



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 14, 2012

I - 12-006

COUNTIES:

Applicability of Competitive Bidding
Requirements to Purchase of
Health Care and Liability Insurance

The Honorable John T. Pepmeyer
State's Attorney, Knox County
Knox County Courthouse
Galesburg, Illinois 61401

Dear Mr. Pepmeyer:

I have your letter inquiring:

- (1) what is the definition of "professional services" for purposes of the competitive bidding requirements applicable to counties under section 5-1022 of the Counties Code (55 ILCS 5/5-1022 (West 2010));
- (2) do the statutory competitive bidding requirements apply to securing and renewing health care or liability insurance coverage for a county and its employees; and
- (3) is a county's use of designated agents to secure and renew health care or liability insurance coverage exempt from the statutory competitive bidding requirements?

For the reasons stated below:

- (1) there is no single, comprehensive definition of what constitutes "professional services" for purposes of competitive bidding requirements in section 5-1022 of the Counties Code; whether the professional services exception applies to a specific transaction is determined by the extent to which the services to be secured require a high degree of professional skill or judgment, or if there is a need for confidence, trust, and belief in the individual rendering the services;
- (2) the competitive bidding requirements of section 5-1022 of the Counties Code apply to securing and renewing health care or liability insurance coverage; and
- (3) the competitive bidding requirements of section 5-1022 also apply to the county's selection of designated agents to assist the county in securing or renewing health care or liability insurance coverage.

BACKGROUND

"The purposes behind requiring governmental units to engage in competitive bidding are to '[i]nvite competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable[.]'" *Smith v. F.W.D. Corp.*, 106 Ill. App. 3d 429, 431 (1982), quoting 10 McQuillin on Municipal Corporations §29.29, at 302 (3d ed. 1981); see also *McMahon v. City of Chicago*, 339 Ill. App. 3d 41, 49 (2003); *Doyle Plumbing & Heating Co. v. Board of Education, Quincy Public School District No. 172*, 291 Ill. App. 3d 221, 227 (1997), appeal denied, 174 Ill. 2d 558 (1997); *Court Street Steak House, Inc. v. County of Tazewell*, 163 Ill. 2d 159, 165 (1994). Accordingly, section 5-1022 of the Counties Code generally requires counties of less than 2,000,000 population¹ to employ competitive bidding principles when obtaining goods and services:

(a) *Any purchase by a county with fewer than 2,000,000 inhabitants of services, materials, equipment or supplies in excess of \$30,000, other than professional services, shall be contracted for in one of the following ways:*

(1) *by a contract let to the lowest responsible bidder after advertising for bids in a newspaper published within the county or,*

¹Based on 2010 Federal decennial census figures, the population of Knox County is 52,919 inhabitants. See Illinois Blue Book 444 (2011-2012).

if no newspaper is published within the county, then a newspaper having general circulation within the county; or

(2) by a contract let without advertising for bids in the case of an emergency if authorized by the county board.

* * *

(c) This Section does not apply to contracts by a county with the federal government or to purchases of used equipment, purchases at auction or similar transactions which by their very nature are not suitable to competitive bids, pursuant to an ordinance adopted by the county board.

(d) Notwithstanding the provisions of this Section, a county may let without advertising for bids in the case of purchases and contracts, when individual orders do not exceed \$35,000, for the use, purchase, delivery, movement, or installation of data processing equipment, software, or services and telecommunications and inter-connect equipment, software, and services. (Emphasis added.)

Contracts for insurance coverage are not expressly exempted from the requirements of section 5-1022.

Your letter states that the Knox County Board periodically selects two "agents of record" from the local insurance industry, one of whom is responsible for the solicitation and procurement of competitive bids and pricing relative to health care insurance coverage, while the other performs similar functions with respect to liability insurance coverage. Each designated agent is selected by the board after submitting a competitive bid for consideration. The designated agents secure the requested insurance bids, investigate available products and companies offering health care and liability insurance coverage (including the parameters of coverage and deductibles, along with the proposed cost to Knox County and its member employees), and communicate these specifics to the finance committee of the Knox County Board, which in turn makes a specific recommendation to the full county board. After county board approval is secured, contracts with the successful bidder(s) are executed. At the conclusion of each term of coverage, the same procedures are followed with respect to renewals or new solicitations. Knox County has viewed these procedures for securing and renewing health

care and liability insurance coverage for the county and its employees as exempt from the competitive bidding statute pursuant to the professional services exemption in section 5-1022 of the Counties Code.

ANALYSIS

It is well established that non-home-rule counties, acting through their county boards (55 ILCS 5/5-1004 (West 2010)), possess only those powers that are expressly granted to them by the constitution or by statute, together with those powers that are necessarily implied therefrom to effectuate the powers which have been expressly granted. Ill. Const. 1970, art. VII, §7; *Redmond v. Novak*, 86 Ill. 2d 374, 382 (1981); *Inland Land Appreciation Fund, L.P. v. County of Kane*, 344 Ill. App. 3d 720, 724 (2003); *Heidenreich v. Ronske*, 26 Ill. 2d 360, 362 (1962). A county board in a non-home-rule county possesses express statutory authority to provide health care insurance for the benefit of its employees² and to purchase liability insurance.³

In response to your initial question concerning what constitutes "professional services," that term is not defined in section 5-1022 of the Counties Code. Illinois courts have addressed the issue of whether professional services exceptions to other competitive bidding statutes apply to a specific transaction by determining whether the services involved require a high degree of skill or judgment, or whether there is a need for confidence, trust, and belief in the individual rendering the services. Accordingly, the issue of whether a particular acquisition constitutes "professional services" can only be determined in the context of the specific services to be obtained.

With respect to whether the competitive bidding requirements of section 5-1022 of the Counties Code apply generally to securing and renewing health care or liability insurance coverage for a county and its employees, in informal opinion No. I-90-006, issued March 21,

²A county board in a non-home-rule county may arrange to provide, for the benefit of employees of the county, group, life, health, accident, hospital, and medical insurance, or any combination of those types of insurance, or the county board may self-insure all or a portion of any combination of those types of insurance. 55 ILCS 5/5-1069 (West 2010) Subsection 5-1069(e) of the Counties Code (55 ILCS 5/5-1069(e) (West 2010)) provides that the term "employees" as used in that section includes elected or appointed officials but does not include temporary employees.

³Section 9-103 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/9-103 (West 2010)) authorizes "[a] local public entity [to] protect itself against any property damage or against any liability or loss which may be imposed upon it or one of its employees for a tortious act under Federal or State common or statutory law, or imposed upon it under the Workers' Compensation Act, the Workers' Occupational Diseases Act, or the Unemployment Insurance Act[.]" Under the Act, the term "local public entity" includes counties (*see* 745 ILCS 10/1-206 (West 2010)).

1990, this office was asked whether contracts for renewable services, including liability and health care insurance, must be awarded by competitive bid. The opinion concluded that the competitive bidding requirements were applicable to the purchase of insurance policies. Further, because the renewal of an insurance contract results in a new contract for the purpose of incorporating any new statutory provisions, renewals likewise are subject to the competitive bidding requirements of section 5-1022.

Addressing the issue of whether the professional services exception applied to the purchase or renewal of insurance policies, the opinion noted that the courts in some jurisdictions had held that insurance policies do not fall within competitive bidding requirements⁴ while others had held that insurance contracts must be competitively bid.⁵ In this regard, informal opinion No. I-90-006 concluded:

The purchase of insurance policies does not entail the need for confidence, trust and belief in the person rendering the services which lies at the heart of "professional services" exceptions to competitive bidding statutes. (See, 1971 Ill. Att'y Gen. Op. 8, 9.) While the services of a broker may be beneficial, the reasoning of Lynd v. Hefferman [sic] and London & Lancashire Indem. Co. v. Upper Danby [sic] Twp., that the services of a broker constitute personal services similar to those rendered by an architect, engineer, lawyer or other member of a recognized "profession", is not persuasive. Specifications for bids for insurance policies can be tailored to assure the provision of adequate, dependable coverage by the vendor, without the services of a broker. Moreover, it bears noting that insurance brokers are usually paid for their services by the underwriting company by commission,

⁴*Lynd v. Heffernan*, 286 A.D. 597, 146 N.Y.S.2d 113 (App. Div. 1955) (relationship between a competent insurance broker and his client is a relationship of personal trust and confidence that calls for the rendition of personal services of a type uniformly held to fall outside the scope of competitive bidding requirements); *London & Lancashire Indemnity Co. v. Upper Darby Township*, 28 Del. Co. 223, 30 Munic. L.R. 129 (Pa. 1937).

⁵*Austin v. Housing Authority of the City of Hartford*, 143 Conn. 338, 122 A.2d 399 (1956) (statute requiring competitive bidding on all contracts for purchases of personal property of every description required the housing authority to let a contract for fire insurance to the lowest, responsible bidder); *State v. Roth*, No. 1326 (Ohio App., 11th Dist., October 5, 1984), *aff'd*, 20 Ohio St. 3d 55, 485 N.E.2d 1043 (1985) (in affirming conviction of a county commissioner for dereliction of duty based upon her vote to renew the county's insurance without competitive bidding as required by statute, Ohio appellate court concluded that the category of insurance broker was not among the professions named in an exception to the statute).

which minimizes the contractual and confidential relationship between the broker and the county. *Because the procurement of insurance does not involve "professional services" within the meaning of the statutory language, it appears that the competitive bidding requirements of section 5-1022 are applicable to the purchase of insurance policies, and to the renewal of such policies.* (Emphasis added.)

Subsequent to the issuance of informal opinion No. I-90-006, the Illinois Appellate Court addressed the analogous issue of whether the competitive bidding provisions of the School Code (105 ILCS 5/1-1 *et seq.* (West 2010))⁶ applied to the award of contracts to health maintenance organizations (HMOs) for the provision of medical benefits to employees of the Chicago Public School (CPS) system. *Compass Health Care Plans v. Board of Education of the City of Chicago*, 246 Ill. App. 3d 746 (1992), *appeal denied*, 151 Ill. 2d 562 (1993). The Board of Education of the City of Chicago (the Chicago Board) decided to reduce the number of HMO plans offered to CPS employees from eight to four for the 1990-91 school year, and notified Compass HMO that it would not be among the four offered. *Compass*, 246 Ill. App. 3d at 747. In response to a protest from Compass, the Chicago Board's chief operating officer explained that outside consultants had recommended the reduction in the number of HMOs offered, and only the four HMOs with the highest enrollment were to be retained. *Compass*, 246 Ill. App. 3d at 747. Compass filed suit seeking a declaration that the health care services contracts with those HMOs were null and void, and an order requiring the Chicago Board to contract with HMOs on the basis of competitive bidding. *Compass*, 246 Ill. App. 3d at 748. The circuit court denied the Chicago Board's motion to dismiss and ordered it to comply with the competitive bidding requirements of the School Code. *Compass*, 246 Ill. App. 3d at 748.

In affirming the circuit court, the appellate court upheld the lower court's findings that the HMO industry is highly competitive, that HMO contracts do not involve the type of professional skills which would render them not adapted to competitive bidding, and that the contracts at issue were not awarded on the basis of professional skills, program offering, or cost effectiveness, but, rather on the number of enrollees in each of the HMO plans offered to CPS

⁶The applicable provisions of the School Code (Ill. Rev. Stat. 1989, ch. 122, pars. 34-21.3, 10-20.21, now codified at 105 ILCS 5/34-21.3, 10-20.21 (West 2010)) required the board to let all contracts for supplies, materials, or work involving an expenditure in excess of \$10,000 to the lowest, responsible bidder after due advertisement, "*except contracts which by their nature are not adapted to award by competitive bidding, such as contracts for the services of individuals possessing a high degree of professional skill where the ability or fitness of the individual plays an important part[.]*" (Emphasis in original.) A board rule contained nearly identical language regarding the awarding of contracts in excess of \$10,000. *Compass*, 246 Ill. App. at 749.

employees. Thus, the appellate court found no error in the circuit court's ruling that the HMO contracts are not exempt from the competitive bidding requirements of the School Code. *Compass*, 246 Ill. App. 3d at 753.⁷

In *Shively v. Belleville Township High School District No. 201*, 329 Ill. App. 3d 1156 (2002), *appeal denied*, 201 Ill. 2d 616 (2002), the appellate court considered whether the selection of a construction manager for a project to renovate one high school and construct another was exempt from the competitive bidding requirements of the School Code (*see* 105 ILCS 5/10-20.21(i) (West 1998)), by virtue of a professional services exemption. After reviewing the decisions in *Compass*, *American Health Care Providers*, and *Hassett-Storage Warehouse, Inc. v. Board of Election Commissioners for the City of Chicago*, 69 Ill. App. 3d 972, 981 (1979),⁸ the court stated:

Each of these decisions reviewing the professional-services exception to bidding statutes focused on the nature of the services provided. *Where the services require the exercise of professional and significant business judgment in providing important services on behalf of the government body, then the award of those contracts is exempt from the competitive-bidding process pursuant to the relevant professional-services exception.*

* * *

After carefully reviewing the contract and Korte's duties and obligations thereunder, we find that the services Korte was hired to provide go well beyond those which are normally provided

⁷But see *American Health Care Providers, Inc. v. County of Cook*, 265 Ill. App. 3d 919 (1994), in which the court held that the county, as a home rule unit of government, was exempt from the competitive bidding requirements contained in section 5-36001 of the Counties Code (55 ILCS 5/5-36001 (West 1992)) when awarding HMO contracts. Although the court acknowledged that it need not address the issue of whether the county's health care contracts are exempt from the competitive bidding requirements by virtue of the professional services exception, the court nevertheless entertained that assertion as a "supplementary argument," and agreed with the circuit court's conclusion that the contracts were not adaptable to competitive bidding procedures. *American Health Care Providers*, 265 Ill. App. 3d at 931-32.

⁸In *Hassett*, the appellate court held that a contract for storage and delivery of voting machines and other election equipment to polling places fell within the professional services exception to the competitive bidding requirements of the Illinois Municipal Code (Ill. Rev. Stat. 1975, ch. 24, par. 8-10-1 *et seq.*, now codified at 65 ILCS 5/8-10-1 *et seq.* (West 2010)) because the contract placed tremendous responsibility on the contractor for the efficient administration of the electoral process. It required that trust and confidence be placed on the performance of the contract and required near perfect performance under extreme time pressures. By its terms, the contract was one where the ability or fitness of the individual contractor played an important part. *Hassett*, 69 Ill. App. 3d at 982.

by a general contractor. Korte was hired to serve as an advisor and consultant to the School District and was vested with considerable discretion in managing all phases of the project. The services Korte was hired to provide require a high degree of professional skill where the ability or fitness of the individual plays an important part. Thus, the professional-services exemption contained in subsection (i) [of the School Code] applies, and the School District was not required to bid the contract. (Emphasis added.) Shively, 329 Ill. App. 3d at 1163-64.

Applying these principles to your inquiries, contracts for insurance coverage do not generally involve the provision of services requiring a high degree of professional skill or judgment. As explained in informal opinion No. I-90-006, specifications for bids for insurance policies can be tailored to assure the provision of adequate, dependable coverage by the vendor. Further, although the services of an insurance broker or agency may be beneficial in assisting a county board to secure adequate health care and liability insurance coverage, insurance broker services do not generally involve a high degree of discretion, analytical skills, independent judgment, or the need for confidence, trust, or belief in the person rendering the services. Indeed, based on your letter, it appears that the county has historically selected its "agents of record" through a competitive bidding process.

Based on the foregoing, neither contracts for insurance coverage nor contracts for insurance broker services are exempt from the competitive bidding requirements of section 5-1022 of the Counties Code as "professional services." Accordingly, the competitive bidding requirements of section 5-1022 of the Counties Code apply to obtaining and renewing health care or liability insurance coverage for a county and its employees. Likewise, the competitive bidding requirements of section 5-1022 apply to the county's selection of designated agents to assist in securing or renewing health or liability insurance coverage.

CONCLUSION

In counties of fewer than 2,000,000 inhabitants, section 5-1022 of the Counties Code generally requires that all purchases of services, materials, equipment, or supplies in excess of \$30,000, other than professional services, be obtained by a contract let to the lowest, responsible bidder after advertising for bids in a newspaper published within the county. Whether the professional services exception to section 5-1022 applies to a specific transaction depends upon whether the services require a high degree of professional skill or judgment or there is a need for confidence, trust, and belief in the individual performing the services. Neither contracts for insurance coverage nor contracts for insurance broker or agent services involve the provision of "professional services." Accordingly, the competitive bidding requirements of section 5-1022 of the Counties Code apply to securing and renewing health care or liability

The Honorable John T. Pepmeyer - 9

insurance coverage for a county and its employees. Likewise, the competitive bidding requirements of section 5-1022 apply to the county's selection of designated agents to secure or renew health or liability insurance coverage.

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Very truly yours



LYNN E. PATTON
Senior Assistant Attorney General
Chief, Public Access and Opinions Division

LEP:MJL:LAS:lk:cj