



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 8, 1994

Ms. Nancy Braswell
Smith County Auditor
100 North Broadway, Room 107
Tyler, Texas 75702

Letter Opinion No. 94-087

Re: Whether purchases by Smith County of culverts and road sign components would run afoul of the prohibitions on separating purchases in order to avoid competitive bidding requirements (ID# 28291)

Dear Ms. Braswell:

You ask with regard to certain purchases in Smith County:

1. Whether purchases may be made without advertising for competitive bids, . . . if the "items" to be purchased are concrete culverts, polyethylene culverts and corrugated culverts, the individual cost of which will not exceed \$15,000.00 for each type of culvert. The total expenditures for all culverts, however, will amount to approximately \$40,000.00 during the county's fiscal year.
2. Whether purchases may be made without advertising for competitive bids, . . . if the "items" to be purchased are components of road signs (lettering, posts, nuts, bolts, etc.). The individual cost of each item will not exceed \$15,000.00 but the total amount for all road sign components will be approximately \$23,000.00 during the county's fiscal year.

We note that, pursuant to Government Code section 41.007, you have already obtained a legal opinion from the Smith County Criminal District Attorney on these questions. That opinion, attached to your request, indicates that, as Smith County has adopted the "Optional County Road System" under V.T.C.S. article 6702-1, sections 3.201 through 3.213, the controlling law here is section 3.211 of article 6702-1. Section 3.211 requires that all purchases of materials for county roads in amounts exceeding \$15,000 be made through competitive bids, and further provides that "[t]his section does not permit the division or reduction of purchases for the purpose of avoiding the requirement of taking formal bids on purchases that would otherwise exceed \$15,000."

The County Purchasing Act, Local Gov't Code ch. 262, subch. C, contains equivalent provisions applicable to county purchases generally. It would appear that these provisions may be read in harmony with those in article 6702-1, at least with regard to the area of your concern, which we take to be whether purchasing the items in question

area of your concern, which we take to be whether purchasing the items in question separately can be characterized as an attempt to avoid the bidding requirements. In any case, we believe that the County Purchasing Act provisions are informative to as to the intent of the counterpart provisions in article 6702-1, section 3.211.

Section 262.023(a) of the County Purchasing Act requires, as does section 3.211 of article 6702-1, that purchases in amounts exceeding \$15,000 be competitively bid, and provides in subsection (c) "all separate, sequential, or component purchases of items ordered or purchased, with the intent of avoiding the competitive bidding . . . requirements of this subchapter, from the same supplier by the same county officer, department, or institution are treated as if they are part of a single purchase and of a single contract." Section 262.022 defines "separate," "sequential," and "component" purchases respectively as purchases "made separately," "made over a period," or "of the component parts" of an item or items "that in normal purchasing practices would be purchased in one purchase." Notably, section 262.034 provides a criminal penalty for an "officer or employee intentionally or knowingly" making or authorizing "separate, sequential, or component purchases to avoid the competitive bidding requirements of section 262.023."

Having reviewed your questions, the criminal district attorney's opinion, and relevant law, we conclude that ultimate resolution of your questions would involve factual determinations. We are unable to resolve fact questions in attorney general opinions. *See, e.g.,* Attorney General Opinion DM-269 (1993). Your request does not indicate whether the concrete, polyethylene, and corrugated culverts are all to be purchased from the same supplier. Nor do you indicate whether the road sign components are all to be purchased from the same supplier. *See* Local Gov't Code § 262.023(c) (quoted above, where purchase "from the same supplier" is element of prohibition on separate, sequential or component purchases). While the criminal district attorney's brief does indicate that culvert and sign component purchases have each been budgeted by the Smith County commissioners court as "single line items" in amounts equal to those you give in your questions for the total purchases of these items, we do not believe, particularly in light of other elements of the language of the separate purchase prohibitions, discussed *infra*, that these facts are dispositive--although they may indeed be some evidence that separate purchases of the culverts and separate purchases of the sign components would run afoul of the said prohibitions.

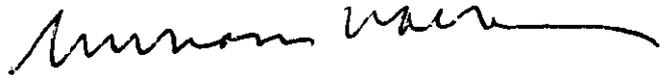
First, both the article 6702-1, section 3.211 language and that of the County Purchasing Act appear to require a culpable mental state for a purchase to fall within their prohibitions. Section 3.211 requires that the division or reduction of purchases be "for the purpose" of avoiding the bidding requirements; section 262.023 requires that the separate, sequential or component purchases be made "with the intent" of avoiding the bidding requirements. *See also id.* § 262.034 ("intentionally or knowingly"). Determining whether the requisite intent, knowledge, or purpose are present would clearly, we think, require taking of evidence and finding of fact that cannot be performed in the opinion process.

Moreover, the County Purchasing Act, at least, expressly requires a finding that purchases be ones which "in normal purchasing practices" would be made as a single purchase, for them to fall within those provisions' prohibitions on separate, sequential, or component purchases. *Id.* § 262.022(2), (7), (8). Determining what are "normal purchasing practices" with respect to particular items in particular locales would, again, require taking of evidence and finding of fact.

S U M M A R Y

Determining whether purchases by Smith County of culverts and road sign components would fall within the prohibitions in V.T.C.S. article 6702-1, section 3.211, or section 262.023 of the County Purchasing Act, on the separation of purchases to avoid the competitive bidding requirements would involve questions of fact which cannot be resolved in an attorney general opinion.

Yours very truly,

A handwritten signature in black ink, appearing to read "William Walker", with a long horizontal flourish extending to the right.

William Walker
Assistant Attorney General
Opinion Committee