Local Preference in City of Austin Contracting

Capital Contracting and Purchasing Offices

January 5, 2016

Purpose of Bidding

- The Texas Supreme Court has noted that the **main purpose of competitive bidding** is to secure for the taxpayers the ***best work and materials at the lowest practicable price***.

- *Texas Highway Comm'n v. Texas Ass'n of Steel Importers*, 372 S.W.2d 525, 527 (Tex. 1963).

Constraints

- Austin is a home-rule city, which means it can do anything not prohibited by law or its charter

- ***HOWEVER***, Austin ***is*** subject to the procurement regulations in the Tex. Local Gov't Code and Tex. Gov't Code

- Statutory construction – when a law is unambiguous and clear on the limitations of what a gov't body can act upon, the City cannot not expand its authority (Op. Tex. Att'y Gen. No. DM-113 – School wanted to give local preference)

Penalties

- Sec. 271.029. CRIMINAL PENALTIES.

- (c) An officer or employee of a governmental entity **commits an offense if the officer or employee intentionally or knowingly violates this subchapter**, other than by conduct described by Subsection (a) **An offense under this subsection is a Class C misdemeanor**.

- (FYI - (a) refers to sequential purchases in violation of state law.)

Construction

- Texas Local Government Code Chapter 271 allows municipalities to consider bidder's principal place of business in certain instances

- Construction – if local bidder is within 5% of non-local bidder and contract is less than $100,000 (§ 271.9051)

- The municipality must determine, in writing, that the local bidder offers best combination of contract price and additional economic development opportunities, including:
  - Employment of local/city residents
  - Increased tax revenue to the city

Contract Provision

00100 – Instructions to Bidders

12. Award and Execution of Contract

"…Notwithstanding anything in this Section 00100 to the contrary, the OWNER may award a contract for construction services in an amount of less than $100,000 to a bidder whose principal place of business is in the City of Austin and whose bid is within 5% of the lowest bid price received from a bidder whose principal place of business is not within the City of Austin, if the City finds that the local bidder offers the City the best combination of contract price and additional economic development opportunities for the City created by the contract award including the employment of resident of the City and increased tax revenues to the City."

Alternative Delivery

- Construction Manager at Risk
- Job Order Contracting
- Competitive Sealed Proposals

- Assessment of local business presence is supported in the criteria outlined for consideration in Texas Government Code 2269.055.

"(8) any other relevant factor specifically listed in the request for bids, proposals, or qualifications."

Criteria Language

Item: Team's Local Business Presence
5 points max

The City seeks opportunities for businesses with a Local Business Presence in the Austin Corporate City Limits to participate on City contracts thereby providing a minimal environmental footprint through reduced transportation time and costs associated with Project delivery. A firm (Offeror or Subcontractor) is considered to have a Local Business Presence if the firm is headquartered in the Austin Corporate City Limits, or has a branch office located in the Austin Corporate City Limits in operation for the past five (5) years. The City defines headquarters as the administrative center where most of the important functions and full responsibility for managing and coordinating the business activities of the firm are located. The City defines branch office as a smaller, remotely located office that is separate from a firm's headquarters that offers the services requested and required under this solicitation. Points will be awarded through a combination of the Offeror's Local Business Presence and/or the Local Business Presence of their subcontractors. Evaluation of the Team's Percentage of Local Business Presence will be based on the proposed team members on the Offeror's MBE/WBE (or DBE) Compliance Plan.

Professional Services

- Chapter 2254.003 of the Government Code (Professional Services Procurement Act)
  - Governmental entity may not select a provider of professional services…for the services on the basis of competitive bids…., but shall make selection and award:
    - on the basis of demonstrated competence and qualifications to perform the services; and
    - for a fair and reasonable price

Legal Interpretation

- Letter Opinion No. 93-73 (1993)
  - Municipalities are required to select based on "demonstrated competence and qualifications" alone.
  - If satisfactory contract cannot be negotiated with the most highly qualified provider….entity shall select the next most highly qualified provider.

- Summary Finding –
  - According to the Opinion: "Professional Services Procurement Act, article 667-4,… prohibits a home-rule city from giving a preference to a local engineering firm in awarding a contract for professional engineering services."

Source: Attorney General of Texas Cumulative Subject Index AG Opinions (1990-Present)

Professional Services (CCO)

CONSIDERATION ITEM 7

TEAM'S EXPERIENCE WITH AUSTIN ISSUES

10 Points Maximum

- City is interested in team's (including subconsultants) experience with Austin issues, as may be evidenced by work in the Austin area during the past five (5) years. Briefly describe experience in the following areas and reference projects relating to that experience:
  - City of Austin site development and/or building permit requirements.
  - Austin area construction in the public right-of-way.
  - Austin area construction costs and practices.
  - Austin environmental community, conditions, and constraints.
  - Public awareness and involvement in project development in the Austin area.
  - Responsiveness due to proximity of projects to local office.

Purchasing Office

- Professional Services –same legal restrictions presented above
- Texas Local Government Code Chapter 271 allows municipalities to consider bidder's principal place of business in certain instances. Two sections apply:
  - Section 271.9051: if local bidder is within 5% of non-local bidder and contract is less than $500,000;
  - Section 271.905: if local bidder is within 3% of non-local bidder
- The municipality must determine, in writing, that the local bidder offers best combination of contract price and additional economic development opportunities, including:
  - Employment of local/city residents
  - Increased tax revenue to the city

Goods and Services - Bidding

- For commodities purchases, 3% preference with no dollar limit.
- For mixed commodity and service purchases, such as auto repair services with parts as necessary, 3% without limit as long as the services component does not exceed $500,000; if services component exceeds $500,000, no percentage allowed.
- For services only, 3% up to $500,000; none thereafter.

Purchasing Office

City of Austin, Texas Purchasing Office
Allocation of Local Preference Percentages and Points based on Local Presence of Vendor

Solicitation Method →	Competitive (Low Bid): Request For Quotations and Invitation For Bids				Competitive (Evaluative): Invitation For Bids Best Value and Request For Proposals			Rqst For Qualifications Statement (Prof Svcs / Consultant)	Non-Competitive Awards (No Solicitation) and Rqst For Info
Acquiring →	Goods Only	Mixed	Svcs Only	Construction	Goods Only	Mixed	Svcs Only	Svcs or Svcs w/ goods incidental	Does Not Apply
Legal Basis (below)				Up to 5%	Local Government Code Chapter 252.043 (b) (8)			Prof Svcs: GC 2254.003 (a) (1) Consultant: GC 2254.027 (2)	LGC252.022, GC 791 and others...
Per Local Government Code Chapter 271, Section 9051	Up to 5%	Up to 5%	Up to 5%	$100,000 or more	Evaluation Criteria Points			Government Code Chapter 2254, Section 003 (a) (1): local presence is not an issue of competence, but may be a matter of qualification? If so: Evaluation Criteria Points Government Code Chapter 2254, Section 027 (2) for consulting is explicit: Evaluation Criteria Points	No Points Or Percentage
$500,000 or More				No Preference Allowed by Either Section of Local Government Code Chapter 271					
Per Local Government Code Chapter 271, Section 905	Up to 3%	Up to 3% Based on Highest Goods or Services Component	No Preference Allowed						

Goods and Services - Evaluated

- "Best Value" bids (IFB-BV) or Requests For Proposals (RFP):
  - Evaluation points (up to 10 points of 100 total points)
  - For consulting services, including any goods, evaluation points (up to 10 points of 100 total points) where goods are not the largest component of the expenditure.

Local Business Presence Program Comparison

- Staff obtained information from 6 other major Texas cities to see how they are implementing local preference in contracting

Local Business Presence Program Comparison

Construction			
Municipality	**Contract Limits**		
	under $50,000	**$50,000 - under $100,000**	**$100,000 and up**
City of Austin	Small Business Construction Program - 5% Preference	low bid method - 5% preference; alt. delivery method - 5 pt. consideration item	alternative delivery method - 5 pt. consideration item
City of Corpus Christi	No Preference	No Preference	No Preference
City of Dallas	No preference	5% preference	No preference
City of El Paso	5% preference for Tier 1 Local Business; 2.5% for preference Tier 2 Local Business	5% preference for Tier 1 Local Business; 2.5% preference for Tier 2 Local Business	alt. delivery method 5% preference for Tier 1 Local Business; 2.5% preference for Tier 2 Local Business
City of Ft. Worth	No preference	No preference	No preference
City of Houston	5% preference	5% preference	3% preference
City of San Antonio	No preference	3% preference	No preference

Local Business Presence Program Comparison

Commodities/Goods				
Municipality	**Contract Limits**			
	under $50,000	**$50,000 – under $100,000**	**$100,000 – under $500,000**	**$500,000 and up**
City of Austin	3% preference	3% preference	3% preference	3% preference
City of Corpus Christi	5% preference	5% preference	5% preference	3% preference
City of Dallas	No preference	5% preference	5% preference	3% preference
City of El Paso	5% preference Tier 1 Local Business 2.5% preference Tier 2 Local Business	5% preference Tier 1 Local Business 2.5% preference Tier 2 Local Business	5% preference Tier 1 Local Business 2.5% preference Tier 2 Local Business	3% preference Tier 1 Local Business 1.5% preference Tier 2 Local Business
City of Ft. Worth	No preference	5% preference	5% preference	3% preference
City of Houston	5% preference	5% preference	3% preference	3% preference
City of San Antonio	No preference	3% preference	3% preference	3% preference

Local Business Presence Program Comparison

Non-Professional Services				
Municipality	**Contract Limits**			
	under $50,000	**$50,000 – under $100,000**	**$100,000 – under $500,000**	**$500,000 and up**
City of Austin	3% preference	3% preference	3% preference	No preference
City of Corpus Christi	5% preference	5% preference	5% preference	No preference
City of Dallas	No preference	5% preference	5% preference	No preference
City of El Paso	5% preference Tier 1 Local Business 2.5% preference Tier 2 Local Business	5% preference Tier 1 Local Business 2.5% preference Tier 2 Local Business	5% preference Tier 1 Local Business 2.5% preference Tier 2 Local Business	3% preference Tier 1 Local Business 1.5% preference Tier 2 Local Business
City of Ft. Worth	No preference	5% preference	5% preference	No preference
City of Houston	5% preference	5% preference	3% preference	3% preference
City of San Antonio	No preference	3% preference	3% preference	No preference

Local Business Presence Program Comparison

Professional Services	
Municipality	
City of Austin	No Local Preference
City of Corpus Christi	No Local Preference
City of Dallas	No Local Preference
City of El Paso	No Local Preference
City of Ft. Worth	No Local Preference
City of Houston	No Local Preference
City of San Antonio	No Local Preference

Local Business Presence Program Comparison

Based on Texas Govt. Code 2254, Local Business Presence does not apply to Professional Services contracts.

- City of San Antonio may award up to 20 points based on knowledge of and experience regarding local conditions as part of the qualifications determination
- City of Houston may consider knowledge of local conditions as part of the qualifications determination.
- City of Austin Consideration Item 7, Team's Experience with Austin Issues

Hire El Paso First

Tier 1 and Tier 2 Designation

Tier 1 Local Business:

- Primary headquarter is located within incorporated city limits of El Paso
- At least 10% of employees must reside within city limits

Tier 2 Local Business:

- Physically present and operating for at least 1 year within city limits
- Minimum of 50 fulltime employees reside within city limits
- Owns or leases property within city limits in which primary business is conducted

Potential Impact of Local Bidder Preference for Construction

Past 3 Fiscal Years (FY13 – FY15):

- Bid price margin of less than 3% between the two lowest bidders for 17% of all construction bids over $100,000 during FY13-15

- Of that 17%, there were only 2 instances where a local bidder was within 3% of a non-local bidder

Impact of Local Bidder Preference for Non-Construction

Fiscal Years FY15 and FY16 YTD:

- FY15
  - 877 Contract Awards totaling $182 Million
  - 15 (1.71%) Awards, totaling $20 Million (11%) with Local Preference
- FY16 (First Quarter Only)
  - 201 Contract Awards totaling $57 Million
  - 3 (1.49%) Awards, totaling $21 Million (44%) with Local Preference

Questions

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- James Scarboro 974-2050