

CONSTRUCTION AND THE LAW IN TEXAS

Alternative Delivery Methods: An Overview of the Legal Framework

In my last column, I introduced the discussion of alternative delivery methods for public construction projects. In this month's column, I will discuss the legal framework for alternative project delivery. Subsequent articles will dive more deeply into each method and discuss their various pros and cons. The goal of this series is to provide education and background familiarity with each method to facilitate a more open and competitive market while also easing any discomfort that some members of the industry might feel with the shift away from low-dollar bidding.

As a threshold issue, we must start the discussion of alternative delivery methods and procurement by identifying the statutes that control. In the local government code, chapters 252, 262 and 271 apply. In the government code, chapter 2269 applies. That chapter contains the laws governing alternative delivery methods, such as competitive sealed proposals.

However, chapter 252 of the local government code also addressed competitive sealed proposals. The fact that this alternative method is addressed in multiple statutes brings up an interesting threshold question about controlling law.

In chapter 252, for civil projects, there is language that would appear to limit the use of the competitive sealed proposal method. Section 252.043(d) requires that a contract for infrastructure (highways, roads, and water works) must be awarded to the lowest responsible bidder, but that for those types of projects with a value under \$1.5 million, the competitive sealed proposal procedure may be used. This language would seemingly prohibit the use of any alternate deliv-

ery method of project delivery for all major public infrastructure projects.

However, at the front of the chapter, section 252.021 says that a municipality must comply with either chapter 252 of the local government code or chapter 2269 of the government code. At the outset of chapter 2269, the legislature included applicability language and a statement that the provisions of chapter 2269 prevail over any other law relating to a public work project.

With respect to applicability, chapter 2269 and the authorization contained in it for using alternative project delivery methods applies to all state agencies including the Texas Facilities Commission (although Texas Department of Transportation and university systems are exempted out), and local governmental entities including counties, cities, and school districts, as well as all special districts and authorities, including hospital districts, river authorities, and water districts.

With chapter 2269, the legislature has essentially relegated all other procurement statutes to a secondary role. The statutes contained in the local government code and elsewhere that apply to procurement now take a backseat to 2269. Also, in the case of conflicting provisions, the language, rules, and structure of 2269 will control over a similar statute located elsewhere in Texas law.

Looking back at the example above concerning civil works in excess of \$1.5 million, the language in 2269 seems to render the provision of chapter 252 that I referenced above meaningless. In 2269, the legislature has defined a "facility" as any improvement to real property. Then,

in the subchapter for competitive sealed proposals, the legislature has authorized the use of competitive sealed proposals for any construction, rehabilitation, alteration, or repair of a facility.

Looking at this example, if one considers a project that extends water and sewer service or repaves roadways into a new neighborhood, it is not hard to imagine that project exceeding \$1.5 million dollars. If a local entity wanted to use competitive sealed proposals for this construction project, doing so under chapter 252 would seem to prohibit that delivery method. But, by utilizing chapter 2269, a public owner could use that method. One cannot argue that the installation of new water and sewer pipe or the repaving of roads is not and improvement to real property. Essentially, any time you perform construction work on real property, whether it be new construction or rehabilitation and repair of existing facilities, the work improves real property. Such an improvement would allow the use of competitive sealed proposals for all projects, regardless of cost and regardless of the stated restriction in chapter 252.

Another interesting and unresolved legal issue with chapter 2269 involves something that is missing from 2269. Chapter 2269 contains a section dealing with general competitive bidding. That section is not as robust as the sections contained in chapters 252, 262, and 271 for local governmental entity procurement. In 2269, there is no provision addressing change orders. In 252 of the local government code, there is such a provision. That section applies to municipalities and prohibits a change order(s) that would increase the contract amount by 25 percent or more. Likewise, chapter 262 of the local government code, applicable to counties, prohibits a contract increase in excess of 25 percent and requires a contractor's approval to decrease the contract sum by more than 18 percent.

One question that the courts have not answered is whether an owner is allowed to increase the contract price by more than 25 percent if using an alternative delivery method pursuant to chapter 2269. One might argue that if a competitive bidding method were utilized under either statute, these prohibitions should apply because 2269 does not actually contradict 252 or 262. However, what about an alternate method such as competitive sealed proposals that is not part of 252 or 262? Would an



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owner be able to add more than 25 percent to a project procured under an alternate method? Until a court answers this question, one possible interpretation is that it could because 2269 is silent as to that issue.

As this article highlights, there are several statutes governing procurement. With chapter 2269 of the government code controlling alternative delivery methods, the industry has to learn to deal with potential new realities in public construction. The old way of doing things is changing. The new marketplace has both opportunities and challenges. Chapter 2269 allows for greater leeway and flexibility that could potentially provide benefits to both the owners and contractors of the world. Having a general understanding to how the statutes control procurement will allow all parties involved to best utilize the tools provided by the law. 🐾

