

From: John Price
To: kathy_nealy@msn.com
Sent: 9/18/2007 8:39:01 AM
Subject: Fwd: Briefing Agenda Item 11)d

FYI

>>> Bob Schell 09/17/2007 4:09:48 PM >>>

Judge and Commissioners, it appears there is an issue of whether or not this proposed contract with Bearing Point can be exempted from bidding requirements. Below is a discussion of what has been defined and found to be a professional or personal service. The Commissioners Court must make a factual determination if all or part of the services to be provided meet the criteria for the exemption.

This is the guidance we have provided in the past:

The determination that a particular contract is for "personal or professional services" within section 262.024 of the Local Government Code involves questions of fact, which cannot be resolved in an Attorney General Opinion. See Tex. Att'y Gen. Op. Nos. DM-418 (1996) at 13; DM-106 (1992) at 2; JM-1136 (1990) at 2-3; JM-486 (1986) at 1. The prior opinions of this office do, however, provide guidance that may assist Dawson County officials in making this determination themselves. Attorney General Opinion JM-486 (1986), in considering whether a contract for janitorial services was a contract for personal services within the predecessor of section 262.024 of the Local Government Code, stated as follows:

Someone who claims to have rendered "personal services" [*10] must have performed the services himself. . . . If the contract you ask about requires a specific person to perform janitorial services, it is a contract for personal services. If the contract merely requires a person or a corporation to provide persons who will perform janitorial services, it is not a contract for personal services.

Tex. Att'y Gen. Op. No. JM-486 (1986) at 1; see also Tex. Att'y Gen. Op. No. JM-890 (1988) at 5 (determining as a matter of law that a particular contract for microfilming services is not a contract for "personal services"). If the contract covers items in addition to employees' wages, such as the use of equipment, taxes, and insurance, the contract is one for personal services only if the cost of other items is substantially less than the cost of employee's wages. See Tex. Att'y Gen. Op. No. MW-344 (1981) at 4.

This office has recognized in previous opinions that the term "professional services" in the Act may encompass more than the services of physicians, attorneys, or others traditionally regarded as "professionals." See Tex. Att'y Gen. Op. No. JM-940 (1988) at 3. It may include "members of disciplines requiring special knowledge or [*11] attainment and a high order of learning, skill, and intelligence." Id. Case law suggests that this term comprehends labor and skill that is "predominantly mental or intellectual, rather than physical or manual." Maryland Casualty Co. v. Crazy Water Co., 160 S.W.2d 102, 104 (Tex. Civ. App.--Eastland 1942, no writ). We need not decide whether the contract for ambulance services is exempt from the competitive bidding requirement of the Act, because it may be excepted as a matter affecting the public health. Moreover, this office generally abstains from determining whether a particular service is a professional service. See Tex. Att'y Gen. Op. Nos. DM-418 (1996) at 11-13; DM-106 (1992) at 2; JM-1136 (1990) at 3; JM-1038 (1989) at 2; MW-344 (1981) at 3.

A personal services contract is a contract for the services of a particular individual. It is not a contract to provide persons who will perform a service. Letter Opinion No. 97-031 (1997) at 1-2. Unless the service to be provided is to be done by a unique, particular, named individual, rather than by anonymous and fungible workers, the contract is not for personal services.

In Attorney General Opinion JM-940, we noted that

it comprehends labor and skill that is "predominately mental or intellectual, rather than physical or manual." . . . It no longer includes only the services of lawyers, physicians, or theologians, but also those members of disciplines requiring special knowledge or attainment and a high order of learning, skill, and intelligence.

Attorney General Opinion JM 940 (1988) at 3 (cit

GOVERNMENT
EXHIBIT NO.

263

3:14-CR-293-M

SBP-1A-162-0099-01-00005923

According to Attorney General Opinion MW-344, a professional service is one requiring "predominantly mental or intellectual, rather than physical or manual," skills. Attorney General Opinion MW-344 (1981) at 4 (quoting Maryland Casualty Co. v. Crazy Water Co., 160 S.W.2d 102, 105 (Tex. Civ. App. -- Eastland 1942, no writ)). Furthermore, a "professional" works in a profession that "requires years of education and service for one to attain competence and [that] calls for a high order of intelligence, skill and learning." Id (quoting Transportation Displays, Inc. v. City of New Orleans, 346 So.2d 359, 363 n.5 (La. Ct. App. 1977)).

Finally, the opinion discussed "[t]he most useful standard for judging the scope of 'profession'" from Wooddell v. Dailey, 230 S.E.2d 466 (W. Va. 1976). Id. at 5. The Wooddell court concluded that the services of an interior decorator were not professional services. The Wooddell court did not, however, limit the term "professional services" to the professions of theology, law, or medicine, nor to professions specifically recognized as such by statute. Id. (citing Wooddell, 230 S.E.2d at 469-70). Rather, while "most occupations, [*7] trades, business or callings require a diversity of knowledge and skill," not all such occupations, trades, business or callings could be called "professions." Id. (quoting Wooddell, 230 S.E.2d at 470). A professional is only one who "is a member of [a] discipline with widely accepted standards of required study or specified attainments in special knowledge as distinguished from mere skill." n2 Id. (quoting Wooddell, 230 S.E.2d at 470).

The precise nature of the services will have to be more completely elaborated. I do not believe there is sufficient description of the services in the briefing memo to support a decision to exempt this contract from bidding.

Please call or reply with any questions or concerns.

Thanks
Bob

Robert "Bob" Schell, Assistant District Attorney
Civil Division Chief
411 Elm Street, 5th Floor
Dallas, Texas 75202
Phone: (214) 653-7358
Fax : (214) 653-6134
Direct Dial: (214) 653-6149