

# Contracts for Non-Contract Attorneys

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Contracts, so easy a monkey could do it?



# Overview

- What is a contract?
- Applicable laws.
- Common concerns when reviewing a contract.



# What is a contract?



In simple terms...

Contracts are binding agreements between two or more parties that create rights and obligations that may be enforced by a court of law.

# What is a Contract?



In legal terms...

Must have Mutual Assent, Offer and Acceptance,  
by those with the capacity to contract and  
Consideration to both Parties.

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# Applicable Laws

# Procurement Laws

Texas Local Government Code, Chapter 252

\$3,000 – \$50,000 – Quotes

More than \$50,000 – Bids



# Exemptions to Bids

Chapter 252 provides for specific exemptions to the bidding process requirement.

# Scenario

What if a municipality has suddenly found itself embroiled in a huge controversial issue. The citizens are not happy. Rioting has started. The Chief points out that he told council last year they should have budgeted for riot gear. Now, the riot gear is in desperate need. As it stands, officers must sit by and watch property being damaged because it is too dangerous to engage.

**Do you believe this is an exemption to the bidding process or is the Chief just out of luck?**

**It is possible that a court could agree this is an exemption.**

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 to preserve the property of the municipality.

# Scenario

- An ambulance service has been sent out for bids by a governmental entity for the last 10 years.
- Bids were recently sought and the entity received four bids.
- All bids were rejected.

**Now, the entity would like to use the public health and safety exemption and choose the service. Can this now be an exemption under the public health or safety?**

## **Under 252.022, an Exemption May be Made to Preserve or Protect the Public Health or Safety.**

In addition, a contract for ambulance services is an item necessary to preserve or protect the public health or safety. M-806

However, this circumstance is a bit different because the entity already began the process and seems to have changed gears in the middle. It is possible this would not be considered proper based on these specific set of circumstances without first proceeding through the process. JC-0136

# Another Exemption Under Chapter 252

**A procurement necessary because of unforeseen damage to public machinery, equipment, or other property.**

Based on this exemption, you are approached regarding the need to conduct some repairs to your agency's building. The second floor is swaying and has created a risk to the occupants of the building. It is going to cost about \$85,000 to repair. The second floor can no longer be occupied so they would like to move forward on these repairs without bidding under this exemption. What do you think? What questions might you ask?

# Questions Could Be...

- Since it must be 'unforeseen,' are they just now finding out about this flooring defect?
- What if their response is "Well, we knew over a year ago the repairs needed to be made, but now we really see how important this is." ?

**Most likely not the emergency they claim it to be. They've known about this for a year and just didn't take action. True facts BTW.**

# Other Possible Exemptions...

- A procurement for personal, professional, or planning services. You would also want to consult TGC 2254 which has specific requirements for some professionals.
- A purchase of land or right of way.
- A procurement of items that are available from only one source.

**For complete list of exemptions see LGC 252.022**



# Scenario

- Your agency handles animal control as part of their department.
- Animal control would like to purchase an incinerator to help dispose of the euthanized animals.
- They are claiming sole source because the incinerator they found has a special release of the ashes that allows for swift, clean disposal. In addition, the one they found also is small in size and creates less smoke. The neighbors do not really care for the 'smoke.' This is the only one that meets this criteria.
- Clearly a sole source, correct?

# Sole Source – LGC 252

Competitive bidding is not required when the goods or services that you are contracting for are available from only one source due to “patents, copyrights, secret processes, or natural monopolies.” TLGC 252.022

Does this fit the facts provided?

# Probably Not...

- If the agency bids for incinerators, they may find other areas of preference they had not even considered; or
- Just maybe their internet search was not as thorough as they thought.

This set of facts in real life did result in the seeking of bids. This proved to be very helpful. The agency actually found a different incinerator that they preferred over the 'sole source' one.

**Moral to the story: Don't allow for sole source exemption if it is simply something they like, they may find something better.**

# Cooperative Agreements Exemption

These agreements pool the resources of several cities or other entities and one or more contracts are executed on behalf of the cooperative.

There are different cooperatives. If your agency wishes to use a cooperative, make sure it is one that your city has signed off on,



# Scenario



- In December, Fleet services purchased \$20,000 worth of tires to replace tires on PD patrol cars.
- In May, Fleet services purchased \$15,000 worth of tires to replace more tires on PD patrol cars.
- In September, in frustration, Fleet services had to make another order for tires for the PD. Those darn officers and their crashes!

# Issues to Address in the Scenario

- What is the fiscal year?
- What has Fleet Services spent on tires last year and the year before?
- Even if this was an unusual year, should the city bid out the tires before the last purchase now that we know we are going over \$50,000?

# Question:

Can a city, or other governmental entity, separate out its purchases over time to avoid the application of competitive bidding or proposal laws?

# Separate, Sequential, and Component Purchases

Multiple Purchases totaling more than \$50,000

An offense is committed if an officer or employee intentionally or knowingly makes or authorizes separate, sequential or component purchases to avoid the competitive bidding requirements.

Under 252.062, an offense under this subsection is a Class B Misdemeanor.

Under 252.063, the employee automatically loses their job.



# Question

May a home rule city, by charter, create a lower threshold for requiring competitive bids?

Perhaps set the bidding threshold to \$30,000 instead of \$50,000?

# Cities Can Change the Rules

Home rule cities can, by charter, change some items. If there is a conflict with state law, the charter prevails.

Chapter 252.022

# Other Items in Local Government Code

Very specific rules regarding procedures, notice and changes.

Note: Often different rules for construction contracts.

**Contracts not in compliance with Chapter 252 are void.**

# Is it an MOU or an Interlocal?

MOU is defined in the Texas Administrative Code under the Texas Health and Human Services Commission

A written document evidencing the understanding or agreement of two or more parties regarding the subject matter of the agreement. Because the underlying agreement may or may not be legally binding and enforceable in and of itself, a memorandum of understanding may or may not constitute a contract. It is generally considered a less formal way of evidencing an agreement, and is ordinarily used in state government only between or among state agencies or other government entities. The term is used interchangeably with "memorandum of agreement."

# Interlocals - Texas Government Code 791

Purpose: The purpose of the interlocal is to “increase efficiency and effectiveness of local governments by authorizing them to contract, to the greatest possible extent, with one another and with agencies of the state.” 791.001

Interlocal Contract means a contract or agreement made under this chapter. 791.003(2)

# Texas Government Code 791.011

Contracting Authority; Terms. A local government may contract or agree with another local government or a federally recognized Indian tribe...to perform governmental functions and services in accordance with this chapter. 791.011

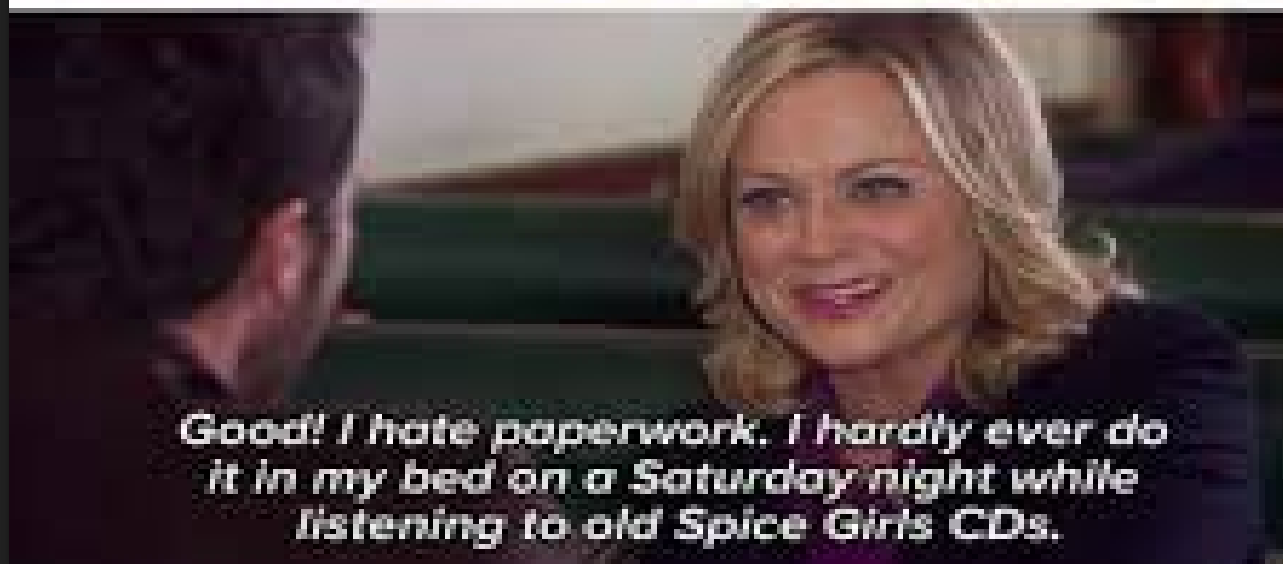
There is a great deal of discussion as to what can be covered in an Interlocal Agreement; however, if you decide this statute applies, take note of 791.011(d)(3).

It states that the Interlocal must “specify that each party paying for the performance of governmental functions or services must make those payments from current revenues available to the paying party.”

# If 791 Applies, What About Non-Texas Contracts?

- This law technically only applies to entities under Texas state jurisdiction with the exception of Indian Tribes.
- There could be Federal or other state contracts.
- Some cities have chosen to take the conservative approach and apply the same rules too non Texas jurisdictions.

# Common Concerns When Reviewing Contracts





# Cities Cannot Indemnify Other Parties

Texas Constitution, Article XI, Section 7

“No debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon...”

Note: If the other party refuses to remove, you may want to add “as the law allows.”

# Duration

If the contract is longer than a year, you will need a non-appropriations clause. (Also called a non-funding clause).

Sample: “Customer’s budget is funded on an October 1<sup>st</sup> to September 30<sup>th</sup> fiscal year basis. Accordingly, the Customer reserves the right to terminate this contract by giving \_\_\_\_\_ fifteen (15) days written notice, without liability to Customer, in the event that funding for the contract is discontinued or is no longer available.”

# Venue

Do not agree to a venue other than your own.

# Confidentiality

Unlike our friends in the private sector, we do not get to decide what we keep confidential. This is up to the Open Records statute.

Keep in mind, we can always make arguments such as third party documents when dealing with a request. The information should be provided to the third party and they can communicate with the AG regarding their reasoning.

The language in the contract should always address this issue by at least stating “as allowed by law.”

# Arbitration Requirements

Usually, your city will not want to agree to this requirement.

# Payments and Interest

This area is governed by Texas Government Code Chapter 2251.

- Payments should be within 30 days and interest is based on a formula from this Chapter. We should not agree to a late fee as this is contrary to this chapter.

# Force Majeure Clauses



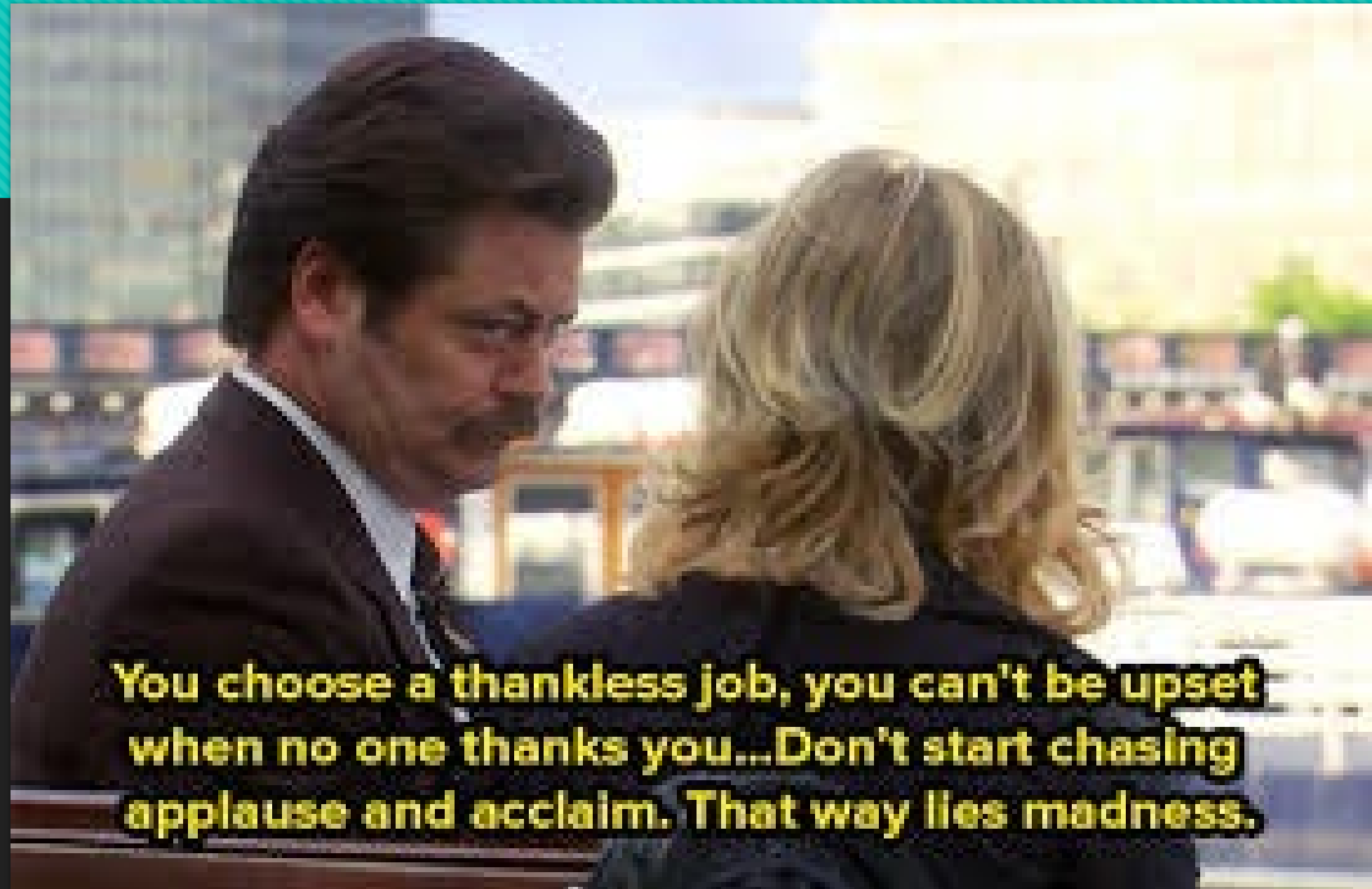
The general rule is that an act of God does not relieve the parties of their obligations unless the parties expressly provide otherwise. To avoid liability in these instances, it is advisable for contracts to contain 'force majeure' clauses, which are enforceable under Texas law. See *GT & MC, Inc. v. Texas City Ref., Inc.*, 822 S.W.2d 252, 259 (Tex. App.—Houston [1st Dist.] 1991, writ denied)

Make sure it states, "Through no fault of the party claiming the force majeure."

# General Terms

Make sure your agency understands the terms. Especially if there are unique or one-sided terms.





**You choose a thankless job, you can't be upset when no one thanks you...Don't start chasing applause and acclaim. That way lies madness.**