



EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.

Common Issues with “Small” Projects

Eric E. Munoz

Shareholder

www.edlaw.com
(800) 488-9045

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First...the Super Small Projects

Projects under the \$50,000 threshold



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So, you don't have to bid it...

- The \$50,000 threshold is not the only relevant \$ threshold
- You may still be required to hire an Engineer
 - \$8,000 – mechanical/electrical
 - \$20,000 – other engineering
- You may still need to require a Payment Bond
 - \$25,000



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And Don't Forget

Prevailing Wage
Workers Compensation



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How do you find a Contractor? (These are all optional)

- Call 'em up
- Advertise
- Look on Co-Ops
- Can you negotiate with more than one at a time?



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What if you don't need an A/E?

- Be sure you're comfortable making that call
- Who's going to "design" the work to be done?
 - Are you comfortable spending that amount of money without investing in design?



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Consider the Risks

- Small projects can have large consequences
 - E.g., rupturing a water line leading to water damage leading to equipment failure
- Does your contractor have sufficient insurance
- Who's going to make you whole?



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Next...the Small-ish Projects

Projects over the \$50,000 threshold



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One more threshold

- \$100,000 for performance bond
- After that, whether it's \$50,000 or \$500,000 it's the same
- All the Day One stuff applies
 - Procurement, etc. etc.



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Common Issues



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Do you *really* need a contract?

Yes!



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How Much Are You Paying?

- Fixed sum
- Cost plus
- This justifies your expenditures (hopefully)



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What Exactly Are They Building?

- Defining the scope of work
- Who prepared the scope?
- Is it clear and definite, or does it leave open ends?



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How/When Are You Making Payment?

- Money upfront?
- Timed draws/payments?
- All at completion?
- Retainage



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What Is The Timeline For Completion?

- Make this a clear contractual obligation
- Consider Liquidated Damages



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What Happens if You Want to Terminate?

- Give yourself the right to walk away for convenience
- Specify what yours/their obligations are upon termination



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Dispute Resolution

- Contractual Adjudication Procedures
- Governing Law
- Venue
- Merger Clauses



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Don't Forget the Legally Required Stuff

- Anti-BDS (\$100k)
- Firearms (\$100k)
- Energy Companies (\$100k)
- Workers Comp
- Bonds
- Prevailing Wage



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Getting What You're Paying For



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Getting What You're Paying For

- If no A/E, who's observing the contractor's work?
- Consider tasking a staff member with being familiar enough with the project to provide at least general oversight



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Local Contractors & Conflicts of Interest

Smaller projects are an opportunity for local vendors



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Conflicts of Interest - Transparency

- Chapter 176 Disclosures
- Chapter 171 Affidavit & Abstention



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Chapter 176, Texas Local Government Code

- This law requires a person to file a Conflicts Disclosure Form promulgated by the Texas Ethics Commission
- Who is subject to disclosure?
- When does the law require disclosure?
- What else does the law require?



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Who is subject to disclosure?

“Local Government Officer”:

- Trustee
- Superintendent/Chief Executive Officer
- Employee/Agent “who exercises discretion in the planning, recommending, selecting, or contracting of a vendor”



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When is disclosure required?

- When a Vendor enters into a contract with the entity, or when the entity is considering entering a contract with a Vendor...and
- One of three possible triggers:
 - Employment/Business Relationship
 - Gifts
 - Family Relationship



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Trigger #1: Employment/Business Relationship

- Vendor has an employment or other business relationship with LGO or Family Member of LGO, that:
 - Family Member = 1st degree by blood or marriage
- Results in LGO or Family Member getting taxable income >\$2,500
 - But not “investment income”
- During preceding 12 months
 - 12-month period before LGO knows of (1) contract signed, or (2) entity considering contract



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Blood and Marriage

- Consanguinity = related by blood [count up then down]
- Affinity = related by marriage
 - Degree of affinity is same as underlying relationship by consanguinity
- “Family Member”: 1st degree only
 - Spouse, parent, child, or spouse’s parent/child
- “Family Relationship”: 3rd degree by blood/2nd degree by affinity



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Trigger #2: Gifts

- Vendor has given LGO or Family Member one or more gifts with:
- Aggregate value of more than \$100 (used to be higher)
- In the preceding 12-months (before knowledge of signing/consideration)



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Definition of “Gift”

"Gift" means a **benefit** offered by a person, including food, lodging, transportation, and entertainment accepted as a guest.

The term does not include a benefit offered on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient.

Old exceptions:

- ~~(1) given by a family member of the person accepting the gift;~~
- ~~(2) a political contribution as defined by Title 15, Election Code, or~~
- ~~(3) food, lodging, transportation, or entertainment accepted as a guest.~~

Current exceptions:

- (1) a political contribution as defined by Title 15, Election Code, or
- (2) food accepted as a guest.



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Trigger #3: Family Relationship

Vendor has “family relationship” with the LGO

- “Family Relationship” = 3rd degree of consanguinity (blood) or 2nd degree of affinity (marriage)



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Family Relationships

- Consanguinity
 - 1st Degree: Parent, Child
 - 2nd Degree: Grandparent, Grandchild, Sibling
 - 3rd Degree: Great-Grandparent, Great-Grandchild, Aunt/Uncle, Niece/Nephew
- Affinity
 - LGO's spouse is vendor
 - LGO's spouse is the Vendor's/Vendor's spouse is LGO's:
 - 1st Degree: Parent, Child
 - 2nd Degree: Grandparent, Grandchild, Sibling



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Basic Summary

- Three LGOs:
 - Trustee
 - Superintendent
 - Agent/employee “who exercises discretion in the planning, recommending, selecting, or contracting of a vendor”
- Three triggers for disclosure:
 - Employment/Business Relationship
 - Gifts
 - Family Relationship



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Mechanics of Filing Disclosure

- Forms are prepared by the Texas Ethics Commission (Form CIS for LGO, CIQ for Vendor).
- LGO must file disclosure with the District's "records administrator."
 - Superintendent or other designated person
- Not later than 5 p.m. on 7th business day after LGO becomes aware that disclosure is required.
- REMEMBER: Disclosure required even before a contract is signed, if District is considering entering into a contract with vendor.



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Other Duties

- Records Administrator must:
 - Maintain a list of all LGOs and make available to the public and any vendor
 - Maintain filed disclosures in accordance with records retention schedule
- If entity has a website, all filed disclosures must be posted (but PIA still applies).
 - Check to see whether employee has elected to protect information re: family members



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Penalties

- LGO commits an offense if knowingly fails to file disclosure (7-day grace period).
- Vendor commits an offense if knowingly fails to file questionnaire or updated questionnaire (7-day grace period). An additional 7 days?
- Entity may reprimand, suspend, or terminate employee who fails to comply.
- Entity may declare a contract void if vendor fails to file.
- An offense under this chapter is:
 - (1) a Class C misdemeanor if the contract amount is less than \$1 million or if there is no contract amount for the contract;
 - (2) a Class B misdemeanor if the contract amount is at least \$1 million but less than \$5 million; or
 - (3) a Class A misdemeanor if the contract amount is at least \$5 million.



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Chapter 171 – Affidavit and Abstention

- Separate and additional requirement to Chapter 176 Disclosure Forms



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Affidavit and Abstention

- “Local Public Official” must (1) file an affidavit, and (2) abstain from participating in a matter if:
- Special economic effect on entity/property, and:
 - Substantial interest in a business entity, or
 - Substantial interest in real property



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Local Public Official

“Local public official” shall mean a member of the governing body or another **officer**, whether elected, appointed, paid, or unpaid, of any district (including a school district)...who exercises **responsibilities beyond those that are advisory** in nature.

The local public official is considered to have a substantial interest if a person related in the **first degree by either affinity or consanguinity** to the local public official...has a substantial interest as defined above.



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Substantial Interest in a Business Entity

A person has a substantial interest in a business entity if any of the following is the case:

1. The person owns at least:
 - Ten percent of the voting stock or shares of the business entity, or
 - Either ten percent or \$15,000 of the fair market value of the business entity.
2. Funds received by the person from the business entity exceed ten percent of the person's gross income for the previous year.



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Substantial Interest in Real Property

A person has a substantial interest in real property if the interest is an equitable or legal ownership with a fair market value of \$2,500 or more.



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Process

- The official shall file, before a vote or decision on any matter involving the business entity or the real property, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter...
- Must file with District's official record keeper
- Forms at your BBFA (EXHIBIT) policy



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Exception

- Abstention not required when majority of members are also required to file affidavits for similar interests on the same official action...
- But affidavit is still required!



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Voting on Budget

(a) The governing body of a governmental entity shall take a separate vote on any budget item specifically dedicated to a contract with a business entity in which a member of the governing body has a substantial interest.

(b) Except as provided by Section 171.004(c), the affected member may not participate in that separate vote. The member may vote on a final budget if:

- (1) the member has complied with this chapter; and
- (2) the matter in which the member is concerned has been resolved.



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Penalty

(a) A local public official commits an offense if the official knowingly:

- (1) violates Section 171.004; *[affidavit & abstention]*
- (2) acts as surety for a business entity that has work, business, or a contract with the governmental entity; or
- (3) acts as surety on any official bond required of an officer of the governmental entity.

(b) An offense under this section is a Class A misdemeanor.



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Illegal Gifts



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Penal Code § 36.08 Gift to Public Servant

- “A public servant who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions...
- Commits an offense if he solicits, accepts, or agrees to accept...
- Any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, etc.”
- Offense is a Class A misdemeanor.



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“Public Servant”

“Public servant” means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if he has not yet qualified for office or assumed his duties:

- (A) an officer, employee, or agent of government;
- (B) a juror or grand juror; or
- (C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy; or
- (D) an attorney at law or notary public when participating in the performance of a governmental function; or
- (E) a candidate for nomination or election to public office; or
- (F) a person who is performing a governmental function under a claim of right although he is not legally qualified to do so.



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Some Exceptions

(2) Gift or other benefit on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient...

Smith v. State

- (5) Political contribution under Title 15 Election Code...
- (6) An item with a value of less than \$50, excluding cash or other negotiable instrument...
- (b) Food, lodging, transportation, or entertainment accepted as a guest (and reported if necessary)



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Key Points

- Quid Pro Quo is not required
- Cash is NEVER acceptable, regardless of amount
- Always best to err on the safe side



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Unsolicited Benefit

A public servant who receives an unsolicited benefit that the public servant is prohibited from accepting under this section may donate the benefit to a governmental entity that has the authority to accept the gift or may donate the benefit to a recognized tax-exempt charitable organization formed for educational, religious, or scientific purposes.

Tex. Pen. Code Ann. § 36.08



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Common Projects



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Scoreboards/Marquees

- Often a Co-Op deal
- Very likely to require engineering



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Turf Replacement

- Is it just like laying carpet?
- Warranty Requirements
- Soil stabilization
- Subgrade issues



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Ag Barns/Metal Buildings

- Often a Co-Op deal
- Design almost always required
- Foundation?
- Drainage?



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Bleachers/Stadium Lights

- Often a Co-Op deal
- Engineering almost always required



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Any Questions?



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The information in this handout was prepared by Eichelbaum Wardell
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EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.

www.edlaw.com | (800) 488-9045 | information@edlaw.com