



establishing the criteria for award of these contracts, the statute implicitly prohibits awarding a contract to professional individuals or firms that resident or have their major office located within the geographic boundaries of a governmental entity. Had the legislature intended to permit local preference as a selection criteria for professional services, it would have done so as it has in other areas. See e.g. ARTICLE 601b, V.T.C.S. SECTION 3.28, THE STATE PURCHASING AND GENERAL SERVICES ACT. However, no such provision has been enacted.

The term professional services comprehends labor and skill that is predominantly mental or intellectual, rather than physical or, manual and includes the services of those members of disciplines requiring special knowledge or attainment and a high order of learning, skill, and intelligence. See ATTORNEY GENERAL OPINION NO. JM-1038 (1989) citing OPINION NO. JM-940 (1988); *Maryland Casualty Co. v. Crazy Water Co.*, 160 S.W.2d 102 (Tex. Civ. App. -- Eastland 1942, no writ); ATTORNEY GENERAL OPINION NO. DM-106 (1992); see also ATTORNEY GENERAL OPINION NO. MW-344 (Defining professional services as emphasizing a body of special knowledge attributable to a profession, the years of study necessary to attain competence, and the wide recognition of the profession and its standards of study.) The legislature has specifically exempted professional services from the competitive bidding process, and instead, has established the competitive negotiation procedure to enable the selection of the most qualified professional by taking into account the special knowledge, skill and ability of each profession. It allows for comparative, judgmental evaluations to be made when selecting from a number of acceptable proposals. ATTORNEY GENERAL OPINION NO. DM-43 (1991) at 3.

The competitive negotiation process is associated with the use of performance specifications in addition to price such as quality, experience and staffing. *Id.* at 4. It generally requires the governmental body to specify the relative importance of the additional evaluative criteria and to give all offerors fair and equal treatment with respect to any opportunity for discussion or revision of proposals. See TEXAS LOCAL GOVERNMENT CODE, SECTIONS 252.042, 262.030. *Id.* Under the negotiation technique, the governmental body is allowed to conduct discussions with offers regarding the particulars of their proposals to negotiate with offerors to obtain the most advantageous contract for the agency and to award the contract to the offeror submitting the best overall proposal. It would be illogical to assume that the legislature created such a process merely to allow the award of a contract to a firm solely on the basis of geographic location.

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professional fees are consistent with and not higher than the published recommended practices and fees of the various applicable professional associations and do not exceed the maximum provided by law."

Section 3A requires that the procurement of architectural or engineering services shall be negotiated on the basis of two step process:

- (1) initial selection shall be based on the **demonstrated competence and qualifications of the person**, including any firm, who is to provide the services; and
  - (2) after selection the municipality must negotiate a contract at a fair and reasonable price.
- (b) If the entity is unable to negotiate a satisfactory contract with the **most highly qualified person**, the entity shall formally end negotiations with the person and begin negotiations with the second "**most highly qualified person**."

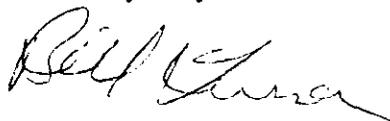
Further, the courts in Texas have reasoned that to award a contract for professional services solely on the basis of price would be contrary to the public interest because it could result in obtaining least competent individual. ATTORNEY GENERAL OPINION No. JM-940. This reasoning equally applies to the award of professional services on the basis of geographic location. Local preference entitles an individual or firm to receive an award of a contract that it would not have otherwise received had it not been for the existence of the preference -- in this case geographic location within the boundaries of the governmental entity awarding the contract. To permit the award of a contract on this basis would defeat the purpose of the Act because it establishes location as the only test for selection and, thus, discounts competence and qualifications as the primary selection criteria. The result would be the same -- that the taxpayers would obtain the services of a person or firm who was not the most qualified professional. Cf. ATTORNEY GENERAL OPINION JM-1198 at FN3. Any modification of the legislative criteria should have a definite and objective relationship to matters of quality and competence or be adopted pursuant to clear legislative authority. See e.g. ATTORNEY GENERAL OPINION No. DM-113 (1992) at 16.

Further, affording local preference tends to promote favoritism and discourages highly qualified firms from responding to a request for proposals if they are not located within the geographical area. This policy would confer an advantage to bidders purely on the basis of residence or proximity without requiring an individualized examination of the practical value of location under the contract vis-a-vis the ability of the bidder to perform under the contract.

**CONCLUSION:**

For all of the foregoing reasons, the City of College Station believes that having a policy of local preference in the award of professional services contracts is against the public interest, contrary to public policy, and the legislature's intent. Consequently, any award would render the contract void based upon this preference.

Yours very truly,



Bill Turner  
District Attorney