

# County Purchasing Act

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County Judges and Commissioners**  
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Presented by: Philip Arnold




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## Competitive Procurement Requirements



**Chapter 262**, Local Government Code (the County Purchasing Act), sets out the procurement requirements for counties.

**It establishes:**

- ◆ The requirements and exemptions for competitive procurement.
- ◆ Criminal penalties for failure to comply.
- ◆ Bid and proposal methods for goods and services other than construction projects.

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## Competitive Methods Procurement Requirements

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Before a county may purchase one or more items that cost more than \$50,000, the Commissioners Court must:

1. Comply with the procedures for competitive sealed bids or competitive sealed proposals set out in Chapter 262; **or**
2. Use the reverse auction procedure set out in Section 2155.062(d) of the Government Code; **or**
3. Comply with an alternative construction delivery method under Ch. 2269; **or**
4. Purchase through a cooperative purchasing program.



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## Exemptions

A county **does not** have to go through one of these competitive procurement methods if:

1. Contract amount is \$50,000 or less; or
2. Purchase falls within an exemption under Ch. 262 **and** the Commissioners Court approves the exemption.

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## Discretionary Exemptions

### Listed Exemptions: (Sec. 262.024)

1. Item needed for an emergency.
2. Item needed to preserve or protect public health and safety of county residents (does not have to be an emergency).
3. Land or right of way.
4. A professional service (e.g., architect, engineer, attorney).
5. Item available from only one source (includes electric power, gas, water, and other utility services).
6. Food (has caveats that require you solicit three sealed bids, keep records, and purchase from the lowest bidder).
7. Personal property purchased at an auction or going out of business sale.
8. Work performed under an economic development contract under Ch. 381.
9. Individual work performed and paid by the day (20-day max for 3-month period).
10. Vehicle and equipment repairs.

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## But note that...

- ◆ For exempt purchases, the County Purchasing Agent or Commissioners Court must adopt policies and procedures for procurement (e.g., contact three vendors for price quotes).
- ◆ For items purchased from a sole source, the Commissioners Court must enter into its minutes a statement from the county official who certifies that the item can only be purchased from a single source.

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## Mandatory Exemption

- ◆ Chapter 262 does **not** apply to:
  - ◆ A county with population under 20,000; and
  - ◆ That owns only one golf course.
    - Chapter 262 does not apply to **management** and **landscaping** contracts.

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## Notice Requirements

- ◆ Notice of the purchase must be published at least once per week for two consecutive weeks in the newspaper and must include:
  1. a **general statement** of the proposed purchase;
  2. purchasing agent **contact** information;
  3. the county **website** address, if any.
  4. the **specifications** describing the items;
  5. the **time and place** for receiving and opening bids
  6. the **name and position of the county official** or employee to whom the bids are to be sent;
  7. whether the bidder should use lump-sum or unit **pricing**;
  8. the **method of payment** by the county; and
  9. the type of **bond** required by the bidder.

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## Separate, Sequential, or Component Purchases

- ◆ County cannot use separate, sequential, or component purchases to avoid competitive procurement requirements (e.g., breaking up a purchase to come in under \$50,000).
- ◆ Purchases from the same supplier by the same county officer, department, or institution are treated as purchases under a single contract (the amounts are aggregated).

### Exceptions:

1. Separate purchases of office supplies, if there is no intent to avoid requirements.
2. Professional Services (accountant, attorney, doctor, etc.).

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### Chapter 262 Procurement Methods

Under 262, a county can use competitive sealed **proposals** for the purchase of:

- ◆ 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.

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### Chapter 262 Procurement Methods, Cont'd.

- ◆ Notice of the Request for Proposal (RFP) must be given in the same manner as for competitive bids.
- ◆ The RFP must list the selection criteria and specify their relative importance.
- ◆ The award is to the responsible party whose proposal is determined to be the lowest offer resulting from negotiation.

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### Chapter 271 Procurement Methods

◆ **If:**

1. A contract is for the construction, repair, or renovation of:
  - structure,
  - road,
  - highway,
  - other improvement, or
  - addition to real property, **and**
2. A statute requires competitive bids, **and**
3. If the contract is greater than \$50,000, **then**
4. You **must** follow Chapter 271.

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## Chapter 271 Requirements

◆ The county **must**:

1. Treat all bidders equally and fairly;
2. Receive bids in a fair and confidential manner;
  - The County **may** receive bids by electronic transmission but **must** accept bids submitted in hard copy.
3. Notice **must**:
  - a. Describe the work;
  - b. State the location of bidding documents/plans;
  - c. State the time and place the bids are due and will be opened;
  - d. Be mailed to anyone who circulates construction bids and requests a copy in advance.

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## Chapter 271 Contract Awards

1. The county can reject any and all bids.
2. The contract **must** be awarded to the lowest "responsible bidder."
  - ◆ But:
    - **If** the lowest bidder is not the lowest "responsible bidder," **then**
    - The lowest bidder must be given notice of the proposed award and given an opportunity to appear before the Commissioners Court (or its designated representative) and present evidence of the bidder's "responsibility."
3. Contracts that do not follow this procedure are **void**.

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## Cooperative Purchasing Programs Chapter 271

- ◆ Counties may purchase items by participating in a cooperative purchasing program with another governmental entity or with a local cooperative organization, instead of going through a competitive procurement process.
  - A "**local cooperative organization**" is "an organization of governments established to provide local governments access to contracts with vendors for the purchase of materials, supplies, services, or equipment".
  - The county **must enter into an agreement** with the government or local cooperative organization regarding the participation requirements.
- ◆ Counties may also purchase goods or services under federal supply schedules of the United States General Services Administration.
  - This automatically complies with Texas competitive bidding laws.

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## Reverse Auction Method

◆ Section 271.906 allows for a Reverse Auction Method of Purchasing.

◆ **“Reverse Auction Procedure” means:**

- A real-time bidding process, that takes place at a previously scheduled time and Internet location, in which multiple suppliers, anonymous to each other, submit bids to provide the goods or services; or

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## Professional Services Procurement Act (Gov. Code Ch. 2254)

◆ **“Professional Services” means:**

- accounting;
- architecture;
- landscape architecture;
- land surveying;
- medicine;
- optometry;
- professional engineering;
- real estate appraising;
- professional nursing;
- forensic science;
- interior design.

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## Professional Services Procurement Act

◆ Prohibits competitive bids for professional services.

◆ Requires that professional services be awarded based on:

1. Competence and qualifications;
2. A fair and reasonable price.

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### Architect, Engineer, or Surveyor

- ◆ The county must:
  1. Select the most highly qualified provider on the basis of competence and qualifications;
  2. Then attempt to negotiate with that provider a contract at a fair and reasonable price.
- ◆ If a contract cannot be negotiated, then the county must:
  1. Formally end negotiations with that provider;
  2. Select the next most highly qualified provider; and
  3. Attempt to negotiate a contract with that provider at a fair and reasonable price.
- ◆ Repeat the process until a contract is entered into.
- ◆ Contracts that do not follow this process are **VOID**.

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### Alternative Construction Delivery Methods

Government Code Chapter 2269 establishes six alternative construction delivery methods for construction projects:

1. Competitive Bid
2. Competitive Sealed Proposals
3. Construction Manager Agent
4. Construction Manager at Risk
5. Design-Build
  - ◆ There are two separate Design-Build methods, one for architectural projects and one for civil engineering projects.
6. Job Order Contract
  - ◆ The job order method cannot be used for civil engineering projects.

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### Competitive Sealed Bid

This is the traditional method of competitive bidding.

**Steps:**

1. The county selects an architect or engineer using the Professional Services Procurement Act to design the project and develop the plans and specifications for the project.
2. The county issues a Request for Bids in which the county provides the plans, the estimated construction budget, the project scope and schedule, and other relevant information.
3. The county selects the lowest bidder.

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## Competitive Sealed Proposals

This is similar to the sealed bid procedure described above. **However**, in this option:

- ◆ Proposals are used instead of bids;
- ◆ The award can be made based on criteria other than price; and
- ◆ The county may negotiate a proposal with the proposer.

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## Competitive Sealed Proposals, Cont'd.

### Steps:

1. County selects the A/E to design the project and develop the plans.
2. County issues an RFP based on the plans and other solicitation documents.
3. The proposals are publicly opened, and the names of the proposers and the dollar amount of their proposals are read aloud.
5. County ranks each proposal and selects the **"best value"** based on the selection criteria.
6. County negotiates 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.

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## What does "best value" mean?

- ◆ It should be defined in the RFP.
- ◆ It may include such things as:
  - direct and indirect costs, including transport and maintenance;
  - quality and reliability;
  - life cycle of the goods;
  - warranties;
  - customer service after a sale;
  - installation costs;
  - delivery terms;
  - probable vendor performance;
  - the cost of employee training associated with a purchase;
  - the effect of a purchase on productivity.

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## Construction Manager at Risk

The Construction Manager provides pre-construction services during the design of the project and serves as the general contractor during construction.

**Steps:**

1. 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.
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.

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## Construction Manager as Agent

The county acts as its own general contractor and contracts directly with the sub-contractors.

The Construction Manager as Agent (CMA) serves as a "project manager" and does not have any responsibility for construction. They administer the contracts and coordinate performance.

**Steps:**

1. County selects A/E to design project and prepare plans and contractors to perform construction using one of the other construction delivery methods.
2. County selects CMA through an RFP based on demonstrated competence and qualifications in the same manner as under the Professional Services Procurement Act.
3. The CMA serves as a consultant to the county and oversees and coordinates work under the construction contract.

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## Design/Build for Architectural Projects

**A single entity designs and builds the project.**

**Steps:**

1. County selects its own A/E to develop a design-criteria package for the project.
2. Selection of the "design/build team" (consisting of A/E and the contractor) is made in two phases:
  - Phase 1: 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.
  - Phase 2: County selects five or fewer respondents to receive an RFP. The County ranks the teams and makes its selection based on the selection criteria.
3. If the county cannot negotiate a contract with the first ranked team, it moves down the rank until a design builder is selected or all respondents are rejected.
4. The design/build team designs the plans and constructs the project.

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## Engineer Statutes

Texas Occupations Code Sec. 1001.407 requires:

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.

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## Architect Statutes

Texas Occupations Code Sec. 1051.703 requires an **architect** for:

1. 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 (e.g., the county jail).
2. A new building having construction costs exceeding \$100,000 that is:
  - a. constructed and owned by the government; and
  - b. used for education, assembly, or office occupancy.
3. An alteration that costs over \$50,000 to an existing building owned by the county and will be used for education, assembly, or office and requires the removal, relocation, or addition of a wall or an exit.

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## Other Noteworthy Statutes

### ◆ Workers' Comp:

- Texas Labor Code Sec. 406.096 requires that the contractor and all subs provide workers comp insurance for all government construction contracts.

### ◆ Conflicts of Interest:

- Local Government Code Chapter 176 requires a Conflict-of-Interest Questionnaire (Form CIQ) if the vendor has a business relationship with the county, a county officer, or a family member of the county officer.
- Best practice is to attach a Form CIQ with the solicitation.

### Proposed Legislation:

- ◆ HB 1132 (Rep. Spiller):
  - Raises limit for competitive bidding to \$100,000.

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## Failure to Comply - Enforcement of Provisions

- ◆ Generally, if the county fails to comply with the County Purchasing Act, the contract is **voidable** by a court.
  - Any property tax-paying citizen of the county can enjoin performance.
    - § 262.033 Tex. Local Gov't Code.
  - **However**, some contracts are automatically void if stated in the statute.
- ◆ 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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## Can You...

- ◆ **Specify the products be "Made in America?"**
  - **No.** This was held to be an undo restriction on competition.
    - *Texas Highway Commission v. Texas Ass'n of Steel Importers, Inc.*, 372 S.W.2d 525 (Tex. 1963).
- ◆ **Require the bidder to be local?**
  - **Generally, no.** The AG has said that a requirement that a bidder be located within the county would be an illegal restriction on competition. Tex. Att'y. Gen. Op. No. H-1086 (1977).
  - **BUT:** Yes, if within 3% of the lowest bid (Sec. 271.905).
- ◆ **Require a brand name product?**
  - **No.** A brand name does not necessarily equal quality.
    - *Davray, Inc. v. City of Midlothian, Texas*, 2005 WL 1586574 (N.D. Tex. July 6, 2005).

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## Can You...

- ◆ **Use health insurance as a factor?**
  - **Yes.** Local Gov't Code Sec. 262.0271 specifically allows you to consider health insurance.
- ◆ **Use past performance as a factor?**
  - **Yes.** Specifically, safety can be a factor under Tex. Local Gov't Code § 262.0275.
- ◆ **Use recycling as a factor?**
  - **Yes.** §262.005 of the County Purchasing Act incorporates the provisions of Health & Safety Code §361.426, which **requires** a county to give preference in purchasing to products made of recycled materials if the products meet applicable specifications as to quantity and quality.

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## Can You...

### • Enter into a multi-year contract?

- **Yes.** While no statute expressly authorizes multiple-year awards, several statutes create exceptions.
  - §271.009 Tex. Local Gov't Code limits a lease-purchase or other installment-type contract under the Public Property Finance Act to a term of 25 years.
  - §116.021 Tex. Local Gov't Code authorizes counties to select a depository either under the County Purchasing Act or for a two to a four-year term, plus negotiated renewal for another two-year term.
  - §271.903 Tex. Local Gov't Code states that a multiple-year contract for the purchase or lease of real or personal property that retains to the governing body the continuing right to terminate the agreement at the end of each budget period and/or is conditioned on a best efforts attempt to obtain and appropriate funds, is a commitment of current revenues only.
- You can also establish a sinking fund.

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## County Purchasing Act

# QUESTIONS?

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