



**THE ATTORNEY GENERAL
OF TEXAS**

September 12, 1988

**JIM MATTOX
ATTORNEY GENERAL**

Mr. Murray Watson, Jr.
General Counsel
Texas State Technical Institute
P. O. Box 1308
Waco, Texas 76703

LO-88-104

Dear Mr. Watson:

Because of the tremendous increase in the volume of requests for opinions and open records decisions, we are responding to your request with the enclosed Letter Opinion or Open Records Ruling. A Letter Opinion or Open Records Ruling has the same force and effect as a formal Attorney General Opinion or Open Records Decision, and represents the opinion of the Attorney General unless and until it is modified or overruled by a subsequent Letter Opinion or Open Records Ruling, a formal Attorney General Opinion or Open Records Decision, or a decision of a court of record.

Very truly yours,

A handwritten signature in cursive script that reads "Jim Mattox".

J I M M A T T O X
Attorney General of Texas

JAM/er
Enclosure



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

September 12, 1988

Mr. Murray Watson, Jr.
General Counsel
Texas State Technical Institute
P. O. Box 1308
Waco, Texas 76703

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Dear Mr. Watson:

The Board of Regents of the Texas State Technical Institute has requested an opinion about a lease transaction between TSTI and a tenant of some of the Institute's property at the TSTI-Waco Airport, a part of main campus of the Institute in McLennan County.

You describe the transaction, a lease between TSTI and a private corporation, as follows:

The Board of Regents of Texas State Technical Institute declared an area adjacent to the TSTI-Waco Airport as not needed for the role and scope of the Institute, and entered into a ground lease with a tenant, Electrospace Systems, Inc. The consideration for the lease is, as best as the Board can determine, the going market rate in the area for similar type ground leases, with a built-in escalation clause for inflation. The primary term is for ten years, with two options for ten years each, (an additional twenty years) for a total of thirty years. At the end of the thirty years, all improvements on the property revert to the State and the Lessor gives to the Lessee, or its successors, an option to lease for a term of ten years all improvements at the market rate for similar improvements, at the date of the exercise of the option.

The Lessee's primary business is related to aerospace and airplanes. Electrospace Systems, Inc., (ESI), the Lessee, is a U.S.

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Government modifications contractor. The Lessee's livelihood depends upon the continued operation of the TSTI-Waco airport. The budget for the . . . Airport is set by the Institute each year. The Lessee requests that the Institute commit not only all budgeted funds, but all income that may be derived from the operation of the airport for the maintenance, upkeep and general operation of the airport throughout the term of the lease.

You ask a series of questions about the legality of these arrangements. You have furnished us with neither a copy of the actual lease nor with any of the subsidiary agreements that may be related to the lease. We are unable to construe contracts or to make findings of fact in the process of issuing legal opinions. We will, however, provide a discussion of the general principles which govern a contract of the kind you have described to us.

TSTI is governed by a board of regents specifically empowered by the legislature to "lease . . . land and permanent improvements . . . which the board determines are not necessary for the . . . operation of the institute." Educ. Code § 135.56. See Attorney General Opinion C-207 (1964).

You ask about the expenditure of "local" or "auxiliary" funds, which are fees and income of a strictly local nature. Cf. Educ. Code § 51.002.¹ The Education Code permits the Institute to retain and expend local funds "accounted for annually as provided for in the general appropriations act." Educ. Code § 54.004.

TSTI's local or auxiliary funds are state funds. See Bolen v. Board of Fireman, Policeman, and Fire Alarm Operators' Trustees, 308 S.W.2d 904 (Tex. Civ. App. - San Antonio 1957, writ ref'd); Attorney General Opinion JM-769 (1987). Article III, section 51, of the Texas Constitution prohibits the grant of public funds "to any individual,

1. Section 51.002 of the Education Code provides a definition of "local" or "auxiliary funds," but that provision is not directly applicable to TSTI. See Educ. Code §§ 51.002 and 51.008.

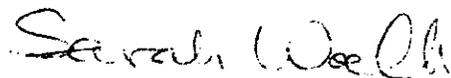
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association of individuals, municipal or other corporations." It is not unconstitutional, however, to expend public money for the direct accomplishment of a proper public purpose even though a privately-owned business may benefit incidentally from the expenditure. Barrington v. Cokinos, 338 S.W.2d 133 (Tex. 1960); State v. City of Austin, 331 S.W.2d 737 (Tex. 1960).

The legislature has delegated to the Board of Regents of TSTI the power to organize and control the institute. Educ. Code § 135.21. In our opinion, the legislature, in delegating such duties to the regents, authorizes them to determine whether any particular expenditure is for a valid public purpose. Attorney General Opinions JM-551 (1986); H-1312 (1978). See also Attorney General Opinions H-403, H-257 (1974). However, the regents may not delegate this responsibility either to a subordinate officer of the Institute or to any of the private parties with which it contracts. Attorney General Opinions H-1312 (1978); H-884 (1976). Thus, any contractual arrangements calling for an expenditure of public funds on state property leased to a private party must be specifically determined by the regents to be for a valid public purpose, and the regents must retain control over such expenditures throughout the life of the contract to insure that a public purpose is achieved. See Attorney General Opinions JM-551 (1986); MW-423 (1982); MW-373 (1981).

We also note that the contemplated contract may be for a substantial term of years. As we previously advised TSTI in Attorney General Opinion JM-394 (1985), the ability of the institute to enter into a contract is not unlimited. We have enclosed a copy of JM-394. See also Attorney General Opinion M-253 (1968) (contract made by the Board of Regents of an institution of higher education may extend beyond the terms of the regents approving such an agreement). See generally Texas Public Building Authority v. Mattox, 686 S.W.2d 924 (Tex. 1985); Attorney General Opinion M-253 (1968).

Sincerely,



Sarah Woelk, Chief
Letter Opinion Section

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A handwritten signature in black ink, reading "Rick Gilpin". The signature is written in a cursive style with a large, prominent "G".

Rick Gilpin, Chairman
Opinion Committee

Prepared by D. R. Bustion, II

SW/RG/DB/bc

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