



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 10, 1997

The Honorable Tom Maness
Criminal District Attorney
Jefferson County Courthouse
1001 Pearl Street, Third Floor
Beaumont, Texas 77701-3545

Letter Opinion No. 97-031

Re: Whether loading and unloading contracts for
the Ports of Beaumont and Port Arthur must be
competitively bid (ID# 39385)

Dear Mr. Maness:

You have asked, on behalf of the Navigation Districts of the Ports of Port Arthur and of Beaumont (the "ports"), whether the ports must use competitive bidding procedures when contracting for labor, equipment, and pallets necessary for loading and unloading freight at their wharves ("loading and unloading contracts"). The question appears to be whether the loading and unloading contracts may be exempt from competitive bidding as contracts for personal or professional services. While this office does not interpret particular contracts in the opinion process, we can advise you in more general terms. A contract by which an entity agrees to provide employees who will engage in loading and unloading freight is not a contract for personal services. A contract for the loading and unloading of freight is not a contract for professional services, even though it may involve ancillary clerical services performed by an accountant.

As you inform us, both ports have adopted and are therefore bound by Water Code chapter 60, subchapter N. Subchapter N requires competitive bidding "[i]f the materials, supplies, machinery, equipment, or other items to be purchased or contracted for exceed \$25,000 . . ." Water Code § 60.404(a). "Item" for these purposes is defined by the statute to include "service." *Id.* § 60.402(5). Section 60.412 lists the exemptions to competitive bidding, the only one of which appears relevant being section 60.412(a)(4), "a personal or professional service."

A series of decisions of this office have attempted to define the scope of personal and professional services. Two, Attorney General Opinion MW-344 and Attorney General Opinion JM-486, appear to us to answer the question of whether this sort of contract is one for "personal services" in the negative. In Attorney General Opinion MW-344, this office held that the services of a container terminal operator on the Galveston wharves were not personal or professional services, and must be competitively bid. Attorney General Opinion MW-344 (1981). Attorney General Opinion JM-486, in discussing janitorial services, sets forth the distinction between "services" and "personal services":

Someone who claims to have rendered "personal services" must have performed the services himself. The claimant's employees, in contrast, may have rendered "services." If the contract you ask about requires a specific person to perform janitorial services, it is a contract

for personal services. If the contract merely requires a person or a corporation to provide persons who will provide janitorial services, it is not a contract for personal services.

Attorney General Opinion JM-486 (1986) at 1 (emphasis added).

A brief submitted in response to this opinion request suggests that Attorney General Opinions MW-344 and JM-486 are somehow distinguishable from this case. In our view both opinions are on point. Operating the wharves in Galveston appears to us little different from loading and unloading cargo in Beaumont and Port Arthur. The legal principle of Attorney General Opinion JM-486 applies in this context. A contract to provide people to load and unload ships is not a personal services contract.

Nor is a loading and unloading contract a contract for professional services. This office has also had occasion to define the term "professional services" in prior opinions. In Attorney General Opinion JM-940, we noted that

it comprehends labor and skill that is "predominately mental or intellectual, rather than physical or manual." . . . It no longer includes only the services of lawyers, physicians, or theologians, but also those members of disciplines requiring special knowledge or attainment and a high order of learning, skill, and intelligence.

Attorney General Opinion JM 940 (1988) at 3 (citation omitted).

Difficult and dangerous though the loading and unloading of cargo may be, it is not primarily mental or intellectual labor, and does not require the kind of special knowledge and high order of learning implied by this definition. Accordingly, a contract for the provision of labor to load and unload cargo is not a contract for professional services.

The brief submitted in response to this question also suggests that one of the loading and unloading contracts "includ[es] accounting services" in its contemplated clerical work. The argument suggested, though not explicitly framed by this assertion is that, since the provision of accounting services may not, pursuant to chapter 2254 of the Government Code, be competitively bid, the loading and unloading contract in question is, at least to the extent it includes such services, a professional services contract. As we have noted, we do not construe particular contracts in the opinion process. However, in our view the implicit argument here is without merit.

The contract at issue, as we understand it, is a contract to load and unload cargo. In the process of such loading and unloading, a certain amount of clerical work must be done and reviewed. It may be expedient, in the review of the necessary clerical work, for the contractor to use the services of an accountant. Generally, a contract for accounting services, like other contracts for certain professional services, is not only exempt from competitive bidding, but rather under chapter 2254 of the Government Code is prohibited from being competitively bid by a governmental entity.

But a contract of the sort we have just described, in which certain ancillary functions may be performed by an accountant, is not a contract for accounting services.

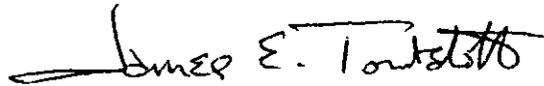
In the execution of large public contracts, it is conceivable that the services of many professionals might be useful--a company doctor, for instance, to treat injuries on a building site, or a company lawyer to review compliance. But to assert that, because such professionals performed such ancillary services, the contract in question became a professional services contract, would allow chapter 2254 to swallow up all competitive bidding requirements. We cannot read chapter 2254 so expansively.

Accordingly, contracts for the loading and unloading of cargo are not exempt from the competitive bidding requirements of chapter 60 of the Water Code as personal or professional services contracts. If the value of such contracts exceeds \$25,000, they must be competitively bid.

S U M M A R Y

Contracts for the loading and unloading of cargo are not exempt from the competitive bidding requirements of chapter 60 of the Water Code as personal or professional services contracts. If the value of such contracts exceeds \$25,000, they must be competitively bid.

Yours very truly,



James E. Tourtelott
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Opinion Committee