



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 30, 1996

The Honorable René Guerra
Hidalgo County Criminal District Attorney
Hidalgo County Courthouse
Edinburg, Texas 78539

Letter Opinion No. LO96-117

Re: Whether a county may build a detention facility using a design/build firm to provide architectural plans and construct the facility and using an architect to oversee construction (ID# 38916)

Dear Mr. Guerra:

On behalf of the Hidalgo County Commissioners Court, you ask whether a county is authorized to build a detention facility using a design/build firm to provide architectural plans and construct the facility and using an architect to oversee construction. You do not identify the statutory framework the county intends to follow to construct the facility.

First, we examine your question assuming that the county intends to build the detention facility pursuant to its general authority to construct county buildings. You ask if the county can hire a design/build firm and an architect, who would serve as project manager, and still comply with competitive bidding procedures applicable to counties, Local Government Code ch. 262, subch. C, and the Professional Services Procurement Act, Gov't Code ch. 2254, subch. A., "even if the county architect does not design the jail, but merely provides construction oversight?"

You state that the design/build firm would "provide conceptual facility design drawings certified by an architect." The drawings you describe clearly constitute services that fall within the scope of the practice of architecture. *See* V.T.C.S. art. 249a, § 10(a) (defining practice of architecture). The Professional Services Procurement Act prohibits the county from obtaining architectural services by competitive bidding. *See* Gov't Code § 2254.003(a); *see also id.* § 2254.002(2)(A)(ii) (defining "professional services" to include services within scope of practice of architecture as defined by state law). As stated by this office in Attorney General Opinion JM-1189, "a commissioners court lacks the authority to make a contract for the construction of public works under the 'design/build' concept when the resulting contract is awarded pursuant to competitive bidding and includes architectural or engineering services as a component of the contract." Attorney General Opinion JM-1189 (1990) at 6. Thus, a county may not procure by competitive bidding a design/build contract that includes architectural services. The use of an architect, retained pursuant to the Professional Services Procurement Act to oversee construction of the project, would not cure the fact that the county obtained other architectural services, *i.e.* the certified drawings, by competitive bidding contrary to law.

You ask this office to describe a method “wherein the County can avail itself of design/build procedures and at the same time comply with the competitive bidding and professional services procurement statutes.” The project at issue involves the design and construction of a detention facility. Section 351.102 of the Local Government Code provides that a commissioners court “may contract with a private vendor to provide for the financing, design, construction, leasing, operation, purchase, maintenance, or management of a jail, *detention center*, work camp, or related facility.” (Emphasis added.) Contracts awarded under this provision must be awarded by requests for proposals. Local Gov’t Code § 351.102. In addition, the contract must be approved by the sheriff of the county, *see id.*, and comply with the requirements of sections 351.103 and 351.1035.

In Letter Opinion No. 88-10, this office considered whether the statutory predecessor to section 351.102, former article 5115d(c)¹, authorized a county to procure a contract with a private vendor using requests for proposals as opposed to competitive bidding. Unlike a statute authorizing the former Texas Board of Corrections to contract with a private vendor to construct facilities that established a request for proposals framework and thus “clearly indicated that the Texas Board of Corrections is not to be subjected to competitive bidding requirements,”² the county statute did not “attempt to set out a procedural framework.”³ The letter opinion concluded that the former article was not intended to change existing procurement requirements and that contracts under the former article had to be obtained through competitive bidding pursuant to sections 262.021 through 262.034 of the Local Government Code.⁴

In 1989, during the following legislative session, the legislature codified the former article as section 351.102 of the Local Government Code⁵ and also amended section 351.102 to provide that a commissioners court “may not award a contract under this section unless the commissioners court requests proposals by public notice and not less than 30 days from such notice receives a proposal that meets or exceeds the requirements specified in the request for proposals.”⁶ A bill analysis states that this amendment would

allow counties to award contracts pursuant to a request for proposal.
The request for proposal allows the private vendor to demonstrate to

¹Act of April 2, 1987, 70th Leg., R.S., ch. 18, § 6, 1987 Tex. Gen. Laws 47, 51, *repealed by* Act of February 21, 1989, 71st Leg., R.S., ch. 1, § 73, 1989 Tex. Gen. Laws 1, 84.

²Letter Opinion No. 88-10 (1988) at 2.

³*Id.*

⁴*Id.* at 2-3.

⁵*See* Act of February 21, 1989, 71st Leg., R.S., ch. 1, § 73(a), 1989 Tex. Gen. Laws 1, 84.

⁶Act of May 29, 1989, 71st Leg., R.S., ch. 479, § 2, 1989 Tex. Gen. Laws 1650, 1651.

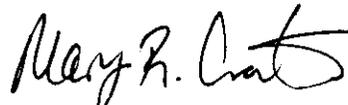
the government the most economical way to provide the necessary services. The county is afforded a greater flexibility in choosing a company that offers the best plan to meet the county's needs and to negotiate a suitable contract.⁷

Thus, we believe that the 1989 amendment exempts section 351.102 contracts from procurement procedures generally applicable to county purchases, including competitive bidding requirements and the Professional Services Procurement Act, Gov't Code ch. 2254, subch. A.⁸ Therefore, we conclude that section 351.102 authorizes a county commissioners court to enter into a design/build contract with a private vendor to design and construct a detention facility, provided that the county adheres to the section 351.102 procedures to obtain the contract and that the contract meets all statutory requirements in sections 351.102 through 351.1035.

S U M M A R Y

As a general matter, the Professional Services Procurement Act, Gov't Code ch. 2254, subch. A, prohibits a county from obtaining architectural services by competitive bidding. Therefore, a county may not procure by competitive bidding a design/build contract that includes architectural services. Section 351.102 of the Local Government Code authorizes a county commissioners court to enter into a design/build contract with a private vendor to design and construct a detention facility, however, provided that the county adheres to the statute's procedures to obtain the contract and that the contract meets all statutory requirements in sections 351.102 through 351.1035.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

⁷House Comm. on Corrections, Bill Analysis, H.B. 1992, 71st Leg., R.S. (1989).

⁸We note that section 351.102 specifically includes the term "design."