



CITY OF JONESBORO

Honorable members of the Jonesboro City Council:

I am returning ORD-18-060 unsigned. Although I appreciate the work done by various people on this issue, the ordinance would violate state law in at least three important provisions. I cannot ask our staff or the Council to carry out such an ordinance so I am vetoing it.

The City Attorneys of Jonesboro and the General Counsel for the Arkansas Municipal League have both advised against the actions that would take place under ORD-18-060, and I am attaching copies of their written opinions. We have found since Tuesday night's action that Sections 11 and 12 of the ordinance would not comply with ACA 14-58-1001 for projects whose cost would exceed \$2 million.

Because the Arkansas Municipal League now represents the City of Jonesboro on insurance matters, ORD-18-060 could put the City at risk in any resulting legal actions if we go against legal advice of our counsel.

ORD-18-060 would also take away administrative authority from our professional staff and give it to the Council's Public Works Committee, a legislative body. That committee already has oversight power on such matters as the selection of professional services. ORD-18-060 would eliminate the check-and-balance system built into our government.

My Administration took positive steps last summer to correct any deficiencies in the selection processes for professional services by establishing written policies complying with state laws for all such projects. On Aug. 1 we distributed copies of four administrative policies – two for services related to construction projects (above and below \$2 million) and one each for legal services and financial services. At the same time we pointed out RES-08-016, a measure that had been devised (but never passed) in 2008 to require that all relevant materials used in the selection process be made available to the appropriate committee and the full Council. We urged the Council then and on later occasions to consider a similar measure.

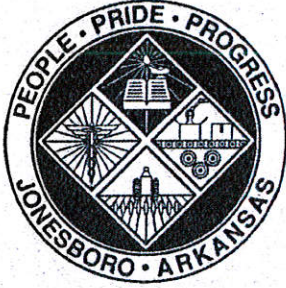
I pledge to work with the Council to find a solution that will ensure fairness and transparency while complying with applicable laws.

The selection of professional services can be handled most effectively and efficiently through administrative policies by the City's professional staff. We remain open to suggestions in regard to those written policies, and they could certainly be incorporated by reference into an ordinance or resolution. The Council's committees can and should have an oversight role in the process. But ORD-18-060 is not the answer.

Date:

2-8-19

Mayor, City of Jonesboro, Arkansas



Carol M. Duncan
CITY ATTORNEY

Jessica Thomason
ASSISTANT CITY ATTORNEY

February 8, 2019

Honorable Mayor Harold Perrin
City of Jonesboro
300 S. Church Street
Jonesboro, AR 72401

RE: Ordinance 18-060

Dear Mayor Perrin:

As discussed previously, as well as on the Council floor, it is my position that Ordinance 18-060, as written, is not in compliance with state law. In addition, this ordinance opens the City of Jonesboro to unnecessary and possibly costly litigation.

First, Section 7 of the ordinance mandates that the City Engineer shall negotiate contracts. Negotiating contracts is a power given to the Mayor, by state law. The mayor then has the ability to select a designee who can negotiate on his behalf, but Council cannot mandate who that designee is.

Second, Section 13 removes any negotiating power given to the mayor under state law. It allows Council to give instructions for changes in a contract. This negates the Mayors authority to enter into contract, thus allowing council to dictate the terms of the contract.

Lastly, after further review, Sections 11 and 12 violate state law for projects exceeding two million dollars. State law requires a preselection committee have a minimum of three (3) persons. Ordinance 18-060 designates the City Engineer and the Public Works Committee Chair as the only members of the preselection committee. Also, state law requires that the final selection committee be comprised of the preselection committee, and that committee shall make a recommendation to the governing body after ranking. As the ordinance stands, the Public Works Committee would be ranking the professionals.

Sections of this ordinance would require city employees, under the direction of the mayor, to violate state law in order to satisfy the requirements of Ordinance 18:060. Because of the violation of state law, the City of Jonesboro would be opening itself up to litigation. As we all know, this can become very costly for the City. Should you decide to exercise your power of veto, I believe there are valid legal reasons to do so.

Thank you for your cooperation and attention to this matter.

Sincerely,

Carol Duncan
City Attorney

CD/mc

JUSTICE COMPLEX
(P) 870.932.0917 (F) 870.933.4628
410 WEST WASHINGTON, JONESBORO, AR 72401
CDUNCAN@JONESBORO.ORG
JTHOMASON@JONESBORO.ORG

JOHN L. WILKERSON
GENERAL COUNSEL
ARKANSAS MUNICIPAL LEAGUE
P. O. Box 38
301 W. 2nd Street
North Little Rock, AR 72115

Telephone: 501-978-6136
Facsimile: 501-978-6558
Email: jwilkerson@arml.org

Mary Caffee, Paralegal
Telephone: 501-978-6128
Email: mcaffee@arml.org

February 5, 2019

Via Email

RE: Proposed Ordinance 18-060

Based on recent conversations with Ms. Duncan, I understand there are discussions to create a sub-committee to review bids from contractors/builders/etc. for City projects. This sub-committee would rank bid submissions based on a set of qualifications and then send that ranking to the Mayor. The Mayor would then negotiate with the top-ranking contractor/builder/etc; but, if an agreement could not be reached, the Mayor would then negotiate with the second ranked bid, and so on. Like Ms. Duncan and I discussed several weeks ago, this appears to be allowable under the law but not necessarily the wisest course of action. Here's why:

As a fundamental matter, a city council is a legislative body, which is responsible for the passage of law. In that capacity, each council member has "legislative immunity." This means, generally speaking, a city council member is immune from suit for an action he or she took in their legislative capacity. That legislative immunity, however, does not apply to council members when they engage in non-legislative matters. A prime example is when a city council votes to terminate an employee. By doing so, the city council is acting administratively. And, because it has acted in a non-legislative capacity, each council member loses its legislative immunity and is subject to suit for wrongdoing as part of the termination. One quick point, legislative immunity is not the same as absolute immunity. Cities and city officials do not have absolute immunity; the focus of this letter is on the waiving of legislative immunity.

I am fairly certain the waiving of this legislative immunity would occur in situations like the one being proposed. Please do not misunderstand, I am not saying that any lawsuit would be successful; I am only saying that city council members serving on the subcommittee would lose their legislative immunity and would thus be subject to a lawsuit. As you know, a contractor/builder who does not get the contract can sue and claim that all sorts of wrongdoing prevented him or her from getting that contract. In situations where the council members had no role in the granting of that contract, which



City of Jonesboro

300 S. Church Street
Jonesboro, AR 72401

Signature Copy

Ordinance: O-EN-008-2019

File Number: ORD-18:060

Enactment Number: O-EN-008-2019

AN ORDINANCE TO PROVIDE FOR TRANSPARENCY AND ACCOUNTABILITY IN THE SELECTION OF PROFESSIONAL ARCHITECTS, ENGINEERS, AND SURVEYORS AND AWARDING OF CONTRACTS FOR CITY OF JONESBORO PROJECTS AND FOR OTHER PURPOSES.

Whereas, The City of Jonesboro throughout any given year uses the services of professional architects, engineers, and surveyors for various projects and capital improvements that benefit the citizens of Jonesboro and visitors to the City. The purpose of this Ordinance is to provide accountability and transparency concerning the selection process for professional services and transparency by the City in awarding of work orders, notices to proceed, or formal contracts.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF JONESBORO, ARKANSAS THAT:

Section 1: Professional services are set out in Ordinance No. 17:072 in Section 2-576 (a).

Section 2: The City of Jonesboro shall request annually from all Architects, Engineers, and Surveyors (hereafter referred to as Professional Service Providers or PSP) a Letter of Interest in being selected for projects that require these professional services. A Letter of Interest shall be published in the Jonesboro Sun and any other publication which the Purchasing Department deems appropriate for giving notice of City projects and the City's need for the above professional services.

Section 3: The request for a Letter of Interest shall be published one time. The first insertion shall be scheduled annually for the second week of December in each year.

The Letter of Interest shall advise Professional Service Providers in the fields of architecture, engineering, and surveying to submit a Statement of Qualifications (SOQ). At a minimum the Statement of Qualifications shall contain the following information:

- a) A copy of a professional license for each licensed person, if more than one licensed professional;
- b) Proof of professional liability insurance;
- c) Proof of worker's compensation insurance;
- d) The number of associates and the duties and qualifications of support associates
- e) A current biography on each licensed professional setting out the professional's experience, education, and training.
- f) A current list of all projects over the previous two years and summary of the type of project, the total project cost, the completion date of each project, and the owner of the project, including

address and telephone number.

- g) The location of the Professional Service Provider's home office and professional license holders and familiarity with the City of Jonesboro.

Section 4: All Statement of Qualifications shall be submitted by all interested Professional Service Provider's by February 1 of each year. The names of all Professional Service Providers which are received shall be listed in alphabetic order by the Purchasing Department for the City of Jonesboro and this list of Professional Service Providers by profession shall be distributed to the Mayor, City Council, Department Directors, and be included on the City's web-site. All Statement of Qualifications shall be open to the public for review under the Arkansas Freedom of Information Act (FOIA).

Section 5: All City of Jonesboro projects which require professional services as set out above when the professional services fee or the City project shall not exceed the total cost to the City of \$5,000.00 shall not come within the provisions of this Ordinance and shall be awarded or constructed thru the administrative procedures established by the Mayor's office.

Section 6: All City of Jonesboro projects which require professional services estimated to cost \$5,001.00 to \$20,000.00 for the required professional service as determined by the Department of Engineering which shall be referred to as an "On Call Project" or OCP.

Section 7: The Department of Engineering shall provide the necessary information required for responses to an On Call Project. The City engineer or his designated representative shall select from the current Statement of Qualifications list three Professional Service Providers for the On Call Project. The City Engineer shall submit the three names chosen to the Public Works Committee who shall review the names submitted and rank the Professional Service Providers one through three by a majority vote of the member in attendance at a regular or called meeting.

The Public Works Committee shall submit the names as ranked back to City Engineer who shall negotiate a contract or purchase order with the Professional Service Providers according to their ranking. If the City Engineer cannot negotiate a contract with the first ranked person or company, he shall go to second ranked person or company. If the City Engineer cannot negotiate a contract with the second ranked person or company, he shall go to the third ranked person or company. If a contract cannot be obtained with the third ranked persons or companies, then the Engineering Department shall re-evaluate the On Call Project and re-submit as provided for in this section.

Section 8: The evaluation of Statements of Qualifications shall be governed by the following factors which shall be considered by the Public Works Committee.

EVALUATION FACTORS FOR PROFESSIONAL SERVICES WITH MAXIMUM POINTS POSSIBLE FOR EACH FACTOR:

- A. The specialized experience and technical competence of the Professional Service Providers with respect to the type of professional services required; (10 Points)

- B. The capacity and capability of the Professional Service Providers to perform the work in question, including specialized services, within the time limitations fixed for the completion of the project; (10 Points)
- C. The past record of performance with respect to such factors as control of costs, quality of work, and ability to meet schedules and deadlines; (10 Points)
- D. The Professional Service Providers proximity to and familiarity with the area in which the project is located. Location of home, office and staff to be assigned to the project; (10 Points)
- E. Professional staff including the education, experience, number of personnel available and any partnerships with sub-contractors. Size is not the sole criteria.. (10 Points)
- F. General and professional reputation, including responsiveness to civil rights and equal employment opportunity requirements; (10 Points)
- G. Past work performance in the City; (15 Points)
- H. Experience with projects of a similar nature as those advertised. (25 Points)

TOTAL OF 100 POINTS POSSIBLE

Section 9: City of Jonesboro projects which require professional services estimated to cost \$20,001.00 or more for the required professional service as determined by Department of Engineering shall be governed by the following sections.

If a Request for Proposal shall not be determined to be necessary by the Engineering Department, the Engineer or his designee and the Chairman of the Public Works Committee or his designee shall select not more than five qualified and appropriate Statement of Qualifications for the proposed project. The five Statements of Qualifications selected shall be submitted to the Public Works Committee who shall determine the three best qualified Professional Service Providers. The Public Works Committee at a regular or a called meeting shall after reviewing the Statements of Qualifications received shall determine the top three and shall rank the Professional Service Providers one thru three. The top three Professional Service Providers shall then be sent to the City Engineer and the Mayor to negotiate a contract.

Section 10: Shall be revised as follows: However, if necessary due to the type of proposed project or due to the complexity of the proposed project or due to other factors, the Engineering Department determines it shall be prudent and necessary to prepare a Request for Proposal. The Request for Proposal shall include a detailed description of the proposed project, the scope of work to be provided, the location of any plans and/or specifications for a project, the proposed time frame for commencing and concluding the project, a request for a detailed work plan compliant with the project scope, a list of any concerns associated with the project scope, the Professional Service Provider's organizational chart identifying key personnel by name and title, a completed SF 330 form and, if desired, identification that the Professional Service Provider is requesting special consideration as a Disadvantaged Business Enterprise as defined under law, and any

other information deemed necessary by the engineering department, and lastly the time frame for each Professional Service Provider to submit its' response to the Request for Proposal to the engineering department.

The Request For Proposal shall be published in the local paper, sent to all appropriate Professional Service Providers listed on the current Statement of Qualifications, the City's web-site, and, if necessary, in an appropriate professional journal for no less than two times for two consecutive weeks. The timeframe for responses to a Request For Proposal shall be determined by the scope of the overall project but not less than 14 business day. All responses shall comply with the required information requested in the Request for Proposal.

Section 11: After submission of all Request for Proposal's each shall be reviewed by the Engineering Department for technical compliance and the Engineer or his designee and the Chairman of the Public Works or his designee shall select not more than five Professional Service Providers who submitted complaint Request for Proposal to the Public Works Committee. The Public Works Committee shall review each compliant Request for Proposal which was submitted before selecting the top three Professional Service Providers.

Section 12: In determining the top three Professional Service Providers, The Public Works Committee shall interview, at a Special meeting called by the Chair, the top Professional Service Providers prior to ranking the top three Professional Service Providers.

The Public Works Committee shall after interviewing the Professional Service Providers, select the top three Professional Service Providers by a majority vote of Public Work Committee's members in attendance. The top three ranked Professional Service Providers shall be sent by the Public Works chairperson to the Engineering Department and to the Mayor to negotiate a contract.

Section 13: The Mayor with the assistance of any City employee shall negotiate a contract with the top ranked Professional Service Providers and if the negotiations are not successful shall end negotiations with the top ranked Professional Service Providers and commence negotiations with the second Professional Service Providers and if the negotiations are not successful shall end negotiations with the second ranked Professional Service Providers and commence negotiations with third ranked Professional Service Providers and if negotiations are not successful shall end negotiations and shall request the Public Works Committee to review any remaining Professional Service Providers who had submitted a compliant Request For Proposal and forward a new list of Professional Service Providers ranked to the Engineering Department and Mayor.

The Mayor shall with the assistance of any City employee negotiate a contract in the same manner as set out in the above paragraph. If no contract has been successfully negotiated, The Mayor shall advise the Engineering Department and the City Council that negotiations have been unsuccessful, and the Engineering Department shall re-evaluate the project scope and other project related facts and after re-evaluation proceed to re-submit a Request for Proposal pursuant to the procedures established by this Ordinance.

If a contract is negotiated, the Mayor will have a final contract prepared and executed by the PSP. The

Mayor will advise the Public Works Committee and the City Council that a contract has been prepared and signed by the Professional Service Providers and the contract will be first reviewed by the Public Works Committee who shall forward the contract with its' recommendation to the City Council for a final vote. In the event, the contract is not approved by either the Public Works Committee or the City Council the signed contract shall be void and the contract shall be returned to the Mayor with instructions on changes to the contract or with directions to re-commence the process to select a Professional Service Provider for the project.

Section 14: All Statement of Qualifications and Request For Proposal information shall be maintained for two calendar years in the office of the City Clerk. All such information may be maintained in electronic format.

Section 15: In the event any title, section, paragraph, item, sentence, clause, phrase or word of this Ordinance is declared to be invalid or unconstitutional, such a declaration shall not affect the remaining portions of the Ordinance which shall continue in full force and effect as if the portion declared invalid or unconstitutional was not originally a part of this Ordinance.

Section 16: All laws, ordinances, resolutions, or parts of same, that are inconsistent with the provisions of this Ordinance, are repealed to the extent of any inconsistency.

PASSED AND APPROVED this 5th day of February, 2019.

_____ Date _____
Harold Perrin, Mayor

ATTEST: _____ Date _____
Donna Jackson, City Clerk