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I - 90-006

COUNTIES:
Competitive Bidding
For Purchases

Honorable Thomas H. Sutton
State's Attorney, White County
White County Courthouse
Carmi, Illinois 62821

Dear Mr. Sutton:

I have your letter wherein you inquire whether section 5-1022 of the Counties Code (hereinafter "the Code") (Public Act 86-962, effective January 1, 1990, to be codified at Ill. Rev. Stat., ch. 34, par. 5-1022 [formerly Ill. Rev. Stat. 1987, ch. 34, par. 25.03b]) is applicable to certain purchases of goods and services by counties. Specifically, you ask whether contracts for items which are purchased on a regular basis, such as fuel for highway department vehicles, are subject to competitive bidding requirements when each purchase is less than $10,000, but the total purchases, over a year's time, accumulate to more than $10,000; whether contracts for renewable services, such as liability and health insurance, must be awarded by competitive bid; and whether contracts for certain specialty items, such as voter registration services or the upgrading of computer software, must be awarded by competitive bid.

Section 5-1022 of the Code provides:

> "Any purchase by a county with fewer than 2,000,000 inhabitants of services, materials, equipment or supplies in excess of $10,000, 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, if no newspaper is published within the county, then a newspaper having general circulation within the county; or
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> (2) by a contract let without advertising for bids in the case of an emergency if authorized by the county board.
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> In determining the lowest responsible bidder, the county board shall take into consideration the qualities of the articles supplied, their conformity with the specifications, their suitability to the requirements of the county and the delivery terms.
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> 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."

This section was enacted by Public Act 85-917, effective July 1, 1988. There are, as yet, no reported cases concerning the scope of this section. There are, however, a number of reported cases which discuss similar statutes or ordinances relating to public contracting, and which provide guidance for the interpretation of section 5-1022.

Your first question concerns whether items purchased on a regular basis are subject to competitive bidding requirements if the accumulated cost on an annual basis exceeds $10,000. It appears that such purchases are not ordinarily subject to the requirements of section 5-1022, provided that the separate purchases are not employed as a subterfuge for avoiding compliance with the statute, and that the county cannot determine, based upon historical precedent or projection of use, that total purchases on an annual basis will exceed $10,000.

In City of Evanston ex. rel. Johnson v. Risinger (1969), 116 Ill. App. 2d 420, a taxpayer challenged the city's payment for tree trimming services, claiming that the contract violated a city ordinance which required competitive bidding on public works contracts exceeding $1,000. The contract in question provided that the city would pay $3.15 per man hour for the tree pruning project. The total services billed for a seven month period exceeded $34,000. The court held that the contract did not exceed the $1,000 limit, and therefore was not required to be awarded by competitive bid, because it provided for payment by the hour and it could be terminated by the city upon 24 hours notice.

In reaching its decision, the court in City of Evanston relied upon an earlier case, Sanitary District of Chicago v. Blake Mfg. Co. (1899), 179 Ill. 167, wherein it was held that a contract to supply pumps and a man to operate them at $42.50 per day was not one which exceeded $500 in value the applicable threshold for competitive bids, even though the Sanitary District ultimately paid $1,200 for the services rendered. The court concluded that since the contract could be terminated at any time, it constituted a mere hiring of pumps by the day, did not exceed $500 in value and could be entered into without advertisement for bids.

In yet another case, Allen v. Treat (1966), 72 Ill. App. 2d 466, the court held that a township highway commissioner had the power to order oil for use on township roads without the consent of the county superintendent of highways, as long as each order did not exceed $1,000. The total amount ordered was over $37,000. The court concluded therein that the fact that the oil was used for maintenance would suggest that it was not part of a single project, or was not essentially one transaction. (For reasons discussed below, however, I do not believe that this decision would govern if the highway commissioner could reasonably have projected that his total usage of oil for road maintenance annually would have exceeded the threshold limit.)

Those instances in which there are actually separate purchases must be clearly distinguished from attempts to avoid the bidding requirement by splitting larger contracts into smaller components, a procedure which is prohibited. For example, in People ex rel. Whitlock v. Lamon (1908), 232 Ill. 587, a city entered into separate contracts with the same contractor, without bids, for construction of a sidewalk along several lots, claiming that the walk in front of each lot was a separate project. The court rejected the city's argument, holding that the sidewalk was all one project for the entire length

of the street. In Brownell Improvement Co. v. Highway Commissioner (1935), 280 Ill. App. 43, 49, a township highway commissioner sought to avoid the bidding requirement on a purchase of crushed stone for a road project by issuing separate warrants, each under the statutory bidding limit. The court held that "this was a mere makeshift to avoid the effect of the statute. The law will not permit a commissioner to do something indirectly that he is not permitted to do directly".

Cases from other jurisdictions further illustrate that a single project cannot be broken down into subprojects for the purpose of avoiding bidding requirements. (See Mayes Printing Co. v. Flowers (Fla. App. 1963), 154 So.2d 859; Kunkle Water & Electric, Inc. v. Prescott (Iowa 1984), 347 N.W.2d 648; Elview Construction Co. v. North Scott Community School Dist. (Iowa 1985), 373 N.W.2d 138; State ex rel. Kuhn v. Smith (Ohio 1963), 194 N.E.2d 186.) Additional cases, with similar reasoning, which address the differentiation between permissible separate purchases of goods and services from the same supplier, and the prohibited splitting of a single contract into smaller units for the purpose of avoiding bidding requirements, are discussed in an annotation, "Determination of amount involved in contract within statutory provision requiring public contracts involving sums exceeding specified amount to be let to lowest bidder," 53 A.L.R.2d 498.

It should be noted, however, that where, based upon historical precedent or projection of use, it is clear that annual purchases for certain supplies will exceed the statutory threshold, contracts for those supplies should be awarded by competitive bid, even though no single purchase may exceed the threshold amount. For example, if it is assumed that the total of accumulated, annual purchases of fuel for county vehicles has exceeded $10,000 in recent years, and that no additional factors are present which could be expected to reduce future use significantly, the contract for fuel for succeeding years should be awarded by competitive bid, even though no single delivery of fuel will exceed the threshold amount. To conclude that each delivery could be treated as a separate purchase for purposes of determining the applicability of section 5-1022 where the county authorities can be relatively certain that accumulated purchases will exceed $10,000 per year, would be tantamount to splitting a contract impermissibly and would subvert the public policy favoring competitive bidding. Consequently, it appears that such transactions are not exempt from the bidding requirements of section 5-1022 of the Code.

Your second question concerns whether the competitive bidding requirements apply to services purchased on a yearly

basis, but which are renewable. The example of such services which you have given is liability and health insurance. This question should be considered in two parts, the first dealing with renewable contracts in general, and the second dealing with insurance purchases.

Initially, section 5-1022 does not contain any exception for the renewal of a year to year contract for goods or services to which competitive bidding requirements would otherwise apply. If each contract was for an amount less than $10,000, then the reasoning set out above concerning the accumulation of purchases would be applicable. Provided that the contracts are separate, competitive bidding requirements would not be required for each renewal under $10,000. If, however, each separate contract or renewal was for an amount greater than $10,000, the bidding requirements of section 5-1022 would apply each year. Each renewal would constitute a "purchase * * * of services, materials, equipment or supplies in excess of $10,000 * * *", because each renewal results in a new contract for the purpose of incorporating any new statutory provision. (Thieme v. Union Labor Life Ins. Co. (1956), 12 Ill. App. 2d 110.) Accordingly, each renewal would have to be rebid.

The second issue is whether section 5-1022 applies to a county's purchase of insurance generally. There are specific statutory provisions permitting counties to purchase group life, health, accident, hospital and medical insurance (Public Act 86-962, effective January 1, 1990, to be codified at Ill. Rev. Stat., ch. 34, par. 5-1069) and liability insurance (Ill. Rev. Stat. 1987, ch. 85, par. 9-103). It is not clear from either of these statutes or the provisions of section 5-1022 whether insurance policies constitute "services, materials, equipment or supplies * * * other than professional services," to which the bidding provisions apply. Some courts have concluded that they are not. For example, in Lynd v. Hefferman (1955), 286 A.D. 597, 146 N.Y.S.2d 113, a section of the city charter required that all contracts exceeding $1,000 be let to the lowest responsible bidder, after published notice. An insurance policy was procured by negotiations with a broker without letting bids. The court held that neither the charter section nor a similar provision of the general municipal law applied to the purchase of insurance, stating:

> "* * * the relationship between a competent insurance broker and his client is a relationship of personal trust and confidence. The contract with

> the broker calls for the rendition of personal services of a type uniformly held to fall outside the scope of competitive bidding requirements."

The Lynd court relied, in part, on an earlier Pennsylvania case, London & Lancashire Indem. Co. v. Upper Darby Twp. (Pa. 1937), 28 Del. Co. 223, 30 Munic. L.R. 129, which held that a statute requiring that all contracts or purchases made by a township involving more than a specified amount be awarded by competitive bidding did not apply to the purchase of insurance. The court compared the services of an insurance broker to those of an architect, stating that competitive bidding requirements generally do not apply to such services.

There are also, however, judicial decisions which have taken a contrary view. In Austin v. Housing Authority of the City of Hartford (1956), 143 Conn. 338, 122 A.2d 399, the court held that a statute requiring competitive bidding on "[a]ll 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.

More recently, in State v. Roth, No. 1326, slip op. (Ohio App., October 5, 1984), the Ohio appellate court affirmed the 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. The category of insurance broker was not among the professions named in an exception to the statute. The court held that the commissioner's non-compliance with the statute was a reckless failure to perform a duty expressly imposed by law and was constitutional grounds for application of the dereliction of duty statute.

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 and London & Lancashire Indem. Co. v. Upper Danby 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, 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.

Your third inquiry concerns the application of the competitive bidding requirements of section 5-1022 to the purchase of certain "specialty items". The examples which you have given include the purchase of election supplies and the procurement of voter registration services, and the upgrading of computer software for an existing system. There is authority in Illinois for the proposition that these types of purchases do constitute professional services for purposes of exceptions to competitive bidding statutes.

In Hassett Storage Warehouse v. Board of Elections (1979), 69 Ill. App. 3d 972, 982, which involved the application of the "Municipal Purchasing Act for cities of 500,000 or more population" (see Ill. Rev. Stat. 1987, ch. 24, par. 8-10-1 et seq.) to a contract for moving and storage of voting machines and other election equipment, the court stated:

> "* * * this contract places a tremendous responsibility on the contractor for the efficient administration of the electoral process. It requires that trust and confidence be placed in the performer of the contract and requires near perfect performance under extreme time pressures. The failure of a contractor to perform his obligation properly could disenfranchise registered voters in an area and do irreparable damage to an election."

Because the performance of the contract required a high degree of confidence in the skill of the provider, the court concluded that the contract was not subject to the competitive bidding requirements of the Act.

The reasoning of Hassett can also be applied to a county's purchase of election supplies and voter registration services. Great trust and confidence must be placed in the performance of the contractor, since virtually perfect performance is required. Although the contractor is not a member of one of the recognized professions, the need for trust, confidence and belief in the ability of the person to render the services satisfactorily justifies treating the contract as one for "professional services".

Similar reasoning can also be applied to the provision of computer software services. The development of software in a form compatible with an existing computer system requires professional skill and expertise. The failure of a contractor to perform its obligation could seriously disrupt the administration of county business. Competitive bidding requirements are keyed to contracts for the furnishing of goods and services for a price or fee. Where the particular agreement is based upon the high degree of skill and expertise possessed by the contractor and involves a number of variables which must be worked out, it may be one which, by its "very nature [is] not suitable to competitive bids." (Charlton v. Champaign Park Dist. (1982), 110 Ill. App. 3d 554, 561.) For a further discussion of "professional services" exceptions in competitive bidding statutes, I refer you to opinion No. S-256, issued January 20, 1971 (1971 Ill. Att'y Gen. Op. 8), which was parenthetically cited above.

In conclusion, it appears that the purchase or renewal of insurance policies is subject to the competitive bidding requirements of section 5-1022 of the Counties Code if the contract exceeds $10,000. The requirements of section 5-1022 do not, however, appear to be applicable to regular purchases of goods under $10,000 or to the purchase of services where confidence and trust in the vendor is imperative, such as election supplies or computer software.

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

Very truly yours,

[redacted]

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Chief, Opinions Division