

PITFALLS IN THE COMPETITIVE BIDDING PROCESS

BY GREG HUDSON

The procurement of goods and services by municipalities and counties requires a working knowledge of a complex web of state statutory bidding requirements. Failure to comply with any one of the statutory requirements may result in the invalidation of the contract as well as substantial criminal penalties for those persons involved in the procurement process. It has been our experience that the most significant mistakes by our clients with respect to competitive bidding have resulted from a lack of adequate planning prior to the commencement of the bidding process, coupled with a general unfamiliarity with the more intricate statutory bidding requirements. Set forth below in outline form are the fundamental statutory bidding requirements pertaining to local governments as well as selected cases and Attorney General opinions interpreting those requirements.

I. Purpose of Requiring Competitive Bidding

- A. To stimulate competition, prevent favoritism and secure the best work and materials at the lowest price, for the best interest and benefit of the taxpayer and property owners. Sterrett v. Bell, 240 S.W.2d 516 (Tex. Civ. App. -- Dallas 1951, no writ); Haas v. Gulf Coast Natural Gas Co., 484 S.W.2d 127 (Tex. Civ. App. -- Corpus Christi 1972, no writ); Vilbig Bros. v. City of Dallas, 91 S.W.2d 336 (Tex. Comm. App. 1936, no writ).

II. Competitive Bidding Statutes Applicable to Local Governments

- A. The competitive bidding process is governed strictly by state statute. Generally, the bidding requirements applicable to local governments have been codified in the Local Government Code as follows:
 - 1. Sections 252.001 et. seq. (applicable to municipalities);
 - 2. Sections 262.001 et. seq. (applicable to counties);
 - 3. Section 271.001 et. seq. (leases and installment purchases by local governments); and
 - 4. Sections 271.021 et. seq. (public works contracts by local governments).

Bickerstaff, Heath & Smiley, L.L.P.

B. However, local governments must be aware of statutory bidding requirements not contained in Sections 252, 262, and 271.

1. Tex. Rev. Civ. Stat. art. 601(g) is a special statute pertaining to bidders who are non-residents of the State. This statute generally allows the local governmental entity to discriminate against a non-resident bidder to the extent the non-resident bidder's home state would allow discrimination against a Texas bidder in a similar situation.

2. Tex. Rev. Civ. Stat. art. 664-4 (Professional Services Procurement Act) applies to local governments seeking the services of certain designated professionals.

a. This Act prohibits the selection of certain professionals (e.g. physicians, architects, optometrists, land surveyors, engineers, public accountants and or groups or associations thereof) on the basis of competitive bids.

b. Additionally, any requests for proposals for architectural and/or engineering services cannot include price as an initial evaluation factor. Tex. Rev. Civ. Stat. art. 664-4, §3A (Vernon 1992 Supp.).

III. Competitive Bidding by Municipalities - Generally, Tex. Loc. Gov't Code § 252.021 et. seq.

A. Municipal Charter controls

1. For home-rule cities, the municipal charter controls in cases of conflict with the bidding statutes. Tex. Loc. Gov't Code § 252.002.

a. Statutory bidding requirements also affect political subdivisions of the municipality; (e.g., municipal housing authorities); Att'y Gen. Op. No. MW-132 (1980).

B. Threshold expenditure requirements

1. The threshold expenditure requirements which trigger the bidding statutes are based on total population:

Bickerstaff, Heath & Smiley, L.L.P.

- a. If the municipality has a population of 50,000 or greater, then bidding is required for all purchases of more than \$10,000. Tex. Loc. Gov't Code § 252.021(a).
- b. If the municipality has a population of fewer than 50,000, then bidding is required for all purchases of more than \$5,000. Tex. Loc. Gov't Code § 252.021(b).

C. Exemptions from municipal bidding requirements of Ch. 252

- 1. The general exemptions from competitive bidding for municipalities are contained in Tex. Loc. Gov't Code § 252.022 and include:
 - a. Expenditures for public calamities;
 - b. Procurements necessary to protect health or safety;
 - (1) an exclusive franchise for garbage collection services held to be exempt as a procurement necessary to protect public health. Browning Ferris, Inc. v. City of Leon Valley, 590 S.W.2d 729 (Tex. Civ. App. 1981, writ ref'd n.r.e.);
 - (2) time warrants issued without competitive bidding for improvements to city sewer system held exempt as necessary to protect public health. Hoffman v. City of Mt. Pleasant, 89 S.W.2d 193 (Tex. 1936).
 - c. Procurements necessary because of unforeseen damage to public machinery, equipment, or other property;
[a-c above contemplate "emergency" purchases]
 - d. Procurements for personal or professional services;
 - (1) The services of a container terminal operator are not "professional services" exempting from competitive bidding under Art. 2368a (now this article). Att'y Gen. Op. No. MW-399 (1981).

Bickerstaff, Heath & Smiley, L.L.P.

- (2) A competent auditor possesses special skill and technical learning and therefore contracts employing such auditors need not be let by competitive bids. Cochran County v. West Audit Co., 10 S.W.2d 229 (Tex. Civ. App. -- Amarillo 1928, writ ref'd).
 - (3) A contract for a construction manager who oversees various public building projects is excepted from the competitive bidding requirements of art. 2368a (now Loc. Gov't Code § 262.024(4)) because the services to be performed are "personal services," in that they are to be performed personally by a particular individual for the benefit of another." Att'y Gen. Op. No. MW-530 (1982).
 - (4) Whether a contract for janitorial services is a contract for "personal services" exempt from competitive bidding is a fact question. If the contract requires a specific person to perform the services, it is a contract for "personal services." Att'y Gen. Op. No. JM-486 (1986).
 - (5) A contract for microfilm services does not fall within the "personal or professional service" exception of Local Gov't Code § 262.024. Att'y Gen. Op. No. JM-890 (1988).
 - (6) The services performed by a Third Party Administrator (TPA) under Ins. Code art. 21.07-5, § 2(3)(A) may be simply clerical ones or complex ones requiring high levels of expertise. The determination of whether such services are "professional services" exempt from competitive bidding under Loc. Gov't Code § 252.022 is a question of fact, and depends on the particular services to be provided under a specific contract. Att'y Gen. Op. No. JM-1038 (1989).
- e. Procurements for work that is performed and paid for by the day as the work progresses;
 - f. Purchases of land or right-of-way;
 - g. Procurements of single source items including:

Bickerstaff, Heath & Smiley, L.L.P.

- (1) patented and copyrighted material,
 - (2) films, manuscripts, or books,
 - (3) electricity, gas, water and other utility services, and
 - (4) captive replacement parts or components for equipment.
- h. Purchases for public libraries;
 - i. Public improvements, if 1/3 of the cost is to be paid from special assessments levied on the property to benefit from the improvement; and,
 - j. Public improvement projects authorized by voters of the municipality.
 - k. Payments under a contract by which a developer participates in the construction of a public improvement as provided by Subchapter C, Chapter 212.
- l. Personal property sold:
 - (1) at an auction;
 - (2) at a going out of business sale held in compliance with Subchapter F, Chapter 17, Business & Commerce Code; or
 - (3) by a political subdivision of this state, a state agency, or an entity of the federal government. Tex. Loc. Gov't Code § 252.022.

D. Notice requirements under Chapter 252

1. Notice must be published at least once a week for two consecutive weeks with first publication before the 14th day before the date set to let the contract. Competitive sealed proposals must comply with the same notice provisions. Tex. Loc. Gov't Code § 252.041(a) and (b).

Bickerstaff, Heath & Smiley, L.L.P.

E. High technology procurements

1. For high technology procurements, the municipality may use competitive proposals rather than competitive bids. Tex. Loc. Gov't Code § 252.042.
 - a. Requests for proposals allow the municipality to negotiate with prospective qualified offerors, so long as all offerors are treated fairly and equally with respect to the discussion and revision of proposals. Tex. Loc. Gov't Code § 252.042(b).
 - b. Requests for proposals must specify the factors to be used in the evaluation process. Tex. Loc. Gov't Code § 252.042(a).
 - c. Offerors may revise their proposals until the award of the contract. Offerors shall be treated fairly and equally with respect to any opportunity for discussion and revision of their proposals. Tex. Loc. Gov't Code § 252.042(b).

F. Lump sum or unit pricing

1. If the contract is for the construction of public works or for the purchase of materials, equipment, or supplies, the municipality may let the contract on a lump sum or unit price basis. If a unit price basis is used, the bid specifications must approximate the quantity needed, based on best information available. Tex. Loc. Gov't Code §252.047.

G. Award of the contract

1. Competitively bid contracts must be awarded by the municipality to "lowest responsible bidder"
- or -
2. The municipality may reject all bids. Tex. Loc. Gov't Code § 252.043(a).
 - a. City has a right to reject a bid tendered 5-10 minutes after the bid filing deadline and award the contract to another bidder. A&A Construction Co., Inc. v. City of Corpus Christi, 527 S.W.2d 833 (Tex. Civ. App. -- Corpus Christ 1975, no writ).

Bickerstaff, Heath & Smiley, L.L.P.

3. Competitive proposals must be awarded to the responsible offeror whose proposal is most advantageous considering price and other factors. Tex. Loc. Gov't Code § 252.043(b).
4. In determining who is a "responsible bidder", the municipality may consider the safety record of the bidder if:
 - a. the municipality has adopted a written criteria for accurately determining the safety record of a bidder; and
 - b. the municipality has given notice in the bid specifications that the bidder's safety record will be considered; and
 - c. the determinations concerning the lowest responsible bidder are not arbitrary and capricious. Tex. Loc. Gov't Code § 252.0435.

H. Other requirements regarding bidding by municipalities

1. Contracts for public works generally require a contractor's bond in the full amount of the contract price. Tex. Loc. Gov't Code § 252.044.
2. The issuance of time warrants requires a referendum if a petition is filed with the requisite number of signatures by the time the contract is let. Tex. Loc. Gov't Code § 252.045.
3. The lease-purchase of real property by the municipality financed by certificates of participation requires an appraisal beforehand. The purchase price may not exceed the fair market value of the property as shown by the appraisal. Tex. Loc. Gov't Code § 252.050.

I. Change orders after the contract is awarded

1. Necessary changes in plans or specifications after a contract is awarded and performance is begun, or necessary reductions or increases in contract quantities, may be approved by a municipality as long as funds are available and the change order does not increase the original contract price more than 25%. Tex. Loc. Gov't Code § 252.048.
 - a. Where a statute requires that a contract be let to the lowest responsible bidder, municipal corporations cannot evade the law by making a substantial change in the contract after it has been

Bickerstaff, Heath & Smiley, L.L.P.

awarded pursuant to the law. In order to render a contract void because of changes or deviations, they must be substantial. City of Crockett v. Murdock, 440 S.W.2d 864 (Tex. Civ. App. -- Tyler 1969, writ ref'd n.r.e.) Citing Wantland v. Anderson, et al., 203 S.W.2d 787 (Tex. Civ. App. -- San Antonio 1947, writ ref'd n.r.e.).

- J. Failure to comply with statutory competitive bidding requirements
1. Contracts made by municipalities in violation of Chapter 252 of the Tex. Loc. Gov't Code are void. Tex. Loc. Gov't Code § 252.061.
 2. Any taxpaying resident may bring an action for an injunction of any further performance of the contract. Tex. Loc. Gov't Code § 252.061.
 3. Criminal penalties may be imposed as set forth in Section 252.062:
 - a. It is a Class B misdemeanor for an intentional failure to competitively bid a contract required to bid under § 252.021.
 - b. It is a Class B misdemeanor for a municipal employee to make separate, sequential or component purchases in order to keep the bid price below the minimum amount specified by § 252.021.
 - c. Other violations of Chapter 252 are punishable as a Class C misdemeanor.
 4. Removal from office and ineligibility.
 - a. A conviction under 3(a) or (b) above results in the immediate removal of that person from public office or employment. Tex. Loc. Gov't Code § 252.063(a).
 - b. For 4 years from the date of conviction, the convicted officer or employee is ineligible to be a candidate for any public office or an employee of the municipality.
 - c. In addition, the convicted officer or employee may not receive any further compensation pursuant to any employment contract with the municipality, except for retirement and workers' compensation benefits. Tex. Loc. Gov't Code § 252.063(b),(c).

Bickerstaff, Heath & Smiley, L.L.P.

IV. Competitive Bidding by Counties - Generally, Tex. Loc. Gov't Code § 262.021 et. seq.

A. Definitions for competitive bidding by counties

1. The definitions set forth in Section 262.022 are helpful in the determination of which statutes apply. Pay close attention to the definitions in determining the applicable bidding procedures to follow. They are very broad in scope. For example:
 - a. "item" is defined to include any service, equipment, goods or other tangible or intangible personal property, including insurance and high technology items; Tex. Loc. Gov't Code § 262.022 (5);
 - b. "purchase" is defined to include any kind of acquisition including the lease of an item. Tex. Loc. Gov't Code § 262.022 (5),(6).

B. Competitive bidding by counties generally applies to all purchases exceeding \$10,000. Tex. Loc. Gov't Code § 262.023(a).

1. Counties with populations less than 20,000 that do not have county purchasing agents may enter into contracts up to \$15,000 without competitive bidding if the commissioners court publicly finds it to be in the public interest to do so. Tex. Loc. Gov't Code §262.023(d).
2. Bid Requirements
 - a. All bids must be sealed.
 - b. In applying the \$10,000 provision to the purchase of office supplies, separate purchases of supplies by an individual department are not considered to be part of a single purchase and a single contract by the county if a specific intent to avoid the competitive bidding requirement of this subchapter is not present. Tex. Loc. Gov't Code § 262.023(c).

Bickerstaff, Heath & Smiley, L.L.P.

C. Exemptions -- Local Gov't Code § 262.024.

1. The following are not required to comply with the competitive bidding or proposal procedures otherwise required by Chapter 262, if the commissioners court by order grants the exemption:

- a. Expenditures for public calamities;
- b. Procurements necessary to protect the health or safety of the county residents;
- c. Procurements necessary because of unforeseen damage to public property;

[a-c contemplate "emergency" purchases]

- d. Procurements for personal or professional services, (See authorities cited at Sec. III.C 1(d)(1)-(6) supra);
- e. Procurements for work that is performed and paid for by the day, as the work progresses;
- f. Purchases of land or right-of-way; and,

(1) A contract was for the sale of gravel as chattel, along with a license for the county to go on the plaintiffs' land and remove the gravel was not a contract for the purchase of land and was not exempt from competitive bidding requirements, and it was therefore void and unenforceable. Darnell v. McLennan County, 671 S.W.2d 686 (Tex. Civ. App. -- Waco 1984, writ ref'd n.r.e.).

g. Procurements of "single source" items, including:

- (1) patented and copyrighted material,
- (2) films, manuscripts, or books,
- (3) electricity, gas, water and other utility services, and

Bickerstaff, Heath & Smiley, L.L.P.

- (4) captive replacement parts or components for equipment.
 - (a) the county commissioners must make a statement in the county minutes of any single source purchases. Tex. Loc. Gov't Code §262.024(c).
- h. Items of food;
 - (a) however, Loc. Gov't Code § 262.024(d) requires the county to solicit bids for food purchases at various intervals. Such bids shall be documented and kept for at least one year or until audited by the county auditor.
- i. Personal property sold:
 - (1) at an auction by a state licensed auctioneer,
 - (2) at a going out of business sale held in compliance with Subchapter F, Chapter 17, Business & Commerce Code; and
 - (3) by a political subdivision of this state, a state agency, or an entity of the federal government.
- j. Any work performed under a contract for community and economic development made by a county under Tex. Loc. Gov't Code § 381.004.
- k. The renewal or extension of a lease or of an equipment maintenance agreement if:
 - (1) the lease or agreement has gone through the competitive bidding procedure within the preceding year;
 - (2) the renewal or extension does not exceed one year, and
 - (3) the renewal or extension is the first renewal or extension of the lease or agreement.

Bickerstaff, Heath & Smiley, L.L.P.

- D. Competitive bidding by county purchasing agent
1. For items not subject to competitive bidding under Ch. 262, the county purchasing agent shall nevertheless adopt procedures that provide for competitive bidding to the extent practicable under the circumstances.
- E. Notice requirements under Chapter 262
1. Notice must be published at least once a week for two consecutive weeks, with first date of publication occurring before the 14th day before the bid opening. Tex. Loc. Gov't Code § 262.025(a).
 2. Notice must include:
 - a. bid specifications or where they may be obtained;
 - b. the time and place for receiving and opening bids;
 - c. the name and position of the county official to whom bids are to be sent;
 - d. whether the bidder should use lump sum or unit pricing;
 - e. the method of payment by the county;
 - f. the type of bond required from the bidder; and
 - g. if payment is to be through warrants, the notice must include a statement of the maximum amount of time warrant indebtedness, the rate of interest on the warrants, and the latest maturity date of the warrants.
 3. Additional optional notice provisions for purchases relating to road maintenance and construction equipment
 - a. the notice of a proposed purchase of road maintenance and/or construction equipment may include a request for information about the costs of repair, maintenance, or repurchase of the equipment. Tex. Loc. Gov't Code § 262.0255(a).

Bickerstaff, Heath & Smiley, L.L.P.

F. Bid specifications requirements

1. Disputes regarding bid specifications generate substantial litigation. Some illustrative cases and Attorney General opinions on this issue include:
 - a. Haas v. Gulf Coast Natural Gas Co., 484 S.W.2d 127 (Tex. Civ. App. -- Corpus Christi 1972, no writ) (Bid specifications must be reasonably specific, so as to give all prospective bidders the opportunity to bid on a common standard).
 - b. Att'y Gen. Op. No. MW-449 (1982) (Where ambiguous bid specifications leave the bidding requirements to speculation and conjecture, competitive bidding is prevented); See also Att'y Gen. Op. H-24 (1973).
 - c. Att'y Gen. Op. No. C-376 (1965) (The Commissioners Court may not specify the manufacturer brand name of machinery to be purchased through competitive bidding as such operates to unduly restrict competitive bidding).
 - d. Att'y Gen. Op. No. H-1086 (1977) (County may not restrict its bids to local merchants and businessmen).

G. Opening of bids

1. Bids are to be opened on date specified in notice, unless an error is discovered in the original specifications, then the commissioners court may order an extension. Tex. Loc. Gov't Code § 262.026(a).
2. Opened bids are to be available to the public for inspection. Tex. Loc. Gov't Code § 262.026(b).

H. Awarding the contract

1. The person who opens bids shall present them to the commissioners court. Tex. Loc. Gov't Code § 262.027(a).

Bickerstaff, Heath & Smiley, L.L.P.

2. The commissioners court shall award contract to the "responsible bidder who submits lowest and best bid". Tex. Loc. Gov't Code § 262.027(a)(1);

- or -

3. The commissioners court may reject all bids and publish a new notice. Tex. Loc. Gov't Code § 262.027(a)(2).
4. If two bidders submit lowest and best bid, the commissioners court is to decide between the two by drawing lots. Tex. Loc. Gov't Code § 262.027(b).
5. The contract may not be awarded to a bidder who is not lowest dollar bidder, unless each lower bidder is given notice of the proposed award and is given an opportunity to appear and present evidence concerning their responsibility. Tex. Loc. Gov't Code § 262.027(c).
 - a. Under Tex. Rev. Civ. Stat. Ann. art. 2368a, (now ch. 262), the Commissioners' Court had a statutory right to reject any and all bids. Absent illegality, arbitrariness, or abuse of discretion, the Commissioners Court was within its right to award a housekeeping contract to the third lowest bidder (who had more experience and better equipment than other bidders) and to reject lower bids of bidders who either had no equipment or needed more men and supervision. Corbin v. Collin County Commissioners' Court, 651 S.W.2d 55 (Tex. App. – Dallas 1983, no writ).
6. In determining who is a "responsible" bidder, the commissioners court may take into account the safety record of the bidder if:
 - a. the commissioners court has adopted a written definition and criteria for determining the bidder's safety record;
 - b. notice was given to prospective bidders that their safety records would be considered; and
 - c. the determinations are not arbitrary and capricious. Tex. Loc. Gov't Code §262.0275

Bickerstaff, Heath & Smiley, L.L.P.

- I. An alternative to competitive bidding - Multistep competitive proposals
1. Tex. Loc. Gov't Code § 262.0295 provides a limited alternative to competitive bidding when bidding specifications are difficult to derive. The alternative is the multistep competitive proposal procedure.
 2. The multistep proposal procedure applies only to counties with a population of 125,000 or more. Tex. Loc. Gov't Code § 262.0295(a)(3).
 3. If the county purchasing agent determines it is impractical to prepare detailed bid specifications for the purchase of an item, he must notify the commissioners court which thereafter must agree. Tex. Loc. Gov't Code § 262.0295(a)(1)(2).
 4. Input from prospective bidders may then be solicited through a request for proposals which may include a general description of the item to be purchased (instead of bid specifications), and may request the submission of unpriced proposals. Tex. Loc. Gov't Code § 262.0295(b).
 5. Within seven days after the proposals are opened, the county purchasing agent may request priced bids from those persons who submitted proposals. Tex. Loc. Gov't Code § 262.0295(c).
 6. Within thirty (30) days from the opening of the original proposals, the commissioners court shall award the contract to the lowest responsible offeror whose price is lowest after negotiations. Tex. Loc. Gov't Code § 262.0295(d). The commissioners court may negotiate with several offerors to obtain the best and final offer so long as each is offered fair and equal treatment. Tex. Loc. Gov't Code § 262.0295(e).
- J. Alternate competitive proposal procedure for insurance or high technology items - Tex. Loc. Gov't Code § 262.030.
1. High technology item means a service, equipment, or good of a highly technical nature including:
 - a. data processing equipment, software and firmware related to data processing equipment;

Bickerstaff, Heath & Smiley, L.L.P.

- (1) It is the responsibility of the commissioners court to determine in the first instance whether a particular service is of a highly technical nature or whether it is a technical service related to a high technology item. Att'y Gen. LO-88-120 (1988).
 - b. telecommunications, radio and microwave systems;
 - c. electronic distributed control systems, including building energy management systems;
 - d. technical services related to those items. Tex. Loc. Gov't Code § 262.022(4).
 2. Public notice is to be published in the same manner as for competitive bidding.
 3. The request for proposals must specify the relative importance of price and other evaluation criteria.
 4. The award of the contract must be to "the responsible offeror whose proposal is determined to be the lowest evaluated offer resulting from negotiation," as evaluated considering the criteria set forth in the request for proposals. Tex. Loc. Gov't Code § 262.030(a).
 5. If provided in the request for proposals, proposals submitted may be kept secret during negotiation so as to avoid disclosure to competing offerors. After the award, proposals shall be made public except for those contents which are identified as confidential. Tex. Loc. Gov't Code § 262.030(b).
 6. The commissioners court may negotiate with several offerors whose proposals may be reasonably susceptible of being selected so long as each is offered fair and equal treatment. Revisions in the proposals submitted may be made before the award for the purposes of obtaining best and final offers. Tex. Loc. Gov't Code § 262.030(c).
- K. Modification of contract terms after the award but before the contract is let.
1. After the award of the contract but before the contract is let, the county may negotiate a modification of the contract if the modification is in the best interest of the county and does not substantially change the scope of

Bickerstaff, Heath & Smiley, L.L.P.

the contract or cause the contract amount to exceed the next lowest bid. Tex. Loc. Gov't Code § 262.0305(a).

2. The commissioners court must approve the modified contract. Tex. Loc. Gov't Code § 262.0305(b).

L. Changes in specifications after the contract is let.

1. The county may change the contract specifications including the price and/or quantity of items to be purchased, so long as the cost of the change can be paid from available funds. Tex. Loc. Gov't Code § 262.031(a).
2. The commissioners court may grant the county purchasing agent the authority to make change orders which increase or decrease the contract price up to \$15,000. However, the original contract price may not be increased by more than 25%. The original contract price may not be decreased by 18% or more without the consent of the contractor. Tex. Loc. Gov't Code § 262.031(b).
 - a. However, the modifications may not amount to a complete revision of the bid specifications despite the fact that the contract price was reduced less than 25 percent. Niles v. Harris County Freshwater Supply Dist. No. 1A, 336 S.W.2d 637 (Tex. Civ. App. -- Waco 1960, writ ref'd 339 S.W.2d 562).

M. Bid Bonds

1. A bid bond or a cashier's check for 5% of the contract price may be required if the contract price exceed \$100,000 or is for public works. Tex. Loc. Gov't Code § 262.032(a).
2. If the contract is for \$50,000 or less, the county may provide in the bid notice that no money will be paid until the work is completed and accepted by the county. Tex. Loc. Gov't Code § 262.032(c).

N. Performance Bonds

1. If the contract price exceeds \$50,000, a performance bond for the full contract price shall be furnished by the successful bidder within 10 days after the contract is executed. Tex. Loc. Gov't Code § 262.032(b).

Bickerstaff, Heath & Smiley, L.L.P.

- O. Penalties for non-compliance with county bidding statutes.
1. Any county taxpayer may seek injunctive relief. Tex. Loc. Gov't Code § 262.033.
 - a. Where the commissioners court executed twenty separate instruments with a single contractor for the construction of a road in an effort to avoid compliance with the notice and advertising requirements of Art. 2368 (now Loc. Gov't Code § 262.021, et seq.), the contracts were held to be void on the grounds that they were made with an illegal purpose. Kelly v. Cochran County, 82 S.W.2d 641 (Tex. Comm. App. 1935, judgment adopted).
 - b. Where the commissioners court, whether or not acting through the agency of the road engineer, had no authority to contract for the purchase of road emulsion except through the taking of competitive bids, any contracts not so bid were void. Such contracts cannot be "ratified" by the commissioners court since the commissioners court cannot bind the county by ratification of a contract the Court itself had no authority to make in the first place. Att'y Gen. Op. No. JM-1027 (1989) citing Limestone County v. Knox, 234 S.W. 131 (Tex. Civ. App. -- Dallas 1921, no writ).
 2. It is a Class B misdemeanor for intentional or knowing violations of the bidding statutes, or evasion of statutes by sequential and/or component purchases. Tex. Loc. Gov't Code § 262.034(a),(b).
 3. It is a Class C misdemeanor for other violations of Chapter 262. Tex. Loc. Gov't Code § 262.034(c).
 4. Removal from office and eligibility.
 - a. A conviction for a violation of Chapter 262 results in that person's removal from county office or employment. Tex. Loc. Gov't Code § 262.035(a).
 - b. The convicted person is also ineligible to run for public office and/or be employed by the county for four years. Tex. Loc. Gov't Code § 262.035(b)(1), (2).

Bickerstaff, Heath & Smiley, L.L.P.

- c. The person may not receive any further compensation pursuant to any employment contract with the county, except for retirement and workers' compensation benefits. Tex. Loc. Gov't Code § 262.035(b)(3),(c).

V. Leases and Installment Purchases of Personal Property by Local Governments (The Public Property Finance Act).

- A. The Public Property Finance Act (Tex. Loc. Gov't Code § 271.001 et.seq.) applies to leases, lease-purchases, leases with an option to purchase, and installment purchases of public personal property by local governments. Tex. Loc. Gov't Code § 271.005.
- B. Governmental agencies subject to Act include municipalities, counties and other special districts. Tex. Loc. Gov't Code § 271.003(4).
- C. Section 271.005(c) limits the interest rate to be charged to the governmental entity or installment purchase contracts to that paid on public securities pursuant to Art. 717k-2 Tex. Rev. Civ. Stat.
- D. Municipalities and counties must also comply with the bidding requirements of Chapters 252 and 262 prior to entering into a lease, lease-purchase, or installment contract. Tex. Loc. Gov't Code § 271.006.
- E. If the contract requires payments exceeding \$100,000, the County or municipality may submit it to the attorney general for approval. Tex. Loc. Gov't Code § 271.007(a).
- F. Contracts authorized under Chapter 271 may be for any term not exceeding twenty-five (25) years. Tex. Loc. Gov't Code § 271.009.

VI. Competitive Bidding By Local Governments on Public Works Contracts

- A. Loc. Gov't Code § 271.021 et. seq. prescribe the bidding procedures for construction and/or improvement projects affecting real property (including structures), if the projects require an expenditure of more than \$10,000.

Bickerstaff, Heath & Smiley, L.L.P.

B. Exemptions from Section 271.021

1. **Contracts for professional services required to be awarded under the Professional Services Procurement Act, (Tex. Rev. Civ. Stat. art. 664-4) (See, Section II.(B)2 above), are exempt from Sections 271.021 et. seq. Tex. Loc. Gov't Code § 271.022.**
2. **The municipal charter of any home-rule municipality controls in cases of conflict with Sections 271.021 et. seq. Tex. Loc. Gov't Code §271.023.**

C. Advertisement for bids

1. **The local governmental entity must publish notice of the request for bids in local newspapers at least twice, with the second publication at least 10 days prior to the date bids are to be submitted. Tex. Loc. Gov't Code §271.025(b).**
2. **The request for bids must also be mailed to any organization that:**
 - a. **requests in advance that notices be sent to it;**
 - b. **agrees in writing to pay the cost of mailing the notice; and**
 - c. **certifies that it circulates such notices to the construction trade. Tex. Loc. Gov't Code § 271.025(c).**
3. **The notice required in section 2 above must be mailed on or before the date that the first newspaper notice is mailed. Tex. Loc. Gov't Code § 271.025(d).**
4. **Contents of bid advertisement - The bid advertisement must:**
 - a. **describe the work to be performed;**
 - b. **state the location(s) where the bid specifications may be obtained or examined;**
 - c. **state the time and place for submitting bids; and**

Bickerstaff, Heath & Smiley, L.L.P.

- d. state the time and place that the bids will be opened. Tex. Loc. Gov't Code § 271.025(a).

D. Bid specifications

1. If the county has a population of 2.2 million persons or more, the commissioners court may require the bidder to perform at least 25% of the work and may establish criteria for the surety companies that underwrite the bid and performance bonds. Tex. Loc. Gov't Code § 271.025(e).

E. Opening of bids

1. Bids must be opened by the local governmental entity at a public meeting, or by an officer of the public entity at his public office.
2. Once the bid has been opened, it cannot be changed to correct an error in the bid price; however, this does not change the common law right of a bidder to withdraw a bid due to a material mistake in the bid. Tex. Loc. Gov't Code §271.026.

- a. Under common law, bid mistakes may result in the contract being equitably rescinded if the conditions of "remediable mistake" are present. Ordinary negligence will not bar equitable relief unless such negligence "amounts to such carelessness or lack of good faith in calculation which violates a positive duty in making up a bid, taking into consideration the nature of the transaction and the position of the opposite contracting party" Additionally, the bidder must give notice of his mistake before the offeree materially changes his position. James T. Taylor & Son, Inc. v. Arlington I.S.D., 335 S.W.2d 371 (Tex. 1960).

- b. Where a bidder made an honest mistake in calculating his bid, in doing so he was not negligent and was entitled to recover his bid deposit. Jordan v. City of Beaumont, 337 S.W.2d 115 (Tex. Civ. App. -- Beaumont 1960, writ ref'd n.r.e.).

Bickerstaff, Heath & Smiley, L.L.P.

F. Award of the contract

1. The contract must be awarded to the lowest responsible bidder

- or -

2. The local governmental entity may reject any and all bids.
3. If the contract is to be awarded to a bidder who is not the lowest bidder, before the award each lower bidder must be given notice of the proposed award and an opportunity to appear at a hearing before the public entity or its designated representative to present evidence concerning the lower bidder's responsibility. Tex. Loc. Gov't Code §271.027.
4. In determining who is a "responsible" bidder, the governmental entity may take into account the safety record of the bidder if:
 - a. the governmental entity has adopted a written definition and criteria for determining a bidder's safety record;
 - b. notice was given to prospective bidders that their safety record would be considered; and
 - c. the determinations by the governmental entity are not arbitrary and capricious. Tex. Loc. Gov't Code §271.0275.

G. Penalties for non-compliance with the public works bidding statutes.

1. Any contract awarded in violation of § 271.021 et. seq. is void. Tex. Loc. Gov't Code § 271.028.
2. It is a Class B misdemeanor for intentional or knowing violations of the public works bidding statutes, or evasion of statutes by sequential and/or component purchases. Tex. Loc. Gov't Code § 271.029(a),(b).
3. It is a Class C misdemeanor for other violations of the public works bidding statutes. Tex. Loc. Gov't Code § 271.029(c).
4. Removal from office and eligibility.

Bickerstaff, Heath & Smiley, L.L.P.

- a. A conviction for a violation of Chapter 271.029(a) or (b) results in that person's removal from office or employment. Tex. Loc. Gov't Code § 271.030(a).
- b. The convicted person is also ineligible to be appointed or elected to public office and/or be employed by the governmental entity for four years from the date of conviction. Tex. Loc. Gov't Code § 271.030(b).
- c. The person may not receive any further compensation pursuant to any employment contract with the governmental entity, except for retirement and workers' compensation benefits. Tex. Loc. Gov't Code § 271.030(b)(3),(c).

CONCLUSION

The determination by municipal and county officials as to which statutory competitive bidding procedures to follow depends in large part on the items, services, and/or facilities sought to be purchased. The statutes are deceptively similar in many instances, yet the penalties for failure to follow the precise statutory requirements applicable to a given purchase are potentially disastrous, both from a contractual and personal standpoint. For these reasons, we recommend a carefully planned and cautious approach to purchases by local governments.

Bickerstaff, Heath & Smiley, L.L.P.