

Based on our conversation, I understand the City Council would like to create a sub-committee for the purpose of reviewing applicants for professional services for City projects. This sub-committee would then rank those applicants and then send that ranking to the Mayor. The Mayor would then negotiate with the number one ranking applicant; but, if an agreement could not be reached, the Mayor would then negotiate with number two, and so on. Like we talked about on Monday, this appears to be allowable under the law but not necessarily the wisest course of action. Here's why.

Again, 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 a 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, each council member loses its legislative immunity and is subject to suit for wrongdoing as part of the termination.

I am fairly certain this would apply to instances in which the city council involves itself in the review of applicants for professional services. As you know, an applicant who does not get the contract can sue and claim that all sorts of wrongdoing prevented him or her from getting that contract. While the city would be subject to that lawsuit, the city council members would not be individually liable both because they were not involved and because they would have legislative immunity. If the council begins to involve itself in this process, the councilmembers are opening themselves up to liability. For instance, if the subcommittee of councilmembers ranks an applicant low, and the applicant does not receive the bid as a result of that low ranking, and the applicant then sues, an individual capacity claim against the individual council members sitting on that subcommittee could exist. And, because the members were not acting in their legislative capacity, they would not have legislative immunity.

Also, I am not terribly comfortable with the council involving itself in matters reserved for the Mayor, at all. Again, while city councils have broad discretion to act as they wish, negotiating and entering into contracts are powers generally reserved for the Mayor. By involving itself so deeply in that process, I fear the council will muddle the separation of powers. For that reason, too, I do not believe that the city council involving itself in this process is wise.