LOC. GOV'T CODE § 262.025(a)

³⁸ TEX. LOC. GOV'T CODE § 262.026(a)

³⁹ TEX. LOC. GOV'T CODE § 262.027(a)

⁴⁰ TEX. LOC. GOV'T CODE §§ 262.027(e), 262.0275

- (c) An item necessary due to unforeseen damage to public property.
- (d) A personal or professional service (these purchases are still subject to the Professional Procurement Act, as discussed below).
- (e) Any individual work performed and paid for by the day so long as the work does not exceed more than twenty (20) days in any three month period.
- (f) Any land or right-of-way.
- (g) Sole source items.
- (h) Work performed under a contract for community and economic development made by a county under Section 381.004.
- (i) A project subject to the alternative procurement or delivery methods set forth in subchapter H of Chapter 271, TEX. LOCAL GOV'T CODE.

TEX. LOCAL GOV'T CODE § 262.024. The list of exemptions is similar, but not as expansive, as that provided for municipalities. While exemptions for emergency services, professional services, and sole source items are included, others are not. Further, state law provides that to the extent practicable a purchasing agent should provide some type of competitive bidding procedure to all purchases—even those appearing in the “exempt” section.⁴¹ Thus, many counties may require competitive bidding under this “catch-all” provision, even if it is not required to do so by the state.

3. COMPETITIVE PROPOSAL PROCEDURE (REQUEST FOR PROPOSAL)

A county may use the request for proposal procedure for the purchase of insurance, high-technology items, and items which are defined as “special services.” Special services include landscape maintenance, travel management, and recycling.⁴² Notices for the request for proposal are made in the same manner as provided for the competitive bidding procedure.

Eligible contracts may be awarded to “the responsible offeror whose proposal is determined to be the lowest evaluated offer resulting from negotiation, taking into consideration the relative importance of price and other evaluation factors set forth in the request for proposals.”⁴³ Thus, the county has wide discretion in awarding contracts which are subject to the request for proposal process.

Texas law also provides for an alternative competitive proposal procedure for certain large counties.⁴⁴ If the commissioner’s court of a county, with a population of 125,000 or more, determines that it is impractical to prepare detailed specifications for an item, the county purchasing official may use the “multi-step competitive proposal procedure.” Under this procedure, public notice is provided in the same manner as competitive bidding, except that the general description of the item to be purchased, instead of specifications, is provided. The contract can be awarded to the responsible offeror whose bid is determined to be the lowest evaluated offer resulting from negotiation, and who qualified under the criteria of the solicitation.⁴⁵

⁴¹ TEX. LOC. GOV'T CODE § 262.0241

⁴² TEX. LOC. GOV'T CODE § 262.030

⁴³ *Id.*

⁴⁴ TEX. LOC. GOV'T CODE § 262.0295

⁴⁵ *Id.*

PROFESSIONAL SERVICES PROCUREMENT ACT

1. INTRODUCTION

While municipalities, school districts, and counties do not have to comply with the competitive bidding requirements for the purchase of professional services, these entities must comply with the Professional Services Procurement Act in obtaining most professional services.⁴⁶ The Act applies to all state agencies and departments, as well as any “district, authority, county, municipality, or other political subdivision of the state.”⁴⁷ A contract entered into in violation of this Act is void.⁴⁸

2. PROFESSIONAL SERVICES DEFINED

The Professional Services Procurement Act specifically defines that which is considered “professional services,” and therefore covered by the requirements of the Act. Occasionally, the legislature will add certain definitions, or otherwise modify the definitions. As of the date of publishing of this paper, the Act applies to the following professions:

- (a) Accounting
- (b) Architecture
- (c) Optometry
- (d) Medicine
- (e) Professional Engineering
- (f) Land Surveying
- (g) Real Estate Appraising
- (h) Landscape Architecture
- (i) Nursing

3. SELECTION CRITERIA

The Act provides that governmental entities may not use the competitive bidding procedures to award a contract for professional services, but must make the selections and awards on the following basis:

- (a) On the basis of demonstrative competence and qualifications to perform the services; and
- (b) A fair and reasonable price.⁴⁹

The Act further provides that the professional fees contemplated by a governmental unit must be consistent with and not higher than the recommended practices of fees published by the applicable professional associations, and may not exceed any maximum provided by the law. However, in reality, few professions publish “maximum fees” as this section contemplates.

Special rules apply to contracts for the services of an architect, engineer, or surveyor.⁵⁰ In particular, the governmental entity is first required to select the most highly qualified provider of those

⁴⁶ TEX. GOV'T CODE § 2254.001, *et seq.*

⁴⁷ TEX. GOV'T CODE § 2254.002

⁴⁸ TEX. GOV'T CODE § 2254.005

⁴⁹ TEX. GOV'T CODE § 2254.003

⁵⁰ TEX. GOV'T CODE § 2254.004

services based on demonstrated competence and qualification. Only after this selection is made does the entity attempt to negotiate with that provider a contract at a fair and reasonable price. If a contract cannot be successfully negotiated with the most highly qualified provider, then the governmental entity can end negotiations with that provider and attempt to negotiate with the next most highly qualified architect, engineer, or surveyor. Pursuant to this section, governmental entities are required to first look to the qualifications of architects, engineers, or surveyors, and not their fees. The intended result, of course, being the selection of the best professional that the entity can afford.

PUBLIC WORKS CONTRACTS

As a general rule, the same laws and regulations that apply to the form and performance of private contracts and projects will apply equally to public projects. However, there are several areas where the two diverge. Public works projects and contracts are subject to certain requirements which are inapplicable to private projects. Further, there are several contractual provisions that are typical in public projects that are not normally found in private contracts.

1. PAYMENT OF BILLS AND INTEREST DUE

Chapter 2251 of the Texas Government Code specifies the time period within which a government entity must pay for goods or services received under a contract. This chapter applies to cities, schools, counties, and special purpose districts and authorities, as well as state agencies. Typically, a payment must be made, and becomes overdue if not paid, on or before the 31st day of the date that the governmental entity receives the goods, the services are performed, or an invoice for the goods or services are received, whichever is later.⁵¹ However, if the governing body of the governmental entity meets once a month or less, the due date is extended to 46 days. This deadline does not apply if there is a bona fide dispute that causes the payment to be late. A vendor (defined as anyone supplying goods or services to a governmental entity) is required to pay its subcontractors the appropriate share of payments received from a governmental entity within 10 days after the vendor receives the payment.⁵² Payments are considered to be mailed on the date that the payment is postmarked.

Interest on payments begins to accrue on the date that the payment is overdue (i.e., the 31st or 46th day after receipt of goods, services or invoices by a governmental entity, or, for subcontractors, the 11th day after the date that the vendor receives payment from a governmental entity). Interest accrues at the statutory rate of one percent per month and stops accruing on the date that payment is mailed.⁵³ The interest is due when the principal is paid and a governmental entity may not require a vendor to waive its right to interest as a condition of a contract.⁵⁴

If a dispute exists regarding an invoice, the governmental entity must notify the vendor of the dispute within 21 days after receiving the invoice. If the dispute is resolved in favor of the vendor, interest accrues at the statutory rate notwithstanding the time consumed in resolving the dispute. A prevailing party in such a dispute is also entitled to recover its attorney's fees in a formal administrative or judicial action.⁵⁵

2. PERFORMANCE, PAYMENT, MAINTENANCE AND BID BONDS

Typical construction projects involve multiple parties. The public entity, standing in the position of the owner, employs a prime or general contractor who, in turn, employs a variety of subcontractors for generic or specially fabricated work and/or materials. Each subcontractor may, in turn, employ additional subcontractors for portions of the work for which the first subcontractor is responsible. When the public entity withholds payment from the prime contractor, the contractor typically withholds payments from an array of subcontractors.

⁵¹ §2251.021, TEX.GOV'T CODE.

⁵² §2251.022, TEX.GOV'T CODE.

⁵³ §2251.025, TEX.GOV'T CODE.

⁵⁴ §2251.027, TEX.GOV'T CODE.

⁵⁵ §2251.042, TEX.GOV'T CODE.

As a basic principle of contract law, a person cannot seek to recover damages from another based on a contract unless the parties are in privity of contract with each other. Privity of contract is a direct contractual relationship. On construction projects, an owner engages a prime or general contractor via a direct contractual relationship and are, therefore, in privity with each other. The subcontractors are engaged directly by the contractor, not the owner. Subcontractors are not, by definition, in privity of contract with the owner. Thus, a subcontractor has no right to sue an owner if the prime contractor fails to pay the subcontractor. It makes no difference if the owner's failure to pay was deliberate or without just cause.

In some limited circumstances, a subcontractor may pursue a claim directly against the owner when there is no privity of contract. Where a contractor is in default and has abandoned the project or whose contract has been terminated, the public entity may attempt to administer the remaining work. Subcontractors who continue to perform on the project after the prime contractor's termination, with knowledge and awareness by the public entity, and without any formal contract between the sub and the entity, may pursue a claim against the entity under the theory of quantum meruit. The doctrine of quantum meruit essentially is that no person should be unjustly enriched by the labor and materials supplied by another if that person was on notice that it would be receiving something of value and failed to object. It is based on the existence of an implied contract and is intended to avoid unjust enrichment by one person at the expense of another.

The Texas Constitution allows contractors and subcontractors to impose a lien on the owner's real estate for the value of the labor and materials furnished to a project if the owner fails to pay.⁵⁶ This constitutional provision is implemented by Chapter 53 of the Texas Property Code which provides a comprehensive scheme involving notices and sworn statements whereby contractors and subcontractors can perfect liens, thereby securing some guaranty of recovery for unpaid bills. Chapter 53 of the Property Code only applies to private, not public, contracts. Under Texas law, there can be no lien imposed against public property. The provisions of Chapter 53 of the Property Code do not apply to public works projects for that reason. As a substitute, Texas law creates a system involving payment and performance bonds.

A bond is intended to provide security for some intended beneficiary. Bonds serve the same purpose as insurance policies. When some triggering event of loss occurs, the beneficiary (or insured) presents a proper claim against the surety on the bond (or the insurance carrier) who then evaluates the claim and pays it in accordance with the terms of the bond (or insurance policy). For public works projects, four general types of bonds are typically used: bid bonds, performance bonds, payment bonds, and maintenance bonds.

A. BID BONDS AND MAINTENANCE BONDS

A bid bond is intended to protect the public entity against a successful bidding party who backs out of the contract before the contract is signed. Although the law indicates that a bid is an offer which, when accepted by the public entity, becomes a contract, it is common for additional negotiations to occur after the contract has been awarded to a successful bidder but before the contract is actually signed. When a successful bidder fails to enter into the contract, the public entity may then be obligated to undergo the competitive bidding process again. This will cause the entity to expend additional time, money and effort in republishing the notices and revising the contract bid documents, and will delay the project's commencement date.

A bid bond is intended to protect the entity from this post-award pre-contract default. The amount of the bid bond should be evaluated as a liquidated damages estimation (i.e., a reasonable forecast

⁵⁶ Article 16, §37, TEX.CONST.

of projected or anticipated loss, expense or cost and not a penalty) and may be expressed as a specific dollar sum or as a percentage (usually 5%) of the total contract price. The following is a sample of a bid bond requirement contained within an Invitation to Bid:

“Together with its Bid and Proposal, and as a part thereof, Bidder shall furnish a Bidder's Bond for \$ _____, which it is agreed shall be collected and retained by the Owner as liquidated damages if the Owner accepts this bid within ninety (90) days of the opening of bids, and the undersigned Bidder then fails to execute the contract and bonds with the said Owner with ten (10) days after official notice of such acceptance; otherwise, said Bidder's Bond shall be returned to the undersigned on demand.”

A maintenance bond is conceptually simpler. It is in effect identical to a warranty against defects in materials and workmanship. Generally, maintenance bonds are for one-year or two-year durations and operate to protect the public entity throughout the bond's duration against defects in materials or workmanship discovered after completion of the project. In the event of discovery of defects, a public entity should always provide notice to the contractor and insist on correction. It is always prudent to forward a copy of this notice to the surety.

It should be kept in mind that all contracts carry express or implied conditions that a project will be constructed in a good and workmanlike manner and in accordance with industry standards; substandard performance can give rise to litigation against the contractor so long as suit is brought within the standard four-year statute of limitations period. A two-year maintenance bond does not change this. The bond gives the public entity an additional remedy against the surety so long as the bond is in effect. The following is a form provision whereby the contractor will be obligated to furnish a maintenance bond:

“The Contractor, upon execution of the Contract and prior to commencement of the Work, shall furnish to the Owner a two-year maintenance bond in the amount of one hundred percent (100%) of the Contract Price covering the guaranty and maintenance prescribed herein, written by an approved surety authorized and duly licensed to conduct business in the State of Texas. The cost of said maintenance bond shall be included in the Contractor's unit bid prices and shall be paid by the Contractor.”

B. PERFORMANCE BONDS

A performance bond is for the protection of the public entity. It is a guarantee, insured by an authorized surety, that the prime contractor will faithfully perform the work in accordance with the plans, specifications, and contract documents. When a contractor defaults in the performance of the contract, the public entity must provide the proper notices to the surety on the bond to invoke the protections which the bond provides. A performance bond is required if a public works contract exceeds \$100,000.00.⁵⁷

The provisions of the statute that require the posting of a performance bond by the contractor are mandatory. Thus, for any public works project (defined as a contract for constructing, altering, or repairing a public building or carrying out or completing any public work), the public entity must require that the prime contractor post a performance bond before the work is commenced if the contract price exceeds \$100,000.00. The surety on the bond must be an approved corporate surety in accordance with Article 7.19-1 of the Texas Insurance Code. The surety company must be authorized and admitted to write surety bonds in this state. This surety must also hold a certificate of authority from the United

⁵⁷ §2253.021(a)(1), TEX. GOV'T. CODE.

States Secretary of the Treasury to qualify as a surety on obligations permitted or required under federal law.

Any terms or provisions contained within performance bonds that attempt to expand or restrict a right or liability will be disregarded. Further, the interpretation of a payment or performance bond will be very liberal; a court will disregard the actual intent of the parties and will construe the terms of the bond as intending to comply with the provisions of chapter 2253 of the Texas Government Code.

The perfection of a claim against a surety on a performance bond does not require that certain specific procedures be followed, as with payment bonds. Nevertheless, prompt written notice by the public entity, sent by certified mail, return receipt requested, to the prime contractor as well as the surety setting forth the claim and the amount sought should typically suffice.

Suit on a performance bond must be filed by a public entity on or before the first anniversary date of the final completion of the project, the contractor's abandonment of the project, or the termination date of the public works contract.⁵⁸ The statute that imposes this one year limitation is inherently vague. Often, the date of final completion can be readily established when an architect's or engineer's certificate of final completion is issued. But this is not universally true. In projects that become problematic, architects and engineers may frequently be reluctant to issue a certificate of final completion pending the resolution of the disputes between the public entity and the contractor. In such cases, the date of final completion may not necessarily be tied to the issuance of the certificate. Further, the date of termination of a public works contract may be established when a formal declaration of termination has been issued by the public entity following the contractor's default. In the absence of a formal declaration of termination, it will be difficult to determine when the statute of limitations begins and ends. Finally, the date of abandonment is virtually always uncertain. Although job logs can be reviewed to determine the last date that the contractor was on the job site, that date may be meaningless if subcontractors continue to render performance.

Given that the statute of limitations for most types of lawsuits is four years, a one-year limitations period is extremely short. Because of the dramatic effect of missing this deadline, a public entity should always thoroughly document the progress of construction and the events that give rise to the contractor's default. The public entity's insistence on the submission of and adherence to a well-defined and clear job schedule that contains progress deadlines is critical. Most importantly, it is always imprudent to wait for the limitations deadline to approach, even where post-default negotiations are on-going. Missing the deadline by as little as one day can result in a complete forfeiture of any claim that the public entity may have against the contractor or surety on the bond.

C. PAYMENT BONDS

The purpose of a payment bond is to protect the subcontractors on the project; its intended beneficiaries are those persons who perform labor or services or who furnish materials to the project. A payment bond must be furnished if the aggregate public works contract price exceeds \$25,000. The payment bond is solely for the protection and use of those persons who have privity of contract (a direct contractual relationship) with the prime contractor or a subcontractor on the project. As with performance bonds, a payment bond must be executed by an approved corporate surety.

If a subcontractor on a public works project is not paid by the general or prime contractor, the subcontractor is limited in its remedies to pursuing a claim against the prime contractor or against the surety on the performance bond, or both. Absent a failure on the part of the public entity to require the

⁵⁸ §2253.078(a), TEX. GOV'T. CODE.

posting of a payment bond, a subcontractor generally has no right to pursue a claim against the public entity. However, where the governmental entity fails to obtain the required payment bond, it will be subject to the same liability that the surety would have had if a bond had been properly posted. The procedures discussed below involving the perfection of claims by subcontractors against sureties will, therefore, apply to claims by subcontractors against the public entity when no performance bond has been furnished. In such cases, a subcontractor may, if it follows the correct procedures, obtain a lien on the monies that would otherwise be due to the prime contractor.⁵⁹

In order to properly perfect a claim on a payment bond, a subcontractor must comply with the procedures set forth in Subchapter C of Chapter 2253 of the Texas Government Code.⁶⁰ The subcontractor must mail, by certified mail, a notice of claim to the prime contractor and the surety on or before the fifteenth day of the third month after each month in which any of the claimed labor was performed or material delivered. Thus, if materials were delivered to the job site in the month of January and were installed during the month of February, the deadline for sending the written notice for the labor will expire on April 15. The deadline for sending the notice for the materials will expire May 15. The subcontractor may combine the claims for labor and materials but must submit the written notice not later than April 15.

The subcontractor's notice must be accompanied by a sworn statement of account. The statement must contain the dollar amount of the claim, it must be verified or sworn to before a notary public, and must contain the following language: "the amount claimed is just and correct and all just and lawful offsets, payments and credits known to the affiant have been allowed." The sworn statement of account must also include the amount of retainage, if any, that has not yet become due under the terms of the contract. The subcontractor may, as an option, enclose a copy of its contract with the prime contractor and a statement of the completion or value of partial completion of its performance.

If no written contract exists between the prime contractor and subcontractor, the notice of claim must also contain the name of the party for whom the work was performed (i.e., the name of the prime contractor or the name of the subcontractor by whom the claimant was employed), the approximate date of performance, a description of the labor or materials, and the amount due. The claim must be itemized and must have copies of any documents, invoices or orders that identify the work, the project and the location. Where multiple items of labor or material have been furnished, and if the claim is for a lump-sum payment, the claimant must describe the labor or materials, state the name of the party for whom the labor was performed or material delivered, identify the approximate date of performance or delivery, state whether the contract is written or oral, identify the amount of the contract, and state the amount claimed.

The deadline for sending the notice of claim is shorter if the claimant is a sub-subcontractor (in other words, someone who has a direct contractual relationship with a subcontractor who, in turn, has a direct contractual relationship with the prime contractor). A notice of claim must be mailed on or before the fifteenth day of the second month after each month in which labor is performed or materials delivered.

A subcontractor may sue the general contractor or the surety, or both, following the expiration of sixty days after the date on which the notice of claim is mailed. However, suit must be filed on a payment bond within one year after the date that the notice for claim is mailed. If a suit is not filed within one year, then the statute of limitations has expired and the subcontractor's claim may be unenforceable.

⁵⁹ It should be noted that a lien on the monies due to the prime contractor does not equate to a lien against the real estate on which the project was constructed. The lien simply provides a claimant with the right to insist on preferential payment.

⁶⁰ §2253.041, *et seq.*, TEX. GOV'T. CODE.

Although the provisions of the statute are mandatory in that all public works projects involving more than \$25,000 must have a payment bond, there is some authority that suggests that this mandatory requirement may be waived. In *Prairie Valley Independent School District v. Sawyer* 665 S.W.2d 606 (Tex.Civ.App.--Fort Worth 1984, writ ref'd, n.r.e.), the Fort Worth Court of Appeals indicated that if a governmental agency chooses to waive the bond, it then voluntarily submits itself to the possibility that it may be compelled to pay the claims of subcontractors.

When a bond that is otherwise required by law to be submitted is not furnished, the public entity opens itself up to multiple claims by subcontractors for the payment of the subcontractors' invoices. This may be true even though no contract existed between the public entity and the subcontractors. If the subcontractor provides labor or materials and intended to charge the public entity, and if the public entity accepted the labor or materials under circumstances as may reasonably provide it with notice that it would be charged for the work, the subcontractor may successfully pursue a claim under a theory of quantum meruit.

3. LIEN ON PUBLIC FUNDS

One fundamental difference between public and private construction projects is that public property is exempt from lien claims. Property owned by the state or by a political subdivision is exempt from attachment, execution or forced sale. No lien may be perfected on public property. This fundamental principle applies to limit the remedies of creditors who successfully sue a political subdivision. The law does not allow the creditor to seize property or foreclose against public property after a judgment is entered.

Nevertheless, a lien may under certain circumstances, be claimed against funds due from a political subdivision to a general contractor. A subcontractor may claim a lien against public funds if the contract is for public improvements, the prime contract does not exceed \$25,000, and the subcontractor timely and properly perfects the claim in substantially the same manner as a mechanic's lien would otherwise be perfected. Generally, perfection of the claim requires notice. The notice must be sworn to by affidavit, must be sent by registered or certified mail to the political subdivision and the general contractor, must contain detailed information regarding the claim, and must be sent not later than the 15th day of the second month following the month in which the labor was performed or the material furnished.⁶¹

4. AMERICANS WITH DISABILITIES ACT

The Americans With Disabilities Act of 1990 (the "ADA") is sweeping legislation designed to prevent and prohibit discrimination against disabled persons. Its stated purpose is to end discrimination against individuals with disabilities, to bring people with disabilities into the economic and social mainstream of American life, to provide enforceable standards which address discrimination against disabled persons, and to ensure that the Federal Government plays an essential role in enforcement. It is probably the most significant legislation impacting employment relations since the Civil Rights Act of 1964. In the employment context, the ADA prohibits discrimination against any "qualified individual with a disability with regard to job application procedures, hiring, advancement or termination of employment, compensation, job training, or any other term, condition or privilege of employment."

A "qualified individual with a disability" is defined as any individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment

⁶¹ See, §53.231, *et seq.*, TEX. PROPERTY CODE.

position that such person holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. Thus, a “qualified individual with a disability” is a person who has some recognized disability who satisfies the criteria for the position and who, with or without reasonable accommodation, can perform the essential functions of the job.

Although a great deal of the Act relates to terms and conditions of employment, a significant portion of the Act also deals with construction requirements for public facilities and places of public accommodation. Title III of the ADA provides regulations that cover places of public accommodation, commercial facilities and private entities that offer certain examinations and courses related to educational and occupational certification. Places of public accommodation include over five million private establishments such as restaurant, hotels, theatres, convention centers, retail stores, shopping centers, dry cleaners, hospitals, museums, libraries, parks, zoos, amusement parks, private schools, daycare centers, health spas, and bowling alleys. Commercial facilities are non-residential facilities that include office buildings, factories and warehouses. Places of worship are not covered by the Title III regulations nor are private clubs except to the extent that the facilities of the private club are made available to customers or patrons of a place of public accommodation.

Title II of the Act essentially prohibits discrimination on the basis of disability by public entities. As of January 26, 1992, all new construction and alteration of public facilities must be designed such that the facility is readily accessible to and useable by individuals with disabilities. The design, construction or alteration of public facilities must be in conformance with the Uniform Federal Accessibility Standards (Appendix A 241 CFR Part 101-19.6) or with the Americans with Disabilities Act Accessibility Guidelines for buildings and facilities (Appendix A 228 CFR Part 36).

In furtherance of the objectives of the American with Disabilities Act, the Texas legislature has enacted Article 9102, Tex.Rev.Civ.Stat.Ann., (entitled the “Texas Architectural Barriers Act”), which is intended to encourage and promote the rehabilitation of persons with disabilities and to eliminate, insofar as possible, unnecessary barriers encountered by persons with disabilities. The Act applies to any building or facility constructed, renovated or altered in whole or in part on or after January 1, 1970, with the use of state, county or municipal funds, or the funds of any political subdivision of this State. The law also applies to temporary or emergency construction and buildings that are leased or occupied for use by the state or any state agency.

Generally, construction standards under both the ADA and the Texas Architectural Barriers Act relate to the removal of physical barriers and the installation of auxiliary aids that enable persons with a disability to make use of facilities. This includes installing ramps, making curb cuts at sidewalks and entrances, rearranging tables, chairs, machines, and other furniture, widening doorways, installing grab bars in restrooms, and adding raised letters or Braille to elevator control panels.

All plans and specifications for the construction or substantial renovation or alteration of a building or facility that has an estimated construction cost of at least \$50,000 must comply with the Texas Architectural Barriers Act and the Texas Accessibility Standards adopted by the Texas Department of Licensing and Regulation. All plans and specifications for applicable projects must be submitted to the Department of Licensing and Regulation for review and approval. It is the responsibility of the architect or engineer to submit these plans to the department not later than the fifth day after the date on which the applicable professional seal is placed on the plans. If there is no architect or engineer, the owner has the obligation to submit the plans to the department within thirty days after construction begins. Substantial modification of approved plans must be resubmitted to the department. Following the completion of the project, the Department of Licensing and Regulation must inspect the building or facility to confirm compliance with applicable standards. It should be noted that fees will be charged for plan review, facilities inspection, and processing requests to waive or modify accessibility standards.

The Texas Commission of Licensing and Regulation (as distinguished from the Department of Licensing and Regulation) has statutory authority to consider a waiver or modification of accessibility standards if the application of the standard is irrelevant to the nature, use or function of a facility, or if compliance with a particular standard is impractical.

The commission may report a failure to timely submit plans and specifications to the appropriate licensing authority that regulates architects or engineers. The commission may also impose an administrative penalty of as much as \$1,000 per day for a violation of an owner to comply with state standards.

It should be noted that compliance with the Texas Architectural Barriers Act and the Texas Accessibility Standards are separate and independent from compliance with the Americans with Disabilities Act and the ADA Accessibility Guidelines. Copies of the Texas Accessibility Standards can be obtained from the following office:

Office of the Secretary of State
Texas Registered Division
P.O. Box 13824
Austin, Texas 78711-3824
(512) 463-5561

Information regarding compliance with the Texas Architectural Barriers Act can be obtained from the following office:

Texas Department of Licensing and Regulation
Architectural Barriers Section
P.O. Box 12157
Austin, Texas 78711
(800) 803-9202

5. PREVAILING WAGE RATES

Chapter 2258 of the Texas Government Code is a state law that requires contractors on public works projects to pay all workers not less than a specified wage rate for labor, depending on the craft or trade.⁶² The governing body of the political subdivision must determine the prevailing wage rate of per diem wages in the locality in which the project is to be constructed for each craft or type of worker needed to execute the project, including holiday and overtime work. This determination may be made by conducting a survey of the wages received by each class of workers employed on similar projects or may be made by using the US Department of Labor's schedule of rates.

Cities with populations of at least 10,000 may impose and collect a penalty of \$60 per day against a contractor or subcontractor for each day and for each worker who is paid less than the prevailing wage rate. If the public entity fails to include the schedule of prevailing wage rates in the contract, the contractor or subcontractors are not in violation of this prohibition. The contractor and the subcontractors are required to keep records showing the name, occupation and actual per diem wages paid to each worker. These records are to be open and made available to the public entity for inspection at reasonable hours.

⁶² §2258.021, TEX. GOV'T CODE.

Enforcement of the provisions of this law may be initiated by the public entity on its own initiative or by the filing of a complaint by a worker, which would trigger the public entity's authority to inspect and investigate. The public entity must, within 30 days of the receipt of a complaint, make an initial determination as to whether good cause exists to believe that a violation has occurred and, if so, is entitled to withhold proportionate payments from the contractor pending a determination of the complaint.
