



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 3, 1993

Honorable Bill Turner
Brazos County District Attorney
Brazos County Courthouse
300 East 26th Street, Suite 310
Bryan, Texas 77803

Letter Opinion No. 93-73

Re: Whether a home-rule city may give a preference to a local engineering firm in awarding a contract for professional engineering services (RQ-574)

Dear Mr. Turner:

You ask whether a home-rule city may give a preference to a local firm in awarding a contract for professional services. You explain that a local engineer has requested that the City of College Station (the "city") give preference to local engineering firms when awarding professional services contracts. You believe that to award a contract for professional services solely on the basis of a local preference would violate the Professional Services Procurement Act, article 664-4, V.T.C.S. (the "act"). We agree.

The City of College Station is a home-rule city. The Texas Constitution grants such cities all the power of self-government not *expressly* denied them by the legislature. Tex. Const. art. XI, § 5; *Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490-91 (Tex. 1993). The Texas Constitution prohibits a home-rule city from enforcing any legislation inconsistent with state laws or the state constitution. Tex. Const. art. XI, § 5; *Dallas Merchant's & Concessionaire's Ass'n*, 852 S.W.2d at 491 (citing *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982), *cert. denied*, 459 U.S. 1087 (1982)).

The act prohibits a municipality from contracting for or engaging the services of a registered engineer on the basis of competitive bids. V.T.C.S. art. 664-4, § 3. Rather, a municipality is required to select and award such contracts or engage such services "on the basis of *demonstrated competence and qualifications for the type of professional services to be performed, and at fair and reasonable prices . . .*" *Id.* Section 3A of the act sets forth a specific, two-step process for negotiating the procurement of architectural and engineering services. First, the initial selection must be based on "the demonstrated competence and qualifications" of the person who is to provide the services. *Id.* § 3A(a)(1). Second, after the entity has made its selection, "it shall proceed to negotiate a contract at a fair and reasonable price." *Id.* § 3A(a)(2). "If the entity is unable to negotiate a satisfactory contract with the most highly qualified person, the entity shall formally end negotiations with that person and begin negotiations with the second most highly qualified person." *Id.* § 3A(b). The act requires that "[n]egotiations . . . be undertaken in this sequence until a contract is made." *Id.* § 3A(c).

Section 3A of the act requires a municipality to initially select an engineer on the basis of "demonstrated competence and qualifications" alone. It does not permit a municipality to select an engineer on the basis of any other criteria, including geographical location. This is underscored by subsection (b) of section 3A which provides that if a municipality is unable to negotiate a contract at a "fair and reasonable price" with the most highly qualified person, *i.e.*, the person who is the most competent and qualified, it must then negotiate with the "second most highly qualified person." Clearly, the act does not permit a municipality to take into account geographical location in selecting an engineer in any phase of the process. Therefore, we conclude that the act prohibits a home-rule city from giving a preference to a local engineering firm in awarding a contract for professional engineering services.

S U M M A R Y

The Professional Services Procurement Act, article 664-4, V.T.C.S., prohibits a home-rule city from giving a preference to a local engineering firm in awarding a contract for professional engineering services.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee