

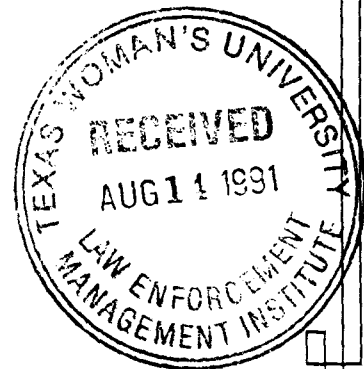
LAW ENFORCEMENT MANAGEMENT INSTITUTE

LAW AFFECTING MUNICIPAL PROCUREMENTS
IN TEXAS

A LEARNING CONTRACT
SUBMITTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR
MODULE II

BY
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MESQUITE POLICE DEPARTMENT
MESQUITE, TEXAS
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#109

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I. Introduction

The police manager is responsible for ensuring that all activities of his or her organization comply with applicable statutes, with municipal policy, and with responsible management practices. The activities of a municipal police agency are multi-faceted and complex, but they all include a common feature. They involve the direction of financial resources in such a manner as to accomplish the police mission.

The largest portion of the police budget is typically allocated for personal services, including salaries and benefits for police personnel. The cost of services provided by employees of the agency is a function of the salary structure established by the governing body and the efficiency of the organization. The procurement of those services is typically governed by federal law, by state or municipal civil service law, and by municipal policy.

The acquisition of services provided by employees of the organization is a part of the personnel process. This paper will examine the procurement process, the acquisition of goods and services other than those provided by employees of the agency.

II. Competitive Sealed Bids

The primary statutory provisions relating to municipal procurement is found in Chapter 252 of the *Local Government Code*.¹ That chapter, entitled "Purchasing and Contracting Authority of Municipalities," is generally applicable to municipalities. In cases where a home-rule municipality has a charter provision regarding notices, advertisements, bid requirements, or contracts which is in conflict with *Chapter 252*, the municipal charter will take precedence over the state code.²

The state law requires competitive sealed bidding or competitive sealed proposals for any contract expenditure of more than \$10,000. That dollar limit is \$5,000 if the municipality has a population of less than 50,000.³ Expenditures of less than the amount which triggers the state law will be governed by local charter, ordinance, or policy.

Contracts open for bid or proposal must be publicized at least once a week for two consecutive weeks in a local newspaper. (If no paper is published in the municipality, the notice must be posted at the city hall.) The first publication date must be at least fifteen days before the date that the contract will be let.⁴

The contract must be awarded to the "lowest responsible bidder." The governing body may determine responsibility, and "may reject any and all bids."⁵ Those two provisions allow

the governing body to exercise some discretion in determining responsiveness and in rejecting bids. Court cases have held, for example, that a commissioners' court may award a housekeeping contract to the third-lowest bidder where that bidder had more experience and better equipment, rejecting two lower bids from bidders with no equipment or less supervision.⁶ Absent illegality, arbitrariness, or abuse of discretion, the courts will not overturn a reasonable decision to award a contract to someone other than a low bidder.

III. Exceptions to Competitive Sealed Bids

There are some exceptions to the general requirements for competitive bidding, including:

1. "a procurement made because of a public calamity that requires the immediate appropriation of money to relieve the necessity of the municipality's residents or the preserve the property of the municipality."⁷

This provision allows the governmental entity to respond to emergency conditions, such as the aftermath of a disaster.

2. "a procurement necessary to preserve or protect the public health or safety of the municipality's residents."⁸

Public health or safety, of course, takes precedence over the bidding requirement. This provision has been interpreted to allow a county to contract for county ambulance service through a process other than competitive bidding.⁹ It also has been used to authorize a garbage collection contract which was not reached through competitive bids.¹⁰

3. "a procurement necessary because of unforeseen damage to public machinery, equipment, or other property."¹¹

In the case of unanticipated damage, the law recognizes that the delay imposed by the bid process could be unacceptable.

4. "a procurement for personal or professional services."¹²

This exception is covered more fully in the *Professional Services Procurement Act, Article 664-4, Vernon's Texas Civil Statutes*, which will be discussed in detail in Section V of this paper.

5. "a procurement for work that is performed and paid for by the day as the work progresses."¹³

Day labor is exempt from the bidding requirement.

6. "a purchase of land or a right-of-way."¹⁴

This exception recognizes that land is a unique commodity due to the fact that no two plots are directly comparable. The law does require an appraisal, by a qualified appraiser who is not an employee of the municipality, prior to the purchase of real estate. The purchase price may not exceed the fair market value as determined by that appraisal. An Attorney General's Opinion indicates that the true legislative intent of this provision is to authorize procurement of real property, without competitive bidding, by lease as well as by purchase.¹⁵

7. "a procurement of items that are available from only one source, including:

"(A) items that are available from only one source because of patents, copyrights, secret processes, or natural monopolies;

"(B) films, manuscripts, or books;

"(C) electricity, gas, water, and other utility services:

"(D) captive replacement parts or components for equipment; and

"(E) books, papers, and other library materials for a public library that are available only from the persons holding exclusive distribution rights to the materials."¹⁶

This exception recognizes the reality that competitive bidding is impossible where there is only one supplier.

8. "a purchase of rare books, papers, and other library materials for a public library."¹⁷

Although the wording of this exception is almost identical to that of one provision of item 8, this exception is probably more closely related to the real estate exception (item 6), in that no two rare books can be expected to be in directly comparable condition, and would therefore not be suitable for the bid process.

9. "paving drainage, street widening, and other public improvements, or related matters, if at least one-third of the cost is to be paid by or through special assessments levied on property that will benefit from the improvements."¹⁸

10. "a public improvement project, authorized by the voters of the municipality, for which there is a deficiency of funds for completing the project in accordance with the plans and purposes authorized by the voters."¹⁹

11. "a payment under a contract by which a developer participates in the construction of a public improvement project as provided by Subchapter C, Chapter 212."²⁰

This exception allows the municipality to share the cost of public improvements with a developer. An example of such a situation might be where a development might require construction of a new bridge, which would also benefit existing residents. The municipality could participate in the cost of the improvement together with the developer, without using the normal bid process.

12. "personal property sold:

"(A) at an auction by a state-licensed auctioneer;

"(B) at a going out of business sale held in compliance with Subchapter F, Chapter 17, *Business & Commerce Code*; or

"(C) by a political subdivision of this state, a state agency of this state, or an entity of the federal government."²¹

These exceptions, added by the legislature in 1989, allow municipalities to acquire property

(other than real estate) at public auctions and at legitimate going out of business sales. With economic conditions such as the state has experienced recently, this provision has allowed municipalities to take advantage of opportunities which could not have been considered prior to the adoption of this exception.

IV. High Technology Procurements

Competitive sealed proposals, rather than competitive sealed bids, may be solicited for high technology procurements. The two processes differ in that the evaluation of proposals should include factors other than price. The relative importance of price and the other evaluative factors must be specified in the Request for Proposals. The other key differences between the bid process and the proposal process include the fact that the latter process permits alterations in proposals following the opening and review by the governmental entity, and the fact that the government may engage in pre-award negotiations with the proposer.²²

A "High Technology Procurement" is defined in the code to include "equipment, goods and services of a highly technical nature, including:

"(A) data processing equipment and software and firmware used in conjunction with data processing equipment;

"(B) telecommunications equipment and radio and microwave systems;

"(C) electronic distributed control systems, including building energy management systems; and

"(D) technical services related to those items."²³

Upon receipt of proposals under the high-tech provision, the municipality may conduct discussions with offerors who are determined to be reasonably qualified to provide the desired goods or services. The law requires that offerors "be treated fairly and equally with respect to any opportunity for discussion and revision of proposals."²⁴ In contrast with the bid process used in non-high-tech acquisitions, revisions to proposals are acceptable in order to obtain the "best final offers." Opportunity for such revisions must be fairly and equally available to all offerors, of course.²⁵

The Request for Proposals may provide for a procedure under which proposals are not made public during the negotiation process. Proposals, with the exception of trade secrets and confidential information, become public information after the contract is awarded.²⁶

Under the high-tech proposal process, the city may award a contract to the offeror whose best final proposal "is determined to be most advantageous to the municipality considering

the relative importance of price and the other evaluative factors included in the request for proposals."²⁷

V. Professional Services

The process of solicitation of professional services is a noteworthy exception to the typical procurement process. The unique process of securing those services is set forth in the *Professional Services Procurement Act*,²⁸ which defines professional services to include:

- Accounting
- Architecture
- Optometry
- Medicine
- Land Surveying
- Professional Engineering

The act prohibits any contract for professional services to be awarded on the basis of competitive bids. In lieu of the bid process, such contracts are to be awarded on the basis of "demonstrated competence and qualifications," and at "fair and reasonable prices, as long as professional fees are consistent with and not higher than the published recommended practices and fees of the various applicable professional associations and do not exceed the

maximum provided by any state law."²⁹

For the two specific services of architecture and engineering, the act specifies a two-step process of contract negotiation. First, an initial selection of the preferred offeror should be made based on the competence and qualifications of the person or firm who is to provide the service.³⁰

Upon initial selection of the most highly qualified offeror, the municipality shall attempt to negotiate a fair and reasonable price. Should they be unable to negotiate a contract with that offeror, the negotiations shall be formally terminated with that offeror and begun with the second most highly qualified offeror. The sequence of selection based on qualifications followed by price negotiations with that single offeror is to be continued until a successful contract is reached.³¹

The two-stage process is not specifically required for professional services other than architecture and engineering; however, the concept of contract award based on competence rather than cost remains applicable.

An example of a Request for Proposals issued under the *Professional Services Procurement Act*, is attached as Appendix I. That document was prepared in fulfillment of the Module I Learning Contract for this institute.

VI. Conclusion

Adherence to the law and to sound financial practices is expected of police administrators. Knowledge of the legal framework affecting procurements and of the underlying philosophy is essential. Failure to comply with the intent of the law, the acquisition of goods and services of the required quality at the lowest cost to the taxpayers and the elimination of favoritism, will subject the administrator to justified criticism. Failure to comply with the letter of the law can subject him or her to criminal penalties³² as well as removal from office or employment.³³

APPENDIX I

**REQUEST FOR PROPOSALS #90-53
ARCHITECTURAL SERVICES
JAIL CONSTRUCTION PROJECT
MESQUITE POLICE DEPARTMENT**

I. Introduction

The City of Mesquite is soliciting proposals for **ARCHITECTURAL SERVICES** to be performed in order to plan, design, and oversee construction of a municipal jail facility. The City desires to provide a safe, secure, functional, and efficient municipal jail facility to replace an existing jail. The new facility should include, in addition to detentions cells, appropriate book-in facilities, prisoner property storage, kitchen facilities, prisoner/visitor accommodations, shower facilities, DWI videotape/intoxilyzer area, separate juvenile holding area, secure prisoner sally port, and other features appropriate to modern municipal jail design. The facility is to be constructed adjacent to the existing police station located at 711 North Galloway Avenue, Mesquite, Texas. It is intended that the existing jail would remain functional until completion of the new facility; it is further assumed that the new facility can be constructed adjacent to the existing facility in order to maximize the efficiency of interaction between the new jail and the existing police facility.

Proposals for Architectural Services shall be written, and shall consist of an original and ten (10) copies. Proposals shall be mailed or hand-delivered to:

Mr. James R. Murray
Purchasing Agent
1515 N. Galloway Ave.
P. O. Box 850137
Mesquite, TX 75185-0137

The deadline for receipt of proposals by the City of Mesquite is May 3, 1990. Any costs associated with submission of a proposal shall be borne by the proposer. Proposals shall be in a sealed envelope, marked on the lower left corner "**RFP 90-53**".

Prospective proposers are encouraged to visit the site in order to develop an understanding of the existing structure and available space. Site visits may be scheduled by contacting:

Mr. Harmon Ivie
Assistant Chief of Police
Mesquite Police Department
711 North Galloway
Mesquite, Texas
216-6231

or

Mr. M. W. Cotton
Acting Bureau Commander
Mesquite Police Department
711 North Galloway
Mesquite, Texas
216-6248

II. Background

Population statistics on the existing jail are not believed to be indicative of anticipated population of a new facility. As background information, however, the average population of the current facility was approximately 23 during 1989. Peak jail population exceeded 50 on several occasions during the past calendar year, but never exceeded 55. The average length of confinement is typically from 22 to 25 hours.

III. Scope and Basic Services

The city desires to construct a jail facility which will meet both the immediate and long-range needs of the city. This RFP is for the design of the facility, including consultation services to the city and representation of the city during the construction process. The facility should be designed to maximize efficiency and prisoner security, and to minimize construction, staffing, and maintenance costs and liability exposure. The facility should meet the standards established by the Jail Standards Commission as well as any other relevant standards and requirements. It is anticipated that the jail construction project will be funded by general obligation bonds issued by the City of Mesquite. Such bonds have not, at this point, been authorized by the electorate. A bond election for such bonds has not been scheduled at this point.

Services solicited under this Request for Proposal include all services, other than actual construction, including but not limited to:

1. Consultation and Needs Analysis
2. Design--Architectural and Engineering
3. Construction Document Development
4. Specification Development
5. Cost Analysis
6. Bid Analysis
7. Construction Administration
8. Project Supervision for Compliance with Specifications

IV. Contents of Proposal

Proposals submitted in response to this request should be complete, and should be developed and structured in such a manner as to demonstrate the competence and qualifications of the proposing firm to successfully complete this project. At a minimum, proposals shall include:

1. Identification of, and an overview of the qualifications of, each member of the architectural/engineering/design team that will be directly involved in the project.

2. A complete listing of jail or other public safety facility projects in which the proposing firm and/or any member of the architectural/engineering/design team have been involved. The listing shall be complete; omission of any jail or public safety project experience may result in disqualification from further consideration. The listing shall include information sufficient to allow contact with a responsible client representative.

3. A description of the specific steps in the process proposed to meet the objectives of the City.

4. The proposal document shall not include any information regarding professional fees, proposed project costs, or pricing.

V. Selection Process

Proposals will be reviewed by an evaluation team for the purpose of identifying and recommending those firms which offer, in total, the highest qualifications for this type of project. Based on the apparent qualifications as presented in the proposals, the evaluation team will select firms for interviews. Based on interviews, client contacts, project visits, and the original proposal, a final short list will be developed and ranked.

Following that process, negotiations will begin with the most highly-ranked firm, and only the most highly-ranked firm, in an attempt to arrive at a fair and reasonable price. Should those negotiations be unsuccessful, negotiations will be formally terminated and the firm so notified. Negotiations with the second-ranked firm shall then begin. That process will continue until satisfactory terms can be successfully negotiated. In no event shall negotiations with any firm be reopened after they have been formally terminated. In no event shall negotiations be undertaken with more than one firm concurrently.

A condition of the fee negotiations will be that a contract will be awarded in phases, and that each phase will be priced on a "not to exceed" basis rather than as a percentage of construction or other costs. The city will reserve the right to terminate the project at any point.

The City Council of the City of Mesquite shall have the sole authority to award a contract for this project. Issuance of this Request for Proposals shall not bind the city to enter into a contract with any proposer.

The City of Mesquite will comply with the Professional Services Procurement Act in the award of any contract for services under this RFP.

VI. RFP Issue Date

This Request for Proposals is issued on April 5, 1990.

1. *Texas Local Government Code*, Chapter 252 (formerly Vernon's Texas Civil Statutes, Article 2368a)
2. *Local Government Code*, Section 252.002
3. *Local Government Code*, Section 252.021
4. *Local Government Code*, Section 252.041
5. *Local Government Code*, Section 252.043 (a)
6. *Corbin vs. Collin County Commissioners' Court*, 651 SW2d 55 (1983)
7. *Local Government Code*, Section 252.022 (a) (1)
8. *Local Government Code*, Section 252.022 (a) (2)
9. *Texas Attorney General's Opinion M-806* (1971)
10. *Browning Ferris, Inc. vs. City of Leon Valley*, 590 SW2d 729 (1979)
11. *Local Government Code*, Section 252.022 (a) (3)
12. *Local Government Code*, Section 252.022 (a) (4)
13. *Local Government Code*, Section 252.022 (a) (5)
14. *Local Government Code*, Section 252.022 (a) (6)
15. *Texas Attorney General's Opinion No. MW-535* (1982)
16. *Local Government Code*, Section 252.022 (a) (7)
17. *Local Government Code*, Section 252.022 (a) (8)
18. *Local Government Code*, Section 252.022 (a) (9)
19. *Local Government Code*, Section 252.022 (a) (10)
20. *Local Government Code*, Section 252.022 (a) (11)
21. *Local Government Code*, Section 252.022 (a) (12)
22. *Local Government Code*, Section 252.042
23. *Local Government Code*, Section 252.001 (4)
24. *Local Government Code*, Section 252.042 (b)
25. *Local Government Code*, Section 252.042 (b)

26. *Local Government Code*, Section 252.049 (b)
27. *Local Government Code*, Section 252.043 (b)
28. *Vernon's Texas Civil Statutes*, Article 664-4
29. *VTCS*, Article 664-4, Section 3
30. *VTCS*, Article 664-4, Section 3A (a) (1)
31. *VTCS*, Article 664-4, Section 3A
32. *Local Government Code*, Section 252.062
33. *Local Government Code*, Section 252.063

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III. Texas Attorney General's Opinions

Texas Attorney General's Opinion M-806 (1971)
Texas Attorney General's Opinion MW-535 (1982)