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July 23, 1991

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Opinion Committee

Honorable Dan Morales
Attorney General of Texas
Supreme Court Building
Austin, Texas 78711-2548

Attention: Ms. Madeleine Johnson, Chairperson Opinions Committee

Re: Requirement for Municipality to Bid Excess Insurance

Dear General Morales:

Pursuant to the provisions of Section 402.043 of the Texas Government Code, I hereby request opinion from the Attorney General with regard to the following question that has arisen in El Paso County, Texas.

I. QUESTION PRESENTED

This is a request for an opinion as to what constitutes excess insurance under Chapter 252, Section 252.024 of the Local Government Code relating to competitive bidding requirements for municipalities.

We are seeking a definition as to what your office would authorize to be purchased under the standards of excess insurance in Section 252.024. The Director of Risk Management for the City of El Paso is of the opinion that the concept of "layered excess coverages" in Section 252.024 is broad enough to allow the City to

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~~FILED SEPARATELY~~
~~FILED SEPTEMBER~~

obtain proposals through a licensed broker (in lieu of the bid process) for all insurance coverages in excess of a given retention amount or in excess of a large deductible. If you hold it is broad enough, what are the retention and deductible amounts the coverage must be in excess of?

Our office is also seeking a clarification of what "selection of an insurance broker" means. Does this allow the City to hire an insurance broker without competitive bidding or does this require the City to competitively bid for the services of an insurance broker unless it would fall within the exemptions under Section 252.022 of the Local Government Code for personal or professional services?

II. STATEMENT OF FACTS

The City of El Paso is self-insured pursuant to the authority of Tex. Rev. Civ. Stat. Art 715c (Vernon 1990). The City wants to consider the selection of a licensed insurance broker under Chapter 252, Section 252.024 of the Local Government Code to obtain proposals for all insurance coverages that exceed the capabilities of its self-insurance program. The coverage the City wishes to secure is between \$1 million and \$20 million for General Public Liability and, therefore, a large enough amount to place such a purchase within the competitive bidding requirements for municipalities under Chapter 252. The City can retain a minimum of \$500,000 per occurrence under its self-insurance program.

III. BRIEF OF THE LAW

The general rule is that contracts for the purchase of insurance must be competitively bid. Opinion MW-494 states an insurance contract is neither a professional or personal service and therefore, does not fall within the exemptions from competitive bidding requirements of Chapter 262, Section 262.024, applicable to counties. Opinion JM-1038, Footnote 2, sites Opinion MW-494 and states, "We see no reason why the same conclusion would not be reached with respect to insurance purchases by municipalities under the current Chapter 252, Competitive Bidding Requirements."

Chapter 252, Section 252.024 states:

This Chapter does not prevent a municipality from selecting a licensed insurance broker as the sole broker of record to obtain proposals and coverages for excess or surplus insurance that provides necessary coverage and adequate limits of coverages in structuring layered excess coverages in all areas of risk requiring special consideration, including public official liability, police professional liability, and airport liability. The broker may be retained only on a fee basis and may not receive any other remuneration from any other source.

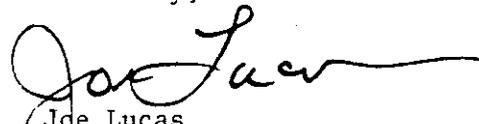
"Excess insurance" is defined in Black's Law Dictionary (5th ed. 1979) as "that amount of insurance coverage which is beyond the dollar amount of coverage of one carrier but which is required to pay a particular loss as distinguished from 'other insurance' which may be used to pay or contribute to the loss." Brownsville Fabric,

Inc. v. Gulf Insurance Co., 550 S.W.2d 332, 337 (Tex. Civ. App.-
Corpus Christi 1977, writ ref'd. n.r.e.) states "an 'excess' policy
is one that provides that the insurer is liable only for the excess
above and beyond that which may be collected on other insurance."
The case then cites 32 Tex. Jur.2d §420 (1962) which also states
that an insurance policy may contain a clause that "if there is
other 'valid and collectible insurance,' the insurer shall be
liable only for any excess above and beyond that which may be
collected on such other insurance. Under such a clause, when any
other insurance has been exhausted without fully indemnifying the
insured, then the insured may seek recovery from the excess
insurer."

IV. SUGGESTED CONCLUSION

In summary, it is our belief that Section 252.024 exempts
municipalities from competitively bidding any insurance that
exceeds the stated retention or deductible amounts in an insurance
policy. It is also our belief that the City may "select" as stated
in Section 252.024, an insurance broker without going through the
competitive bidding process.

Sincerely,


Joe Lucas
El Paso County Attorney

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