

Rebuilding Texas: An Overview Of Public Procurement

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In late August of 2017, Hurricane Harvey dropped a staggering 40-61 inches of rain across southeast Texas. Individual drops of water combined to create over \$180 billion worth of estimated damages to public and private buildings and structures statewide. The federal government has committed substantial dollars toward reconstruction efforts with the promise of more dollars to follow. Many public entities will be the recipients of those federal rebuilding dollars. For members of the construction industry who plan to enter the Texas market, and for those already in the private Texas market who wish to engage in public projects, there are important aspects to know about Texas public procurement law.



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Like many states, public procurement in Texas started as a competitive, sealed-bidding process with the lowest responsible bidder awarded the contract. Over the last two decades, alternative procurement methods found their way into the playbooks of the various types of governmental entities. The differences between the various agencies, such as school districts, water districts, municipalities, counties, and state agencies; and the additional considerations required for vertical and horizontal construction projects; created an emergence of distinct sets of rules. Over time, efforts have been made to unify the types of public procurement methods available to the different public entity types. That said, there are still differences in the procurement methods of various entities, including significant differences when it comes to transportation-related projects.



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In future articles, the authors will discuss with more detail the various alternative procurement methods available to the public entities. In this article, the authors will cover some of the general characteristics or components of public procurement.

Alternative Procurement Methods

Most public entities in Texas have access to a wide variety of public procurement methods. The available procurement methods include competitive sealed bidding, competitive sealed proposals, design-build, construction manager at risk, construction manager agent, and job order contracting (which is similar to federal indefinite delivery/indefinite quantity contracting, a type of contract that provides for an indefinite quantity of supplies or services during a base period of time). The methods available to civil

works projects are slightly different than those available for bidding a building or structure.

Emergencies

Public entities are typically permitted to avoid the normal procurement process in order to respond to emergencies. As one example, the Texas Water Code allows certain water and utility districts to negotiate limited-duration contracts to make necessary repairs to correct a condition where there is a serious health hazard or an unreasonable economic loss to the district.

Criteria That Can Be Considered

A Texas governmental entity can consider more than just price in attempting to award a contract to the lowest responsible bidder. It is not uncommon to find aggrieved bidders with the lowest price, who failed to differentiate that it is not the lowest bidder, but the lowest “responsible” bidder who wins. Criteria specifically listed in the procurement statutes include: price, experience, reputation, quality, impact on HUB (historically underutilized business) rules, safety record, proposed personnel, financial capability, and any other relevant factor specifically listed in the request for bids, proposals, or qualifications.

Workers Compensation

Workers compensation is required on public projects in Texas. Public entities are required to include a significantly sized provision of the Texas Administrative Code, which details workers compensation requirements, in every contract.

Prevailing Wage

The construction of public-works projects, including buildings, highways, roads, excavation and repair works, or other project development or improvements, paid for in whole or in part with public funds, require prevailing wages. Public entities are permitted to determine their own prevailing wages or use the federal Davis-Bacon prevailing wages. Contractors who fail to pay a prevailing wage must pay a penalty to the governmental entity of \$60 for each worker, for each calendar day in which the worker is not paid the prevailing wage. This rather small penalty becomes quite a large impact when compounded by a sizable workforce over an extended period of time before the issue is discovered.

Bonds Are Required

A contractor who enters into a construction contract with a public entity must provide the public entity with a payment bond if the project is over \$25,000 (\$50,000 if it is a municipality) and a performance bond if the project is over \$100,000. It is also common to see a requirement that the contractor post a maintenance bond that covers the warranty period, although these bonds are not specifically required by statute. The bonds must be issued by a corporate surety (not an individual) that meets certain requirements.

Local Preferences

Some public entities are empowered by statute to prefer local contractors. An example of one such preference, is when municipalities and counties are granted discretion to award a contract to a bidder who is not the lowest responsible bidder, if the bid is within 5 percent of a nonresident low bidder. The

public entity may determine that the local bidder offers the best combination of contract price and additional economic development opportunities due to the employment of residents and increased tax revenues.

Disclosure Regarding Contracts with Governmental Entities

New to public procurement in 2015, is a reporting requirement that mandates disclosure of interested parties who have been awarded a contract in excess of \$1 million. The contracting business entity must report known interested parties to the Texas Ethics Commission. An interested party may be anyone who has a controlling interest in the business entity, or anyone who actively participates in facilitating or negotiating the terms of contracts for the business entity, including a broker, intermediary, adviser or attorney.

Prohibition on Boycotting Israel

Even more recently, a prohibition was added to Texas law that prevents public agencies from doing business with entities that boycott Israel, or entities who plan to boycott Israel, during the term of the contract. The prohibition is much broader than it sounds. The statute defines prohibited behavior as refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm, or limit commercial relations with Israel, or a person or entity doing business in Israel. Significant national press has been given to this requirement, and the American Civil Liberties Union has declared the prohibition unconstitutional. At the time of the printing of this article, the prohibition is still on the books in Texas, but it is possible that challenges to the statute may work their way into the Texas legal system.

Historically Underutilized Businesses

Much like the federal system, Texas supports and promotes the use of historically underutilized businesses on public projects in Texas. HUBs are those businesses operated by an economically disadvantaged class. Businesses that are at least 51 percent owned, operated, managed, or actively controlled by a minority, woman, or disabled veteran, may certify as a HUB through the Texas Comptroller of Public Accounts. All state agencies are encouraged to make a good-faith effort to involve HUBs in the procurement process. However, agencies who enter contracts that have a value of \$100,000 or more, and the contract includes subcontracting opportunities, may only consider subcontracts including a HUB subcontracting plan.

Contesting the Award

When a contract is awarded in a manner that violates the public procurement statute, the contract and any of its affiliated job orders are voidable for public policy reasons. The contract is not automatically void, and may be enforceable until, and unless, it is contested. Parties who seek to enforce the rules of the public procurement statute must bring an action for declaratory or injunctive relief within 10 days after the contract is awarded. A party may seek this type of relief unless the contract in question was entered into by a state agency. "State agency" means any department, commission, board, office, or other agency in the executive branch of Texas, high courts including the Texas Supreme Court, the Court of Criminal Appeals, lower courts of appeals, or the Texas Judicial Council; or Texas public university or college.

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