



Steven L. Beshear  
Governor

Leonard K. Peters  
Secretary  
Energy and Environment Cabinet

Commonwealth of Kentucky  
**Public Service Commission**  
211 Sower Blvd.  
P.O. Box 615  
Frankfort, Kentucky 40602-0615  
Telephone: (502) 564-3940  
Fax: (502) 564-3460  
psc.ky.gov

David L. Armstrong  
Chairman

James W. Gardner  
Vice Chairman

Linda Breathitt  
Commissioner

August 2, 2013

Mr. Anthony Habermehl  
Bracken County Water District  
P.O. Box 201  
Brooksville, Kentucky 41004

Re: Water Tank Maintenance Agreement      **PSC STAFF OPINION NO 2013-008**

Dear Mr. Habermehl:

This letter responds to your letter of July 9, 2013 in which you requested an opinion regarding a proposed maintenance agreement for Bracken County Water District's water storage tanks. This opinion represents Commission Staff's interpretation of the law as applied to the facts presented, is advisory in nature, and is not binding on the Public Service Commission should the issues herein be formally presented for Commission resolution.

In your letter, you present the following facts: Bracken County Water District, a water district organized pursuant to KRS Chapter 74, owns and operates facilities that distribute water to approximately 2,489 customers in Bracken, Mason, Pendleton and Robertson counties, Kentucky.<sup>1</sup> Bracken District is considering an agreement with Leary Construction Company for a preventive maintenance program for each of its four water storage tanks. This agreement includes interior and exterior painting, repairs, annual inspection, and biennial cleaning and disinfection of tank interiors. The agreement requires an annual fee of \$8,220. The annual fee will remain \$8,220 for the first ten years of the contract and then be subject to adjustment. Under the proposal presented to Bracken District, Bracken District would enter a contract for each water storage tank.

In your letter, you inquire whether the proposed agreements require Commission approval and whether Bracken District must advertise for bids prior to awarding the contract.

As to the first question, the proposed contracts do not require Commission approval. The work to be furnished under the proposed agreements does not involve the construction of new utility facilities or the installation of new equipment. Accordingly, KRS

---

<sup>1</sup> *Annual Report of Bracken County Water District to the Kentucky Public Service Commission for the Year Ended December 31, 2011 at 5, 27.*

Mr. Anthony Habermehl

August 1, 2013

Page 2

278.020(1)<sup>2</sup> does not require Bracken District to obtain a Certificate of Public Convenience before the work is performed.

Furthermore, the proposed contracts are not evidences of indebtedness and, therefore, would not require prior Commission approval pursuant to KRS 278.300(1).<sup>3</sup> They appear to be only an agreement to purchase services from another party. It does not obligate the water district to take the vendor's service for more than one year, but permits Bracken District to renew the contract price at a guaranteed price annually. Bracken District may terminate the contract at the end of the one-year period by failing to pay annual fee for the next annual term.

As to the second question, KRS 424.260(1) requires Bracken District to advertise for bids prior to contracting for the service. It provides:

Except where a statute specifically fixes a larger sum as the minimum for a requirement of advertisement for bids, no city, county, or district, or board or commission of a city or county, or sheriff or county clerk, may make a contract, lease, or other agreement for materials, supplies except perishable meat, fish, and vegetables, equipment, or for contractual services other than professional, involving an expenditure of more than twenty thousand dollars (\$20,000) without first making newspaper advertisement for bids.

The proposed transaction involves an expenditure of more than \$20,000 and is for contractual services that are not professional in nature.

While the amount of each contract is below the \$20,000 threshold, the total annual payment for the four contracts is \$32,880.<sup>4</sup> Bracken District has indicated that Leary Construction Company's offer is conditioned upon the water district entering maintenance

---

<sup>2</sup> No person, partnership, public or private corporation, or combination thereof shall commence providing utility service to or for the public or begin the construction of any plant, equipment, property, or facility for furnishing to the public any of the services enumerated in KRS 278.010, except retail electric suppliers for service connections to electric-consuming facilities located within its certified territory and ordinary extensions of existing systems in the usual course of business, until that person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service or construction.

<sup>3</sup> No utility shall issue any securities or evidences of indebtedness, or assume any obligation or liability in respect to the securities or evidences of indebtedness of any other person until it has been authorized so to do by order of the commission.

<sup>4</sup> In your letter of July 9, 2013, you indicate that the total annual cost of the contracts will be \$36,670. The contract that the water district provided to Commission Staff indicated an annual fee of \$8,220. Commission Staff has assumed that each of the four contracts establish the same annual fee.

Mr. Anthony Habermehl

August 1, 2013

Page 3

contracts for all of its water storage tanks.<sup>5</sup> Thus, the transaction is contemplated as a single transaction, not as four transactions. Where a public entity "is prohibited from letting contracts involving an expenditure of more than a specified sum without submitting the same to competitive bidding, it cannot divide the work and let it under several contracts, the amount for each falling below the amount required for competitive bidding." OAG 84-274 (Aug. 8, 1984).<sup>6</sup>

The services that will be provided under the proposed contracts are not professional in nature and, therefore, are not exempted from KRS 424.260(1). Professional services require some degree of "scientific knowledge or professional skill such as that possessed by a lawyer, engineer, physician, artist, or court reporter." OAG 92-144 (Oct. 1, 1992).<sup>7</sup> None of the services to be provided, which include tank inspection, repairs, and painting, fall within this category.

In summary, Commission approval of the proposed contracts is not required, but Bracken District **must advertise** for bids for the proposed services.

Questions concerning this opinion should be directed to Gerald Wuetcher, Executive Advisor, at (502) 782-2590.

Sincerely,



Jeff Derouen  
Executive Director

---

<sup>5</sup> E-mail from Diana Moran, Office Manager, Bracken County Water District, to Gerald Wuetcher, Executive Advisor/Attorney, Public Service Commission (July 29, 2013, 11:03 EDT).

<sup>6</sup> See also *Bd. of Education of Floyd County v. Hall*, 353 S.W.2d 194 (Ky. 1962).

<sup>7</sup> See also KRS 274.005(2) (defining professional service as "any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and which, prior to the passage of this chapter and by reason of law or a professional code of ethics, could not be performed by a corporation" and includes "the personal services rendered by but not limited to certified public accountants, public accountants, chiropractors, osteopaths, physicians and surgeons, doctors of medicine, doctors of dentistry, podiatrists, chiropodists, architects, veterinarians, optometrists, and attorneys-at-law."