

TEXAS SOCIETY OF PROFESSIONAL SURVEYORS

BOARD OF DIRECTORS MEETING
AUGUST 29, 2009
AUSTIN, TEXAS

LEGAL COUNSEL'S REPORT

Listed below are the developments/activities which have occurred since our June 13, 2009 Board of Directors Meeting.

- (1) **Sales Tax** – On November 21, 2008, the Tax Policy Division, Texas Comptroller of Public Accounts, advised TSPS that a new publication clarifying the application of sales tax to surveying services would soon be available in draft form for TSPS to review and comment. The draft "*Tax Bulletin #94-103 on Surveying Services*" was provided to TSPS on February 25, 2009. A meeting was held with the Comptroller's staff to discuss revisions on March 3, 2009. Our goal is to complete a draft which will list all taxable and non-taxable activities (with definitions) and submit the final draft to the Comptroller the week of October 12, 2009.
- (2) **Title Insurance** – The Commissioner of Insurance issued a Notice of Hearing for the 2008 Texas Title Insurance Biennial Hearing on July 22, 2008. The hearing will consist of a rulemaking phase and a ratemaking phase. The rulemaking phase, under Docket No. 2690, will be for the consideration of rules, forms, and endorsements, and related matters not having primary rate implications. The ratemaking phase, under Docket No. 2691, will be for the consideration of fixing the premium rate and other matters with direct rate implications. The scope of the hearing includes subjects and matters related to both real property title insurance and personal property title insurance. The hearing for the rulemaking phase was held on October 2, 2008. No agenda items were submitted which would have an adverse impact upon the surveying profession. At the direction of the Commissioner, the ratemaking phase of the hearing will be conducted by the State Office of Administrative Hearings. The ratemaking hearing will begin at 9:00 a.m. on September 14, 2009, and continue through September 18, 2009. Anyone who wishes to participate in the ratemaking phase must file a motion for admission as a party. TSPS filed its Motion for Admission As A Party on August 11, 2008.
- (3) **Austin Community College** – On June 29, 2009, I wrote a letter to the Austin Community College (see attached) requesting that RFQ #925-09032RW be withdrawn and that future RFQs be revised so as to comply with the requirements of the Professional Services Procurement Act. On July 14, 2009, RFQ #925-09032RW was withdrawn.

- (4) **Lusardi Construction Company** – On June 10, 2009, and August 6, 2009, I wrote letters to Lusardi Construction Company requesting that Company withdraw its invitation to “*bid*” surveying services for construction projects in Houston and San Antonio and revise future requests for proposals so as to comply with the requirements of The Brooks Act (see attached).
- (5) **Surveyors As Excavators** – Per the attached article written by Shane Neally, surveyors are classified as “*excavators*” under Texas Railroad Commission Rule §18.2.4 and therefore must comply with Chapter 251, Texas Utilities Code which provides that “*an excavator shall request the location of underground pipelines at each excavation site by giving notice to the notification center.*” The TSPS Governmental Affairs Committee will consider this issue and make recommendations to the Board of Directors at the August 29th Meeting.
- (6) **Special Session** – The First Called Session of the Eighty-First Texas Legislature convened on July 1, 2009 and adjourned *sine die* on July 2, 2009. The Texas Department of Insurance and the Texas Department of Transportation were continued in existence until September 1, 2011.

Respectfully submitted,



Mark J. Hanna
TSPS Legal Counsel

Attachments

LAW OFFICES OF
HANNA & ANDERTON

PROSPERITY BANK PLAZA
900 CONGRESS AVENUE, SUITE 250
AUSTIN, TEXAS 78701

ROBERT M. ANDERTON
MARK J. HANNA
FRANK B. WALKER

June 29, 2009

TELEPHONE: (512) 477-6200
FACSIMILE: (512) 477-1188

**VIA HAND DELIVERY,
CERTIFIED MAIL, RETURN
RECEIPT REQUESTED AND
REGULAR FIRST CLASS MAIL**

Mr. Rodney Wheeler
Purchasing Department
Austin Community College
RFQ #925-09032RW
9101 Tuscany Way
Austin, Texas 78754

Re: *RFQ #925-09032RW*

Dear Mr. Wheeler:

I represent the *Texas Society of Professional Surveyors*. As you know, the Texas Professional Services Procurement Act, Chapter 2254, Subchapter A, Government Code, provides that a governmental entity may not select a provider of professional services, which includes land surveying, on the basis of competitive bids. Instead, the governmental entity must first select the most qualified provider on the basis of demonstrated competence and qualifications, and then attempt to negotiate with that provider a contract at a fair and reasonable price. If a satisfactory contract cannot be negotiated with the most highly qualified provider, the governmental entity must formally end negotiations with that provider, select the next most highly qualified provider, and attempt to negotiate a contract with that provider at a fair and reasonable price. The governmental entity must continue this process to select and negotiate with providers until a contract is entered into.

Mr. Rodney Wheeler
June 29, 2009
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However the referenced RFQ describes a two-step process for selecting a land surveying firm or team whereby Austin Community College (ACC) first (Step 1) selects up to three (3) of the top ranked qualified respondents to provide additional information for Step 2. Then (Step 2), the most qualified respondents will be asked to provide a proposal with pricing and other factors and attend an interview with the Owner (ACC) and its Evaluation Committee. The Committee will then make a final selection of the successful respondent for an award. Clearly, the two-step selection process described in RFQ #925-09032RW does not comply with the requirements of the Texas Professional Services Procurement Act as summarized above. Accordingly, a contract entered into pursuant to RFQ #925-09032RW is in violation of the Texas Professional Services Procurement Act and pursuant to Section 2254.005, Government Code, is void as against public policy.

Therefore, based upon the foregoing, we respectfully request that ACC withdraw RFQ #925-09032RW and revise future RFQs so as to comply with the requirements of the Government Code regarding the procurement of professional land surveying services. Thank you for your assistance. Please let me know how you intend to proceed.

Sincerely,



Mark J. Hanna

LAW OFFICES OF
HANNA & ANDERTON

PROSPERITY BANK PLAZA
900 CONGRESS AVENUE, SUITE 250
AUSTIN, TEXAS 78701

ROBERT M. ANDERTON
MARK J. HANNA
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June 10, 2009

TELEPHONE: (512) 477-6200
FACSIMILE: (512) 477-1188

**VIA CERTIFIED MAIL,
RETURN RECEIPT REQUESTED
AND FACSIMILE (866) 670-7072**

Lusardi Construction Company
8301 North Capital of Texas Highway
No. 175
Austin, Texas 78731

Re: *Project:* *Houston Tracon Facility*
Location: *Houston, Texas*
Description: *48K SF Terminal Radar Approach Control Facility at George Bush Intercontinental Airport. Precast concrete/steel building with a small mezzanine and corresponding site improvements.*

Dear Sir or Madame:

I represent the *Texas Society of Professional Surveyors*. As you may know, The Brooks Act (Public Law 92-582), also known as Qualifications Based Selection (QBS), establishes the procurement process by which architectural and engineering services, which includes surveying services, may be procured for design and construction contracts with federal agencies. The Brooks Act establishes a qualifications-based selection process, in which contracts for architectural, engineering, and surveying services are negotiated on the basis of demonstrated competence and qualification for the type of professional services required at a fair and reasonable price. Under QBS procurement procedures, price quotations (*i.e.*, "*bids*") may not be used in the selection process.

There are seven basic steps involved in pursuing federal design and construction work under QBS:

1. Public solicitation for architectural, engineering, and surveying services.
2. Submission of an annual statement of qualifications and supplemental statements of ability to design/construct specific projects for which public announcements were made.
3. Evaluation of both the annual and project-specific statements.
4. Development of a short list of at least three submitting firms in order to conduct interviews with them.
5. Interviews with the firms.
6. Ranking of at least three of the most qualified firms.
7. Negotiation with the top ranked firm.

However, the referenced project requires that the subcontractor submit a "bid" for the surveying services to be provided on the project. Accordingly, the process which you are using to select a firm to provide surveying services on the referenced project is not in keeping with the requirements of Federal law. Therefore, we respectfully request that you withdraw your request for bids on this project and revise future requests for proposals to comply with the requirements of The Brooks Act regarding the procurement of professional land surveying services.

Thank you for your assistance. Please let me know how you intend to proceed.

Sincerely,



Mark J. Hanna



(760) 744-3133
FAX (760) 744-9064

INVITATION TO BID

**To: Thompson Surveying Co.
Project: LACKLAND AFB, SAN ANTONIO, TX**

We are inviting you to bid the **SURVEYING** on the above referenced project.

Description: Recruit dormitory totaling 274K SF. P.I.P concrete structure on a 10 acre site. This is a prevailing wage project.

Bids are due: **August 07, 2009 at 02:00 pm**

Please confirm your interest by completing this Invitation To Bid and faxing it back to (760) 744-9064.

Plans will be available to access online at www.Bidmail.com

To view plans online please visit www.bidmail.com
Select Subcontractors, Suppliers & Vendors
Select Click here to begin accessing plans and specs online
This will take you to the Subcontractor Login Page
If you have used bidmail before enter your username and password
If you are a new user select New User? Click here to register
Complete the Subcontractor Registration Form and select Submit My Details
Bidmail will then fax you your User Id and Password for bidmail.com
You can then log-in
Once you are logged on you please select Lusardi Construction Company under Private Sector
Select Lackland AFB under Projects
You have completed the process!

Please do not hesitate to call if you have any questions. Thank you

Sincerely, **Drew Wall**
(760) 744-3133 x1718

Company Name: _____

Trade(s) Bidding: _____ Email: _____

Contact Person: _____ Phone: _____

Address: _____

Website: _____

YES WE ARE INTERSTED IN BIDDING SORRY WE ARE NOT INTERESTED IN BIDDING

Surveyors as Excavators

Did you know that you can now add another title to your business card? That title would be Excavator! Under the Texas Administrative Code Title 16, Chapter 18 applies to all persons engaged in or preparing to engage in the movement of earth in the vicinity of an intrastate underground pipeline containing flammable, toxic, or corrosive gas, a hazardous liquid, or carbon dioxide. The definition of excavate, under Rule §18.2.4, is movement of earth by any means and the definition of movement of earth, under Rule §18.2.11, is any operation in which earth, rock, or other material in the ground, any structure, or any mass of material is moved, removed, disturbed, or otherwise displaced by hand digging, mechanized equipment or tools of any kind, or explosives, and includes but is not limited to augering, backfilling, boring, cable or pipe plowing and driving, compressing, cutting, demolition, digging, ditching, dragging, dredging, drilling, grading, plowing-in, pulling-in, razing, rendering, ripping, scraping, tilling of earth at a depth exceeding 16 inches, trenching, tunneling, or wrecking.

Under these rules the simple act of driving a 24” rebar in the ground for a property corner would constitute disturbing the soil below a depth of 16” and therefore classifying surveyors as excavators when placing property monuments.

The fact that surveyors can be classified as “Excavators” under this Railroad Commission rule was recently made plainly evident when a Tyler surveyor sent his crew out to replace a front lot corner abutting a public street. As the crew member was in the process of driving a 24” iron re-bar, a natural gas distribution line was pierced at a depth of only 16”. The surveyor reported the incident to Centerpoint Energy who promptly repaired the pipeline and also billed the surveyor for the damages. At a later date the surveyor received a notice from the Texas Railroad Commission informing them that they could be fined \$1,000 for not filing a damage report as an excavator. After another period of time the surveyor was also sent a notice of a penalty amount for failure to comply with Railroad Commission rules.

This is an important issue that can affect the bottom line for Texas surveyors and the TSPS Board of Directors felt it needed to be brought to the attention of it’s membership. Since our last board meeting, Dennis Walker has been in contact with DigTess and the TRRC to find a solution to keep surveyors in compliance. The TRRC has mentioned that we can petition for an exemption to the rule for surveyors noting that other groups have already been exempted. For the time being while TSPS Legal Counsel Mark Hanna works on the exemption petition, we as surveyors need to make the call to Dig Tess or Texas 811 before setting a 24” rebar for property corner or before disturbing the earth more than 16” deep.

You can visit the Texas Pipeline Damage Prevention Program at <http://www.rrc.state.tx.us/programs/damageprevention> for more information on the State Rule and there is also a Brochure on Excavator Report Guidelines that you can download and review.