

City of Weslaco

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Leonardo Olivares, City Manager

MEMO

10 November 2010

TO: Leonardo Olivares, City Manager
FR: Ramon Vela, City Attorney
RE: **COMPETITIVE BIDDING – EMS BILLING CONTRACT**

ISSUE

Your office has asked the City Attorney's Office to answer the following question:
Is the Billing and Collection of EMS accounts a professional service under the Professional Procurement Act and can a contract for this service be awarded only without having to comply with the competitive bidding process of Section 252.021 of The Texas Local Government Code?

RULES

The Relevant Texas Statutes are:

1. § 252.021. COMPETITIVE REQUIREMENTS FOR CERTAIN PURCHASES. (TEXAS LOCAL GOVERNMENT CODE)
 - (a) Before a municipality may enter into a contract that requires an expenditure of more than \$25,000 from one or more municipal funds, the municipality must:
 - (1) comply with the procedure prescribed by this subchapter and Subchapter C for competitive sealed bidding or competitive sealed proposals;
 - (2) use the reverse auction procedure, as defined by Section 2155.062 (d), Government Code, for purchasing; or
 - (3) comply with a method described by Subchapter H, Chapter 271.
 - (b) Before a municipality with a population of less than 25,000 may enter into a contract for insurance that requires an expenditure of more than \$5,000 from one or more municipal funds, the municipality must comply with the procedure prescribed by this chapter for competitive sealed bidding.
 - (c) A municipality may use the competitive sealed proposal procedure for high technology procurements and, in a municipality with a population of 25,000 or more, for the purchase of insurance.

(d) This chapter does not apply to the expenditure of municipal funds that are derived from an appropriation, loan, or grant received by a municipality from the federal or state government for conducting a community development program established under Chapter 373 if under the program items are purchased under the request-for-proposal process described by Section 252.042. A municipality using a request-for-proposal process under this subsection shall also comply with the process under this subsection shall also comply with the requirements of Section 252.0215.

2. § 252.022. GENERAL EXEMPTIONS. (TEXAS LOCAL GOVERNMENT CODE)

(a) This chapter does not apply to an expenditure for:

(4) a procurement for personal, professional, or planning services

3. § 252.043. AWARD OF CONTRACT. (TEXAS LOCAL GOVERNMENT CODE)

(i) This section does not apply to a contract for professional services, as that term is defined by Section 2254.002, Government Code.

4. § 2254.002. DEFINITIONS. (TEXAS GOVERNMENT CODE) In this subchapter:

(1) "Governmental entity" means:

(A) a state agency or department;

(B) a district, authority, county, municipality, or other political subdivision of the state;

(C) a local government corporation or another entity created by or acting on behalf of a political subdivision in the planning and design of a construction project; or

(D) a publicly owned utility.

(2) "Professional services: means services:

(A) within the scope of the practice, as defined by state law, of:

(i) accounting;

(ii) architecture;

(iii) landscape architecture;

(iv) land surveying;

(v) medicine;

(vi) optometry;

(vii) professional engineering;

(viii) real estate appraising; or

(ix) professional nursing; or

(B) provided in connection with the professional employment or practice of a person who is licensed or registered as;

(i) a certified public accountant

(ii) an architect;

(iii) landscape architect;

(iv) a land surveyor

(v) physician, including a surgeon;



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- (vi) an optometrist;
- (vii) a professional engineer;
- (viii) a state certified or state licensed real estate appraiser; or
- (ix) a registered nurse.

5. § 2254.003. SELECTION OF PROVIDER; FEES. (TEXAS GOVERNMENT CODE)

(a) A government entity may not select a provider of professional services or a group or association of providers or award a contract for the services on the basis of competitive bids submitted for the contract or for the services, but shall make the selection and award:

- (1) on the basis of demonstrated competence and qualifications to perform the services; and
- (2) for a fair and reasonable price.

(b) The professional fees under the contract:

- (1) must be consistent with and not higher than the recommended practices and fees published by the applicable professional associations; and
- (2) may not exceed any maximum provided by law.

ANALYSIS

State law requires that any contract calling for or requiring the expenditure of \$50,000.00 or more of any fund or funds of a municipality must be submitted to competitive bids or competitive sealed proposals pursuant to Section 252.021 of The Texas Local Government Code. There are many exceptions to the Section 252.021 procurement process. I will limit my comments to the exception that applies to “a procurement for personal, professional or planning services”. (Section 252.022 (4) Texas Local Government Code)

The Professional Services Procurement Act states that services within the scope of practice of accounting architecture, landscape architecture, land surveying, medicine, optometry, professional engineering, real estate appraising or professional nursing be selected in accordance with the procurement process of Section 2254.002 of The Texas Government Code.

A municipality may not select any of the professionals identified by Section 2254.002 Texas Government Code on the basis of competitive bids but instead on “demonstrated competence and qualifications.” Any contract negotiated must be at a fair and reasonable price. (Section 2254.003 Texas Government Code).

Billing and collection of EMS accounts is not one of the professionals identified in Section 2254.002.

The fact that billing and collection of EMS accounts is not identified as a professional service in Section 2254.003 Texas Government Code does not eliminate that service as a



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“personal, professional or planning service” exception under Section 252.022 (4) of The Texas Local Government Code. Attorneys are not identified as a professional service under Section 2254.002 but they are a profession that has long been recognized as a 252.022 (4) exemption.

Competitive bidding procurement procedures have not been applied to contracts for personal services involving a particular skill or ability such as services for court stenographer, attorney at law, auditor, car advertising specialist. The courts have recognized these services emphasizing predominantly mental effort or personal skills. Van Zandt vs. Fort Worth Press, 359 SW 2nd 893 (Tex.1962)

The Attorney General in JM-1136 addressed the question whether contract for the services of a skilled carpenter was a contract for a professional service. The Attorney General said that was a fact question that must be decided on a case by case basis. JM-1136 did provide guidelines to determine whether a contract is a “professional service”. JM-1136 referred to JM-940 that addressed the issue what was a professional service under Section 21.907 of the Texas Education Code. JM-940 held that several cases suggested that the phrase professional service comprehends labor and skill that is predominantly mental or intellectual rather than physical or manual. Maryland Casualty Co. vs. Crazy Water Co., 160 SW 2nd 102 (Tex Civ App- Eastland 1942, no unit) JM-940 went further to state that members of disciplines requiring special knowledge for attainment and a high order of learning skill and intelligence. JM-940 determined that the services of a construction management consultant were within the professional services exception of competitive bidding.

JM-1038 addressed the issue whether a third party administrator of an insurance contract is a professional for purpose of exemption from competitive bidding under Local Government Code Section 252.022 (4). JM-1038 also held that whether the services of a TPA are professional under 252.022(4) depend on the particular services that the municipality wants from the TPA.

The billing and collection of EMS accounts does require particular specialized skill in knowing collection and billing laws that apply to Medicare, Medicaid or private pay patients. If the accounts are not billed with the right codes the invoices will be rejected. Collection of EMS accounts requires the ability to negotiate paying agreements with patients and keeping accurate ledger sheets to know if the people are making payments. Knowledge is required in filing liens and dealing with attorneys, insurance companies and the federal government.

The City of Weslaco did go out for proposals for Billing and Collections of EMS Accounts. Two proposals were submitted. A contract was awarded to South Star Billing. That contract was terminated and a new contract was negotiated with Medical Financial Services.



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The City of Weslaco did not have to seek competitive proposals but it did. In 2004 a contract for Billing and Collections of EMS accounts was negotiated with AFB pursuant to the 252.022(4) exemption of the Texas Local Government Code.

The argument that a Billing and Collection of EMS Accounts service that is not listed in Section 2254.002 prohibits it from qualifying or an exception under Section 252.022(4) of The Texas Local Government Code as a personal, professional or planning service is incorrect.

CONCLUSIONS

It is my opinion that Bill and Collection of EMS accounts services does qualify as an exception to competitive bidding under Section 252.022(4) of The Texas Local Government Code and is not disqualified just because it is not listed as one of the professions in Section 2254.002. of The Texas Government Code.

It is important to note that Section 252.043 (i) states that the awarding of a contract that is awarded on competitive sealed bids does not apply to a contract for professional services as that term is defined by Section 2254.002 of The Texas Government Code. This is consistent with Section 2254.003 that states that the professions listed in 2254.002 must not be awarded on competitive bids but on “demonstrated competitive and qualifications.: Qualifying as a “personal professional or planning” service exemption under 252.022 (4) under The Texas Local Government Code is a separate issue from whether the professions identified in 2254.002 cannot be selected on competitive bids.



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