



Agenda Item: Discuss and Consider Approval of Addition of Professional Services and Legal Services Procurement Procedures to the Park Board Purchasing Policies, Procedures and Controls Manual

Background: The Park Board of Trustees of the City of Galveston (herein referred to as Park Board or Board) has developed and published a Purchasing Policies, Procedures, and Controls manual to operate efficiently and effectively. It was approved in April 2021 and recognizes existing requirements from the State law and the Board policy established through Board approval that governs different types of major purchases.

State law governs the significant parameters that control procurement by local governments in Texas. These requirements are found in Texas Local Government Code Chapters 252 and 271 and Texas Government Code Chapters 2254 and 2269. These laws control the formal bidding limits, define the basis for procuring different types of goods and services, and regulatory standards to ensure compliance with the competitive bidding laws.

Most purchases over \$50,000 are governed by State law with few exceptions. One of those exceptions is personal and professional services. Most professional service procurement falls under The Professional Services Procurement Act. However, that does not apply to attorneys and the selection of an attorney is exempt from competitive bidding requirements as a “professional service.” (See TEX. LOC. GOV’T CODE § 252.022(a)(4) ; Op. Tex. Att’y Gen. No. JM-940 at 3 (1988), MW-344(1981)).

In addition to the items exempt from Texas Local Government Code 252, legal services are exempt from the Park Board Purchasing Policy’s competitive bidding procedures. All other requirements in the policy, and by law, are still applicable. Any expenditures with a value of \$10,000 or more requires board approval, this includes legal services.

Legal and organizational changes and process improvements will bring about policy and procedural changes. Revisions will be issued as needed that reflect these changes to keep this manual current.

While legal and professional services are exempt from competitive bidding, the method for their procurement should be provided for in the Park Board’s procurement manual. During the public Board meeting held on January 24, 2023, Board directed staff draft specific procedures for soliciting and procuring professional and legal services.

Included herein is the draft Professional Services and Legal Services Procurement Procedures addition to the Park Board’s procurement policy. The procedures were developed by staff with the assistance of the City Auditor’s office. Staff is appreciative of the assistance provided by the City Auditor.

The additional procedures for procuring professional services can be summarized as follows:

No professional services will be procured by the Park Board without a written contract, agreement, or engagement letter. The contract or agreement for professional services shall contain the following:

- Scope of services, scope of work, deliverables, and/or a clear description of the services rendered and their purpose.

- A summary of cost to include hourly rates for all individuals providing the service – this can include a lump sum cost and/or hourly rates. All agreements must include a “not to exceed” amount.
- Identify the Park Board employee who will manage the contract, agreement, or engagement letter and guide the work performed under the contract, agreement, or engagement letter. And identify the contact person for the person or firm providing the professional services.
- Provide for dispute resolution.
- Include an appropriations clause.
- Provide for the regular billing for legal services rendered. Billing shall occur at least monthly.
- A termination date for the contract, agreement, or engagement letter. The contract, agreement, or engagement letter can be extended only with board approval.
- Any other items the Park Board or Park Board general counsel deem necessary.

The additional procedures for procuring legal services can be summarized as follows:

No legal services will be procured by the Park Board without a written contract, agreement, or engagement letter. The non-contingent fee contract or agreement for legal services shall contain the following:

- Scope of services, scope of work, deliverables, and/or a clear description of the services rendered and their purpose.
- A summary of cost to include hourly rates for all attorneys providing the service – this can include a lump sum cost and/or hourly rates. All agreements must include a “not to exceed” amount.
- Identify the Park Board employee who will manage the contract, agreement, or engagement letter and guide the work performed under the contract, agreement, or engagement letter. And identify the contact person for the attorney or firm providing the legal services.
- Provide for dispute resolution.
- Include an appropriations clause.
- Provide for the regular billing for legal services rendered. Billing shall occur at least monthly.
- A termination date for the contract, agreement, or engagement letter. The contract, agreement, or engagement letter can be extended with board approval.
- Any other items the Park Board or Park Board general counsel deem necessary.

Staff believes this is an example of how local governments can come together to improve processes and procedures to ensure public funds are spent in legal and appropriate ways that benefit the City, residents, and tourists.

Staff Recommendation: Staff recommends approval of the addition of Professional Services and Legal Services Procurement Procedures to the Park Board Purchasing Policies, Procedures and Controls Manual

Procurement Method – Professional Services

Local Governments are authorized to procure professional services under Chapter 2254, Subchapter A, of the Texas Government Code. The procurement of most professional services falls under the provisions of the aforementioned state law.

Professional services refer to services that are

1. within the scope of the practice, as defined by state law, of accounting, architecture, landscape architecture, land surveying, medicine, optometry, professional engineering, real estate appraising, or professional nursing;
2. provided in connection with the professional employment or practice of a person who is licensed or registered as one of the following: a certified public accountant, an architect, a landscape architect, a land surveyor, a physician, including a surgeon, an optometrist, a professional engineer, a state certified or state licensed real estate appraiser, or a registered nurse; or
3. provided by a person lawfully engaged in interior design, regardless of whether the person is registered as an interior designer under Chapter 1053 of the Occupations Code 242

Professional services procurements are usually advertised as either an RFQ or RFP. The award of a professional services contract is based on (1) demonstrated competence and qualifications to perform the services, and (2) a fair and reasonable pricing. The professional fees under the contract may not exceed any maximum provided by law.

To procure architectural, engineering, or land surveying services, the Park Board must first select the most highly qualified provider based on demonstrated competence and qualifications (this is achieved through the RFQ/RFP process), and then attempt to negotiate a fair and reasonable price for the services. If a satisfactory contract cannot be negotiated with the most highly qualified respondent, the Park Board must formally end negotiations with the respondent and then must attempt to negotiate a fair and reasonable price with the next most highly qualified respondent. This process may continue until a contract is executed for the service solicited by the Park Board. Although the described process applies to the services of an architect, engineer or land surveyor, this selection process can be used for all professional services.

A contract entered into or an arrangement made in violation of Chapter 2254, Subchapter A, of the Texas Government Code is void as against public policy.

A contract awarded for professional services totaling \$10,000 or more will be in a public meeting in accordance with Section [551.041](#) of the Open Meetings Act.

No professional services will be procured by the Park Board without a written contract, agreement, or engagement letter. The contract or agreement for professional services shall contain the following:

- Scope of services, scope of work, deliverables, and/or a clear description of the services rendered and their purpose.

- A summary of cost to include hourly rates for all individuals providing the service – this can include a lump sum cost and/or hourly rates. All agreements **must** include a “not to exceed” amount.
- All agreements must include the following statements:
 - “If the contractor performs work or provides services that if billed or invoiced to the park Board would exceed the ‘not to exceed’ amount, the contractor expressly acknowledges they will **not** be compensated for the work performed or services provided that cause the contractor to exceed the ‘not to exceed’ amount.”
 - “If the contractor anticipates that work will need to be performed or service provided that is necessary to fulfil the deliverables of the agreement and the performance of that work or rendering of that service will cause the contractor to exceed the ‘not to exceed’ amount, the contractor must seek written approval from the Park Board or their designee **before** performing the work or rendering the service, or otherwise incurring any other cost that will cause the contractor to exceed the ‘not to exceed’ amount.”
 - “Any changes in the ‘not to exceed’ amount that total \$10,000 or more **must** be approved by a vote of the Park Board of Trustees in a public meeting **before** any work is performed or service rendered by the contractor that precipitated the change in the ‘not to exceed’ amount.”
 - “Any changes in the ‘not to exceed’ amount that total less than \$10,000 **must** be approved in writing by the Chief Executive Officer **and** Chief Financial Officer of the Park Board **before** any work is performed or service rendered by the contractor that precipitated the change in the ‘not to exceed’ amount.”
- Identify the Park Board employee who will manage the contract, agreement, or engagement letter and guide the work performed under the contract, agreement, or engagement letter. And identify the contact person for the individual or firm providing the professional services.
- Provide for dispute resolution.
- Include an appropriations clause.
- Provide for the regular billing for legal services rendered. Billing shall occur at least monthly.
- A termination date for the contract, agreement, or engagement letter. The contract, agreement, or engagement letter can be extended only with board approval.
- Any other items the Park Board or Park Board general counsel deem necessary.

Other requirements for procuring professional services are as follows:

- For professional service agreements totaling \$1,000 or more in compensation for the service provider, a requisition must be entered into Abila and a Purchase Order issued by the Accounting Department **before** any work is performed or service rendered by the contractor. A copy of the Purchase Order shall be presented to the contractor **before** any work is performed or service rendered by the contractor.
- The written contract, agreement, or engagement letter must be fully executed by all parties **before** any work is performed or service rendered by the contractor.
- Apparent policy violations shall be reported to the CEO’s office. Employees guilty of violations of this policy are subject to disciplinary action, up to and including termination from employment.

Procurement Method – Legal Services

One exception to the requirements of Chapter 2254 and Chapter 252 of the Texas Government Code is legal services. The requirements of Chapter 2254 and Chapter 252 do not apply to attorneys and the selection of an attorney is exempt from competitive bidding requirements as a “professional service.” (See TEX. LOC. GOV'T CODE § 252.022(a)(4) ; Op. Tex. Att’y Gen. No. JM-940 at 3 (1988), MW-344(1981)).

While legal services are exempt from the requirements of Chapter 2254 and Chapter 252, if the contract is for a contingent fee, then the provisions of Chapter 2254.003 and 2254.1032 apply. A contingent fee contract is defined as:

Sec. 2254.101

- (1) "Contingent fee" means that part of a fee for legal services, under a contingent fee contract, the amount or payment of which is contingent on the outcome of the matter for which the services were obtained.
- (2) "Contingent fee contract" means a contract for legal services under which the amount or the payment of the fee for the services is contingent in whole or in part on the outcome of the matter for which the services were obtained. The term includes an amendment to a contract for legal services described by this subdivision if the amendment:
 - (A) changes the scope of representation; or
 - (B) may result in:
 - (i) the filing of an action; or
 - (ii) the amending of a petition in an existing action.

If a contract or agreement for legal services meets the definition of a contingent fee contract, then the requirements of Chapter 2254.003 and 2254.1032 apply. Those requirements are as follows:

Sec. 2254.1032

- (a) A political subdivision may select an attorney or law firm to award a contingent fee contract only in accordance with Section 2254.003(a) and this section.
- (b) In procuring legal services under a contingent fee contract, a political subdivision shall:
 - (1) select a well-qualified attorney or law firm on the basis of demonstrated competence, qualifications, and experience in the requested services; and
 - (2) attempt to negotiate a contract with that attorney or law firm for a fair and reasonable price.

Sec. 2254.003

- (a) A governmental entity may not select a provider of professional services or a group or association of providers or award a contract for the services on the basis of competitive bids submitted for the contract or for the services, but shall make the selection and award:
 - (1) on the basis of demonstrated competence and qualifications to perform the services; and
 - (2) for a fair and reasonable price.
- (b) The professional fees under the contract may not exceed any maximum provided by law.

Chapter 2254.1036 also provides for how a local government’s governing body must approve a contingent fee contract for legal services in an open meeting. The requirements are as follows:

Sec. 2254.1036

(a) A political subdivision may enter into a contingent fee contract for legal services only if the political subdivision:

(1) before or at the time of giving the written notice required by Section [551.041](#) for a meeting described by Subdivision (2), also provides written notice to the public stating:

(A) the reasons for pursuing the matter that is the subject of the legal services for which the attorney or law firm would be retained and the desired outcome of pursuing the matter;

(B) the competence, qualifications, and experience demonstrated by the attorney or law firm selected under Section [2254.1032](#);

(C) the nature of any relationship, including the beginning of the relationship, between the political subdivision or governing body and the attorney or law firm selected under Section [2254.1032](#);

(D) the reasons the legal services cannot be adequately performed by the attorneys and supporting personnel of the political subdivision;

(E) the reasons the legal services cannot be reasonably obtained from attorneys in private practice under a contract providing for the payment of hourly fees without contingency; and

(F) the reasons entering into a contingent fee contract for legal services is in the best interest of the residents of the political subdivision; and

(2) approves the contract in an open meeting called for the purpose of considering the matters listed in Subsection (a)(1).

(b) On approval of a contingent fee contract, the governing body of a political subdivision shall state in writing that the political subdivision finds that:

(1) there is a substantial need for the legal services;

(2) the legal services cannot be adequately performed by the attorneys and supporting personnel of the political subdivision; and

(3) the legal services cannot reasonably be obtained from attorneys in private practice under a contract providing only for the payment of hourly fees, without regard to the outcome of the matter, because of the nature of the matter for which the services will be obtained or because the political subdivision does not have funds to pay the estimated amounts required under a contract providing only for the payment of hourly fees.

It is the Park Board's policy to award non-contingent fee contracts or agreements for legal services in a public meeting in accordance with Section [551.041](#) of the Open Meetings Act, regardless of the amount of the contract.

No legal services will be procured by the Park Board without a written contract, agreement, or engagement letter. The non-contingent fee contract or agreement for legal services shall contain the following:

- Scope of services, scope of work, deliverables, and/or a clear description of the services rendered and their purpose.

- A summary of cost to include hourly rates for all attorneys providing the service – this can include a lump sum cost and/or hourly rates. All agreements **must** include a “not to exceed” amount.
- All agreements must include the following statements:
 - “If the contractor performs work or provides services that if billed or invoiced to the park Board would exceed the ‘not to exceed’ amount, the contractor expressly acknowledges they will **not** be compensated for the work performed or services provided that cause the contractor to exceed the ‘not to exceed’ amount.”
 - “If the contractor anticipates that work will need to be performed or service provided that is necessary to fulfil the deliverables of the agreement and the performance of that work or rendering of that service will cause the contractor to exceed the ‘not to exceed’ amount, the contractor must seek written approval from the Park Board or their designee **before** performing the work or rendering the service, or otherwise incurring any other cost that will cause the contractor to exceed the ‘not to exceed’ amount.”
 - “Any changes in the ‘not to exceed’ amount that total \$10,000 or more **must** be approved by a vote of the Park Board of Trustees in a public meeting **before** any work is performed or service rendered by the contractor that precipitated the change in the ‘not to exceed’ amount.”
 - “Any changes in the ‘not to exceed’ amount that total less than \$10,000 **must** be approved in writing by the Chief Executive Officer, Chief Financial Officer, and General Counsel of the Park Board **before** any work is performed or service rendered by the contractor that precipitated the change in the ‘not to exceed’ amount.”
- Identify the Park Board employee who will manage the contract, agreement, or engagement letter and guide the work performed under the contract, agreement, or engagement letter. And identify the contact person for the individual or firm providing the professional services.
- Provide for dispute resolution.
- Include an appropriations clause.
- Provide for the regular billing for legal services rendered. Billing shall occur at least monthly.
- A termination date for the contract, agreement, or engagement letter. The contract, agreement, or engagement letter can be extended only with board approval.
- Any other items the Park Board or Park Board general counsel deem necessary.

Other requirements for procuring professional services are as follows:

- All legal service agreements must be approved by a vote of the Park Board of Trustees in a public meeting **before** any work is performed or service rendered by the contractor, regardless of the amount to be paid to contractor.
- For legal service agreements totaling \$1,000 or more in compensation for the service provider, a requisition must be entered into Abila and a Purchase Order issued by the Accounting Department **before** any work is performed or service rendered by the contractor. A copy of the Purchase Order shall be presented to the contractor **before** any work is performed or service rendered by the contractor.
- The written contract, agreement, or engagement letter must be fully executed by all parties **before** any work is performed or service rendered by the contractor.
- Apparent policy violations shall be reported to the CEO’s office. Employees guilty of violations of this policy are subject to disciplinary action, up to and including termination from employment.