



## **The Texas County Purchasing Act**

*by Philip B. Arnold*

### **Introduction**

The Texas County Purchasing Act and associated purchasing laws are complex. This is mostly due to the fact that the laws are scattered over several different codes and different chapters within those codes, requiring someone to flip from one section of the code to another. They also have a lot of exceptions. This paper breaks down county purchasing into three main sections. However, it is not an exhaustive list of every purchasing law and exception. To list them all would defeat the point of this paper, which is designed to provide a basic working knowledge of the various laws and how they apply to the day-to-day business of county purchasing.

### **Three statutes to know**

County purchasing laws fall into three main buckets – Local Government Code Chapter 262, Government Code Chapter 2269, and Government Code Chapter 2254. Chapter 262 is generally referred to as the “County Purchasing Act,” Chapter 2269 is generally referred to as “Alternative Construction Delivery Methods,” and Chapter 2254 as the “Professional Services Procurement Act.” Understanding which chapter applies to what type of contract can help remove the veil of confusion that inevitably stymies even the most diligent student of purchasing laws.

Chapter 262 governs the process a county must follow when it purchases a good or a tangible thing. Examples include everything from pencils to vehicles. If you want to purchase something that you would normally buy at a store, Chapter 262 is most likely the chapter you must follow. Chapter 262 only applies to counties.

Chapter 2269, on the other hand, is a law that is shared with other governmental entities and applies to construction projects. If the state, a county, city, or special district wants to build something, they follow Chapter 2269. This is why, if you read the County Purchasing Act, the Municipal Purchasing Act, and even laws applying to the State, they refer to Chapter 2269. One way to think of Chapter 2269 is as a catchall for all government building contracts.

Finally, Chapter 2254 governs the process to hire a “professional.” Chapter 2254 provides a list of what a “professional” is and includes doctors, accountants, engineers, surveyors, and architects, among others. In the construction context, Chapter 2254 comes into play when a county



wants to build something under Chapter 2269 because Chapter 2269 requires that the county first hire an architect and engineer to create plans before the project is put out for bid to contractors. Like Chapter 2269, Chapter 2254 applies to multiple governmental entities. One reason Chapter 2254 is a stand-alone statute is because a governmental entity may not want to hire the “lowest bidder” as their attorney or engineer. While purchasing the cheapest pencil may not have a detrimental effect on the county, contracting with the lowest bidding engineer could be catastrophic. This is why Chapter 2254 requires the government to hire the “most highly qualified” professional and why the contract price is secondary.

Understanding these three separate statutes, and how they refer to each other, is key to understanding county purchasing. But if you take nothing else from this paper, take with you the basic concept that, depending on what you want to do, these three statutes are the first place to look for guidance. While they refer to each other, in sometimes confusing ways, they are all building blocks a county must use to form different types of contracts.

There are, inevitably, exceptions to everything stated above. In its wisdom, the Texas Legislature carved out exceptions for certain types of contracts or for certain types of projects. Sometimes these exceptions are really “options” where the county can choose one or the other statute to follow. Sometimes it is unclear which statute must be followed. This paper will cover the exceptions at a very high level so that you are aware of them, but it will not go into great detail on the subject, as books can be written on the topic.

### **Chapter 262 – The County Purchasing Act**

Chapter 262 is a fairly simple statute, and one that you are probably familiar with. Generally speaking, before a county may purchase one or more items for more than \$50,000 total, the county must first comply with Chapter 262. Chapter 262 authorizes several options and exceptions for counties to purchase items – notably Chapter 2269 (discussed in detail below). The typical process to purchase items under Chapter 262 is as follows:

- Publish notice of the item to be purchased once a week for two consecutive weeks in the newspaper. The notice must state:
  - What is being purchased and the specifications (e.g., 500 #2 pencils, 6 inches in length and 2 cm diameter).
  - The name and telephone number of the purchasing agent or county contact.
  - The county website containing the details of the purchase.



- The time and place for receiving and opening bids and who to send the bids to.
- Whether the bidder should use lumpsum or unit pricing (e.g., “all the concrete that will be needed to build a road as described in the blueprints” or “20 tons of concrete”).
- The method of payment by the county.
- The type of bond required by the contractor.
- Whether attendance at a pre-bid meeting is required (at the county’s option).
- The purchasing agent must open the bids on the date specified in the notice. All bids must be opened at the same time and kept on file for one year.
- The contract must be awarded to the “lowest and best” “responsible bidder” or the county can reject all bids. In the event of a tie, the county draws lots to determine the winner.
- If someone other than the lowest bidder is awarded the contract, they must be given an opportunity to present their case to the Commissioners Court about why they should be awarded the contract.

#### **“Lowest and Best Bidder:”**

Chapter 262 gives two examples of what “lowest and best bidder” means. Lowest is obvious – it is the lowest price by dollar amount. “Best” is more subjective. However, we know that in determining the “lowest and best bidder” for earth-moving, material-handling, road maintenance, or construction **equipment**, the Commissioners Court can require information about the maintenance and repair costs of the equipment and require a bond to repurchase the equipment.<sup>1</sup> In determining the “lowest and best bidder” for road construction **material**, the commissioners court may consider the pickup and delivery locations of the material and the cost to the county of delivering or hauling the material to be purchased (i.e., taking into account fuel costs to haul the material).<sup>2</sup>

#### **“Responsible Bidder:”**

What does “responsible bidder” mean? Courts have held that determining who is a “responsible bidder” is within the discretion of the Commissioners Court. Chapter 262 only provides one specific factor – the contractor’s safety record can be used to determine who is a “responsible bidder” if the county has adopted a policy defining criteria for evaluating safety and

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<sup>1</sup> Loc. Gov’t Code § 262.027(d).

<sup>2</sup> *Id.* at § 262.027(e).



gives notice to bidders that it will consider safety. Outside of safety records, the Commissioners Court alone determines who is a “responsible bidder.”

Should someone file a lawsuit to challenge the Commissioners Court’s decision that they are not a responsible bidder, their complaint is reviewed by a district court judge under the “abuse of discretion” standard, which means the district court judge will defer to the judgment of the Commissioners Court unless there is evidence that the Commissioners Court acted arbitrarily (without any facts or evidence to support its decision), in bad faith, or fraudulently. If there is some evidence to support the Commissioners Court decision, then the district court will defer to the judgment of the Commissioners Court. Proving the Commissioners Court abused its discretion is difficult for a plaintiff. But the county should always keep diligent records of everything it considered in determining who was a responsible bidder in the event someone later challenges the decision. Keeping good records can be the difference between winning and losing a court battle over a procurement contract.

### **Exceptions:**

There are many exceptions to the general rule set out under Section 262. These are generally optional exceptions. For example:

- A county can purchase road equipment and tires through the Comptroller’s State Purchasing and General Services Commission.
- If the purchase can only be made from one source and costs \$50,000 or less, the county does not need to put the purchase out for bid.
- If the county does not receive any responsive bids, it can purchase the item without putting the item out for bid. This requires that the county adopt a specific policy and procedure.
- Section 262.024 provides a list of when a county may choose to not follow Chapter 262:
  - In the event of public emergency.
  - To protect public health and safety.
  - Due to unforeseen damage to public property.
  - For personal or professional services (*see* Government Code Chapter 2254, below).
  - For day laborers who work less than 20 days in a three-month period.
  - Land or right of way.
  - Items available from only one source (films, books, utilities, replacement parts).
  - Food.



- Personal property sold at auction, a going out of business sale, or by another governmental entity.
- Work performed for economic development.
- Vehicle equipment and repair.
- If a bidder provides health insurance (and requires his subcontractors to provide health insurance) and that bidder is within five percent of the “lowest and best” bid of a contractor who does not provide health insurance, then the county may award the contract to the bidder who provides health insurance even though they are not the lowest bidder.

### **Component Purchases:**

The County cannot avoid the \$50,000 contract limit imposed by Chapter 262 by breaking the purchase up into smaller parts. These are called “component” purchases and are illegal if used to get around the \$50,000 cap. Purchases from the same supplier by the same county officer, department, or institution are treated as purchases under a single contract (i.e., the contracts amounts are aggregated/combined for purposes of compliance with Chapter 262). A notable exception to this is the purchase of office supplies.

### **Competitive Sealed Proposal Method:**

Chapter 262 also allows for the county to purchase goods using the Competitive Sealed Proposal method (as opposed to the Competitive Sealed Bid method described above) for certain items:

- Insurance
- High technology items
- Landscape maintenance
- Travel management
- Recycling
- Other items when the County Purchasing Agent determines, with the consent of the Commissioners Court, that it is in the best interest of the county to use this method.

The notice requirements for proposals are the same as for Competitive Sealed Bids. The main difference is that the proposals method requires that the county publish the criteria it will use to evaluate each responsive proposal and the weight given to each criterion (e.g., 30% to



experience). In the proposal method, the responders are ranked according to the criteria. The county then enters into a negotiation with the highest ranked responder and negotiates a final price.

### **Alternative Construction Delivery Method - Government Code Chapter 2269**

As noted above, Chapter 2269 is the statute a county uses to build something – typically a building. It is a shared statute and the purchasing laws that govern other governmental entities generally refer to Chapter 2269. Chapter 2269 lists five different methods by which a county can solicit bids for construction work. The processes are very similar. The main differences lie in the county’s level of engagement in the project. As you will see below, some of the methods listed allow the county to act as the general contractor and some provide more leeway in selecting the “best” responsive bidder. Which method is best for your project will depend on the project and the team you anticipate working on the project.

#### **A. Competitive Sealed Bid:**

This method is the traditional method of competitive bidding:

1. The county selects an architect or engineer (A/E) using the Professional Services Procurement Act (Chapter 2254 Texas Government Code) to design the project and develop the plans and specifications for the project (Plans).
2. The county issues a Request for Bids in which the County provides the Plans, the county’s estimated construction budget, the project scope and schedule, and other relevant information. The county may use selection criteria to determine whether a bidder is responsible.
3. The county selects the bidder who is the lowest responsible bidder.

#### **B. Competitive Sealed Proposals:**

This is similar to the sealed bid procedure described above. However, in this option proposals are used instead of bids, awards can be made based on criteria other than price, and the county may negotiate a proposal with the proposer.

1. The Commissioners Court determines that this method provides the best value.
2. The county selects the A/E to design the project and develop the Plans.
3. The county requests sealed proposals based on the Plans, the solicitation documents set out the selection criteria established by the county, the estimated construction budget, project scope, project schedule, and other relevant factors.



4. The proposals are publicly opened, and the names of the proposers and the dollar amount of their proposals are read aloud.
5. The county evaluates and ranks each proposal and makes its selection of “best value” based on the selection criteria and ranking.
6. The county begins negotiation with the first ranked proposer. If negotiations are not successful, the county moves to the next-ranked proposer until a contract is selected or all proposers are rejected.

#### **C. Construction Manager at Risk:**

In this method, the Construction Manager provides pre-construction services during the design of the project and serves as the general contractor during construction. The contract will usually provide for a guaranteed maximum price for construction.

1. The county selects A/E to design project and prepare Plans.
2. At the same time, the county selects the Construction Manager at Risk (CMR) through either a one-step or two-step process. In the one-step process, the county uses a Request for Proposals (RFP); in the two-step process, the county first sends out a Request for Qualifications (RFQ), then selects five or fewer candidates to receive the RFP.
3. The county evaluates and ranks each contractor and makes its selection of “best value” based on the selection criteria and ranking.
4. The county begins negotiation with the first ranked contractor, and if negotiations are not successful, moves down the rank until a selection is made or all proposers have been rejected.

#### **D. Construction Manager as Agent:**

In this option, the Construction Manager serves as a “project manager” and does not have any responsibility for construction. The county acts as its own general contractor and enters into contracts with the subcontractors and tradesmen. The Construction Manager as Agent administers the contracts and coordinates performance.

1. The county selects A/E to design the project and prepare Plans.
2. The county selects a contractor to perform the construction using one of the other construction delivery methods listed in Chapter 2269.



3. The county selects Construction Manager as Agent through an RFP on the basis of demonstrated competence and qualifications in the same manner as under the Professional Services Procurement Act.
4. The Construction Manager as Agent serves as a consultant to the county and oversees and coordinates work under the construction contract.

**E. Design/Build for architectural projects:**

This is a method where the county contracts with a single entity to design and build the project. This method is useful if you are going to engage a large engineering firm who employs engineers, architects, and performs their own construction work.

1. The county selects its own A/E to develop a design-criteria package for the project.
2. Selection of the “design/build team” (consisting of the A/E and the contractor) is made in two phases.
  - In Phase 1, the county prepares an RFQ for a design/build team that includes general information on the project, selection criteria, project scope, budget, and the design-criteria package, and evaluates each respondent based on experience, competence, and other qualifications.
  - In Phase 2, the county selects five or fewer respondents to receive an RFP. The county ranks the teams and makes its selection based on the selection criteria and ranking.
3. If the county cannot negotiate a contract with the first ranked team, it moves down the ranking until a design builder is selected or all respondents are rejected.
4. The design/build team designs the plans and constructs the project.
5. The team is responsible for all pre-construction and construction phase services described in their scope of work.

**Government Code Chapter 2254 – Professional Services Procurement Act**

A county uses Chapter 2254 when hiring a “professional,” which is defined as someone who practices:

- A. accounting;
- B. architecture;
- C. landscape architecture;
- D. land surveying;





- E. medicine;
- F. optometry;
- G. professional engineering;
- H. real estate appraising;
- I. professional nursing;
- J. forensic science; or
- K. interior design.

Chapter 2254 **prohibits** competitive bidding for professional services. In order to hire a “professional” the county must make the award based on competence and qualifications at a “fair and reasonable price.”

There is also a specific requirement when hiring an architect, engineer, or surveyor. When hiring one of these three professionals, the county must select the most highly qualified provider on the basis of competence and qualifications (usually through an RFQ). The county then attempts to negotiate with that provider a contract at a fair and reasonable price. If a contract cannot be negotiated, then the county must formally end negotiations with that provider, select the next most highly qualified provider, and attempt to negotiate a contract with that provider at a fair and reasonable price. Contracts that do not follow this process are void.

#### **Other things to be aware of**

The Commissioners Court should also be aware of the following applicable statutes:

**Texas Occupations Code Section 1001.407** requires that:

1. The engineering plans, specifications, and estimates have been prepared by an engineer; and
2. The engineering construction is performed under the direct supervision of an engineer.

**Texas Occupations Code Section 1051.703** states:

1. An architectural plan or specification for any of the following may be prepared only by an architect:
  - a. A new building, or modification of an existing building, intended for occupancy on a 24-hour basis by persons who are receiving custodial care from the proprietor or operator of the building, regardless of the number of stories or square footage of the building;



- b. A new building having construction costs exceeding \$100,000 that is:
  - i. Constructed and owned by a state agency, a political subdivision, or any other public entity; and
  - ii. Used for education, assembly, or office occupancy;
- c. This section does not prohibit a county from contracting with an architect or engineer as the prime design professional for a building construction, alteration, or addition project.

**Texas Labor Code Section 406.096** states:

- 1. A governmental entity that enters into a building or construction contract shall require the contractor to certify in writing that the contractor provides workers' compensation insurance coverage for each employee of the contractor employed on the public project.
- 2. Each subcontractor on the public project shall provide such a certificate relating to coverage of the subcontractor's employees to the general contractor, who shall provide the subcontractor's certificate to the governmental entity.

**Penalties for failure to following purchasing laws**

Generally, if the county fails to comply with the County Purchasing Act, the contract is voidable by a court. However, some contracts are automatically void if stated in the statute. The difference between a contract being "void" and "voidable" generally matter for payment purposes – a void contract never existed and the county cannot pay any money under the contract; a voidable contract is voided at the time a judge declares it void and prior payments under the contract may be allowed. Any property tax-paying citizen of the county can sue to enjoin performance.<sup>3</sup>

There are also criminal penalties for violating county purchasing laws. A county officer or employee who intentionally or knowingly makes or authorizes sequential purchases to avoid purchasing requirements commits a Class B misdemeanor. A county officer or employee who intentionally or knowingly violates any other competitive procurement requirement commits a Class C misdemeanor.

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<sup>3</sup> Tex. Local Gov't Code § 262.033.



### **Conclusion**

County purchasing laws can be intimidating and confusing. Generally speaking, the County Purchasing Act (Chapter 262), the Alternative Construction Delivery Methods Act (Chapter 2269) and the Professional Services Procurement Act (Chapter 2254) will dictate the process a county must follow before entering into a contract or purchasing a good or service. However, there are exceptions, and the county should also be aware of legislative changes to these statutes. Because of the complex laws and factors involved in the purchasing process, counties should always consult an attorney or other professional to ensure they are following the correct statute before entering into any particular contract.

Philip B. Arnold, Partner  
Bickerstaff Heath Delgado Acosta LLP  
1601 S. MoPac Expressway  
Suite C 400  
Austin, Texas 78746  
P: 512.472.8021  
E: [parnold@bickerstaff.com](mailto:parnold@bickerstaff.com)