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RQ-0063

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David E. Dobbs  
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May 5, 1999

ML-  
FILE # 40819-99  
I.D. # 40819

Attorney General John Cornyn  
State of Texas  
Austin, Texas

Via Fax: (512)936-1401

RECEIVED

MAY 05 1999

Opinion Committee

Re: Opinion Request (Emergency Request)  
From County Auditor Nancy Braswell  
Smith County, Texas

Dear General Cornyn:

Thank you very much for visiting with me by phone this morning in regard to the above-referenced opinion request. We just faxed the letter request and attached memorandum to you from our office.

Please give me a call if I can provide any further information. As I mentioned, the need for the opinion to be issued just as soon as possible is because our process of receiving proposals from architects for a new County Courthouse is contingent upon receipt of the opinion from your office. Basically, everything is on hold until the opinion is received.

Again, thank you for your assistance.

Yours very truly,

JACK SKEEN, JR.  
Criminal District Attorney  
/db



# COUNTY OF SMITH

*The County Auditor  
100 N. Broadway, Room 107, Courthouse  
Tyler, Texas 75702*

*Nancy F. Braswell  
Auditor*

*903-535-0501  
Fax 903-535-0516*

May 4, 1999

The Honorable John Cornyn  
The Office Attorney General  
P.O. Box 12548, Capitol Station  
Austin, Texas 78711-2548

Re: Opinion Request (Emergency Request)

Dear Attorney General Cornyn:

I am writing to request an attorney general opinion regarding the following situation, which I believe affects the public interest.

Chapter 2254.003 (Government Code) outlines the procedure for employing an architect in a two step process. **Step 1.** "Select the most highly qualified provider of those services on the basis of demonstrated competence and qualifications." **Step 2.** "Then attempt to negotiate with that provider a contract at a fair and reasonable price."

The facts are as follows:

On April 12, 1999 Commissioners Court appointed a committee composed of elected and appointed officials. This committee is composed of the County Judge, one commissioner, county auditor, assistant county auditor acting as purchasing agent, county engineer, director of maintenance, assistant district attorney as ex officio member, and three members of a courthouse citizens task force earlier established by commissioners court.

The Request For Qualifications (RFQ) reads: (Date released to public March 17, 1999 return date April 8, 1999.)

"Once Qualification Statements are reviewed, a short list will be compiled by an Evaluation Committee appointed by Commissioners Court. Interviews may be conducted with the firms determined to be the most qualified. Additional information may be required at the time

interviews are conducted. The most qualified applicant will then be chosen. After the most qualified applicant is chosen, a contracted price for services will be negotiated. Commissioners Court will make the final selection and approve a proposed contract, if any."

The RFQ further reads:

"A selection committee comprising two members of Commissioners Court, County staff and select members of the task force will review and evaluate the qualifications and according to the criteria outlined in IV. Then a 'short list' will be forwarded to Commissioners Court. Upon approval of that list, the selection committee will then interview the short list and ultimately make a final recommendation to the Commissioners Court."

Each architectural firm submitted written documents stating their qualifications, experience, and other pertinent information. The function of the committee is to evaluate written documents, listen to presentations, research previous work history and then rank them as to the most qualified. The recommendation presented to the court is simply the committees evaluation and is not in any form binding to the court. If the committee ranked firm XYZ last, the court could determine firm ABC to be the most qualified. Once the court had determined the "most qualified", then the same committee would begin negotiations with that firm, and then the negotiated price be considered by commissioners court. It would be difficult or impossible for commissioners court to negotiate fees in open court. All written documentation is at all times available to the members of the commissioners court.

**Committees are generally used, as described above, when competition is involved and open sessions would hinder the competitive nature of doing business. It is my understanding, the full court could not conduct this process in executive session.**

Attachment: The Model Procurement Code for State & Local Governments states Section 3-203 (b) "Competitive sealed bidding and competitive, sealed proposals also differ in that, under competitive sealed bidding, no change in bids is allowed once they have been opened, except for corrections of errors in limited circumstances. The competitive sealed proposal method, on the other had, permits discussions after proposals have been opened to allow clarification and changes in proposals provided that adequate precautions are taken to treat each offeror fairly and to ensure that information gleaned from competing proposals is not disclosed to other offerors."

Section 3-203 (6) ".... In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors."

The statute is silent as to the openness of negotiations. Article 262.030 (Local Government Code) is the closest reference found where it states proposals are to be kept secret during the process of negotiations. All proposals that have been submitted shall be available and open for public inspections after the contract is awarded, except for trade secrets and confidential information contained in the proposals.

My questions concerning this are as follows:

1. Does the fact that the county judge and one commissioner are on this committee violate any open meeting requirements?
2. If the answer to number one (1) is yes, then, if the county judge and one commissioner is removed from the committee, does the remaining committee fall under the open meetings act and require any posting notices?

These RFQ's will remain valid through July 7, 1999. All interviews and negotiations must be complete by this date or will cause added expense and delay of the project. On April 26, 1999 after questions emerged concerning two members of the court participating in the interview process the two members resigned, leaving a committee composed of eight (8). At this point all interviews are on hold waiting for a response from your office. We respectfully request a early response concerning these questions.

Respectfully submitted,



Nancy Braswell  
County Auditor

Attachments (2)