



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**WAGGONER CARR
ATTORNEY GENERAL**

October 9, 1963

Honorable Henry Wade
District Attorney
Dallas County
Dallas, Texas

Opinion No. C-156

Re: Whether the County of Dallas may hire professional services without advertising for bids and related questions.

Dear Mr. Wade:

You have requested an opinion from this office upon the following questions:

"1. May the County of Dallas hire professional services without advertising for bids?

"2. May Dallas County contract for three years for a professional service contract?

"3. Can the Commissioners' Court ratify the action of the individual members and then assume the obligation of paying for the services rendered and to be rendered as they come due in the future?

"4. If No. 3 is answered in the negative, can Dallas County pay on quantum meruit for the services rendered?"

These questions have arisen in connection with a series of events which were set forth in your letter as follows:

"In January of this year, a public spirited benefactor contacted orally one or more members of the Commissioners' Court individually, and in conversation with said members agreed to beautify certain county owned property by planting and maintaining numerous trees on same. This individual undertook this task on the erroneous assumption that the County of Dallas had officially agreed to the planting of the trees and that the County had assumed the obligation of maintaining same with a landscape architect to be agreed upon by the parties.

"Immediately thereafter, said trees were planted, and the landscape architect commenced performing his duties, under the assumption that he had a three year

contract in the sum of \$2,000.00 per year, with the County of Dallas, for his services. These professional services include spraying, trimming, replacing dead trees, watering and maintaining the beauty of the location. He has now submitted a statement for professional services rendered to date."

In regard to your first question concerning whether the County of Dallas may hire professional services without advertising for bids, the provisions of Section 2 of Article 2368a, Vernon's Civil Statutes, should be noted, and the pertinent portions are set forth as follows:

"No county, acting through its Commissioners Court . . . shall hereafter make any contract calling for or requiring the expenditure or payment of Two Thousand (\$2,000.00) Dollars or more out of any fund or funds . . . without first submitting such proposed contract to competitive bids. . . . Provided, that in case of public calamity . . . this provision shall not apply; and provided further, that it shall not be applied to contracts for personal or professional services. . . ." (Emphasis added).

In Attorney General's Opinion No. R-2315 (1951), this office had before it the validity of a contract for engineering services relating to county roads which was let by the Commissioners' Court without competitive bids, and in such opinion it is stated that:

". . . even before Article 2368 was superseded by Article 2368a, which expressly provides that the bidder requirements 'shall not be applied to contracts for personal or professional services,' it was held that contracts involving special skill and experience were not within the contemplation of the statute requiring competitive bids. . . .

". . . the engineering company has contracted to perform services requiring technical skill and experience, - 'professional services.' We agree with the opinion . . . that the contract in question calls for professional services requiring technical skill and experience, that it does not fall within the competitive bid provisions of the law, and that, as such, it is expressly excepted from the competitive bid requirements of Article 2368a."

See also, Gulf Bitulithic Co. v. Nueces County, 11 S.W.2d 305 (Tex.Comm.App. 1928); Hunter v. Whiteaker, 230 S.W. 1096 (Tex.Civ.App. 1921, error ref.); Stephens County v. McCammon, 40 S.W.2d 67 (Tex.Comm.App. 1931); Stephens County v. J. N. McCammon, Inc., 122 Tex. 148, 52 S.W.2d 53 (1932); Tackett v. Middleton, 280 S.W. 563 (Tex.Comm.App. 1926). The first two cases pertain to personal services requiring special skill and experience and the last three cases pertain to professional architectural services.

The services to be performed in the posed situation, if they are not to be considered professional services, are certainly personal services requiring special skill and experience, and consequently would be the type of services exempted from the competitive bid provisions of Article 2368a.

In connection with your second question concerning whether Dallas County may enter into a three year contract for professional services, attention should be called to certain provisions contained in Section 7 of Article XI of the Constitution of Texas which provide that:

" . . . no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent (2%) as a sinking fund; . . ."

The term "debt" as used in the above quoted constitutional provision has been uniformly held by the courts of this State to mean any pecuniary obligation imposed by contract, except such as were, at the date of the contract, within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year, or out of some fund then within the immediate control of the city or county. See, Stevenson v. Blake, 131 Tex. 103, 113 S.W.2d 525 (1938); Bexar County v. Hatley, 136 Tex. 354, 150 S.W.2d 980 (1941); McNeill v. City of Waco, 89 Tex. 83, 33 S.W. 322 (1895); Foard County v. Sandifer, 105 Tex. 420, 151 S.W. 523 (1912); Attorney General's Opinion No. V-1556 (1952).

In the case of Stevenson v. Blake, 88 S.W.2d 773 (Tex.Civ.App. 1935), affirmed in Stevenson v. Blake, 131 Tex. 103, 113 S.W.2d 525 (1938), the Commissioners' Court had entered into a contract with certain attorneys and pursuant to such contract the attorneys were to perform certain duties for which they were to be compensated \$3,000.00. This sum was to

be paid in three installments. The first installment of \$1,000.00 was due shortly after the making of the contract in July of 1935; the second installment of \$1,000.00 was due in February of 1936; and the balance upon completion of the contemplated litigation.

The court in Stevenson v. Blake, 88 S.W.2d 733 (Tex. Civ.App. 1935), in holding the contract invalid as being in contravention of the constitutional restriction found in Section 7 of Article XI of the Constitution of Texas stated that:

" . . . the validity of such contract is determinable by the good-faith intention of the parties, at the time of contracting, as to whether the county's obligation is, upon the one hand, to be paid out of unappropriated revenues then in hand or to be collected during the year of the contract, and lawfully available for the purpose, or, upon the other hand, out of revenues to be collected after the termination of that fiscal year. In the first case, the contract does not contravene the constitutional limitation; in the second, it does."

As the contract in the instant situation calls for annual payments over a period of three years, and would not be payable solely out of current revenues, we are of the opinion that such a contract would be invalid unless the constitutional restrictions found in Section 7 of Article XI of the Constitution had first been complied with.

In regard to your question concerning whether the Commissioners' Court can ratify the action of the individual members and then assume the obligation of paying for the services rendered and to be rendered as they become due in the future, it is stated in 15 Tex.Jur.2d, Counties, Section 96, page 322, that:

"A contract the commissioners' court has authority to make may be binding by virtue of subsequent acts of the court, although the agent making it had no authority to enter into it. Thus where the commissioners' court, with knowledge of the lack of authority of an agent to enter into a contract, elects to accept its benefits, it thereby ratifies the contract and the county is estopped to deny its validity. . . ."

See also, Gussett v. Nueces County, 235 S.W. 857 (Tex.Comm.App. 1921); Morrison v. Kohler, 207 S.W.2d 951 (Tex.Civ.App. 1948, error ref. n.r.e.).

In view of the foregoing authority, we are of the opinion that the Commissioners' Court could ratify the action of individual members of the Commissioners' Court if the contract so ratified is one which the Commissioners' Court had authority to make and which was not in excess of the powers of the Commissioners' Court.

Your third question being answered in the affirmative, it becomes unnecessary to answer your fourth question.

SUMMARY

The County of Dallas may hire professional services without advertising for bids. The competitive bid provisions of Article 2368a, Vernon's Civil Statutes, exempt professional and personal services requiring technical skill and experience.

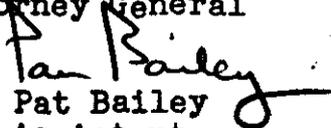
A professional service contract extending over a period of three years and not payable out of current revenues would be invalid unless the provisions of Section 7 of Article XI of the Constitution of Texas were first complied with.

The Commissioners Court may ratify the action of the individual members of the Commissioners' Court if the contract so ratified is one which the Commissioners' Court had authority to make and which was not in excess of the powers of the Commissioners' Court.

Yours very truly,

WAGGONER CARR
Attorney General

By


Pat Bailey
Assistant

PB:wb

APPROVED:

OPINION COMMITTEE

W. V. Geppert, Chairman

Faul Phy

William Allen

H. Grady Chandler

APPROVED FOR THE ATTORNEY GENERAL

EY: Stanton Stone