



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 17, 1995

Honorable José R. Rodríguez  
El Paso County Attorney  
500 East San Antonio, Room 203  
El Paso, Texas 79901

Letter Opinion No. 95-010

Re: Scope of performance bon  
requirement for developer participatio  
contracts under chapter 212, subchapte  
C, Local Government Code, and relate  
questions (ID# 25758)

Dear Mr. Rodríguez:

You ask about the provisions pertaining to "developer participation contracts" under chapter 212, Subchapter C of the Local Government Code.

Section 212.071 of subchapter C provides:

Without complying with the competitive sealed bidding procedure of [Local Government Code] Chapter 252, a municipality with 50,000 or more inhabitants may make a contract with a developer of a subdivision or land . . . to construct public improvements, not including a building, related to the development. If the contract does not meet the requirements of this subchapter, Chapter 252<sup>1</sup> applies to the contract if the contract would otherwise be governed by that chapter. [Footnote added.]

Section 212.072 provides:

(a) Under the contract, the developer shall construct the improvements and the municipality shall participate in their cost.

(b) The contract must establish the limit of participation by the municipality at a level not to exceed 30 percent of the total contract price. The municipality is liable only for the agreed payment of its share, which shall be determined in advance either as a lump sum or as a factor or percentage of the total actual cost as determined by municipal ordinance.

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<sup>1</sup>Chapter 252 of the Local Government Code, in section 252.021, currently provides that, with certain exceptions, a municipal "contract . . . that requires an expenditure . . . from . . . municipal funds" in excess of a stated amount may not be entered into without competitive bidding. Section 252.022 sets out various exceptions to the bidding requirement; subsection (a)(11) thereof excepts from the bidding requirement "a payment under a contract . . . as provided by Subchapter C, Chapter 212." These provisions are discussed more fully in our response to your second question, *infra*.

Your specific questions pertain to the "performance bond" requirement in section 212.073 of subchapter C, which reads :

The developer must execute a performance bond for the construction of the improvements to ensure completion of the project. The bond must be executed by a corporate surety in accordance with Article 5160, Revised Statutes.

You ask if a policy of the Public Service Board (the "PSB") "to require performance bonds only on the maximum amount of the municipal contribution rather than on the total amount of the . . . project [is] in compliance with . . . [section] 212.073 and . . . art[icle] 5160." In our opinion, section 212.073 on its face precludes the construction that the required performance bond is to be only for the amount of the municipal contribution. A bond for only the portion of the project cost covered by the municipal contribution--which, under section 212.072(b), may not in any case exceed 30 percent of the contract price and for which the provisions set no minimum amount--would not "ensure completion of the project." Bearing in mind that under section 212.072 "the developer" is to "construct the improvements and the municipality shall participate in their cost," we construe the section 212.073 provisions for a bond "for the construction of the improvements" as requiring a bond sufficient to cover the total cost of the "construction of the improvements" in all developer participation contracts.

As for former article 5160, now found in section 2253.021 of the Government Code, we do not believe that its requirement that contractors on public works projects execute performance bonds only when the contracts are in excess of an amount set under that statute was meant to be applicable in the context of developer participation contracts under chapter 212, subchapter C. The language of section 212.073 referring to article 5160 itself suggests that it is the requirements of the latter regarding the "execution" of the performance bonds "by a corporate surety," rather than all its requirements, that are incorporated by reference. *See, e.g.,* Gov't Code § 2253.021(d) (referring in turn to general provisions in Insurance Code art. 7.19-1 regarding bond of surety company), (e) (form of bond and to whom bond made payable). Moreover, the threshold amounts provisions in section 2253.021 are irreconcilable with the express and unqualified requirement in section 212.073, discussed above, of a performance bond for *all* contracts under subchapter C. The latter provisions, specific to the developer participation contracts at issue here, should be taken as prevailing to the extent of any arguable conflict.

You also ask whether a failure to require a performance bond in connection with a developer participation contract "subjects all public improvements constructed under such a contract to the competitive bidding requirements of Chapter 252." We concluded above that a performance bond is required under section 212.073 of subchapter C on all developer participation contracts in order to be in compliance the subchapter. Under section 212.071, a contract not in compliance with the subchapter, such as one for which the required performance bond was not executed, is subject to the competitive bidding requirements of chapter 252 to the extent "the contract would otherwise be governed by that chapter." Chapter 252, with listed exceptions, requires compliance with its

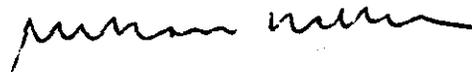
competitive bidding procedures on a "contract . . . that requires an expenditure . . . from one or more municipal funds" in excess of a stated amount. Local Gov't Code § 252.021.

It follows, in response to your question, that a "contract" not in compliance with chapter 212, subchapter C, and involving an expenditure of municipal funds in excess of the amount set out in section 252.021 must be let in compliance with the notice, bidding, and other requirements of chapter 252 unless it falls within an exception set out in the chapter. *See id.* §§ 252.041 (notice), 252.043 (award of contract in response to bids), 252.044 (contractor's bond required for expenditure of \$100,000 or more), 252.022 (various kinds of expenditures excepted from chapter 252 requirements).<sup>2</sup>

### S U M M A R Y

A developer must execute a performance bond for the total cost of improvements to be constructed pursuant to a developer participation contract under chapter 212, subchapter C, Local Government Code. The provisions of former V.T.C.S. article 5160, now chapter 2253 of the Government Code which require a performance bond on public works contracts only where the latter are in excess of stated amounts, are inapplicable to the bond requirement under chapter 212, subchapter C. If a developer participation contract does not comply with the requirements of chapter 212, subchapter C, but calls for expenditures of municipal funds in excess of the amount stated in chapter 252, Local Government Code, and is not within any of the listed exceptions to the chapters requirements, the contract must be let in compliance with the notice, bidding, and other requirements of chapter 252.

Yours very truly,



William Walker  
Assistant Attorney General  
Opinion Committee

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<sup>2</sup>While we reach our conclusion here based on what we believe to be the clear language of the relevant provisions, we note that the imposition of the requirements of chapter 252 on a developer participation contract which fails to comply with the chapter 212 performance bond requirements may have little practical effect. Even if the amount of the expenditure from municipal funds called for in such a contract exceeds the statutory threshold amount and no exceptions are found to apply so as to trigger the applicability of the chapter 252 notice and bidding requirements, it seems unlikely that anyone other than the developer would bid on such a contract under which the municipal payment will be only a portion of the total cost of the project.