

DON STRICKLIN
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RQ 64

JOHN B. HOLMES, JR.
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

1D# 12005
SG

March 21, 1991

Honorable Dan Morales
Attorney General
State of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711

RECEIVED

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ATTN: Mr. Rick Gilpin
Chairman, Opinion Committee

Opinion Committee

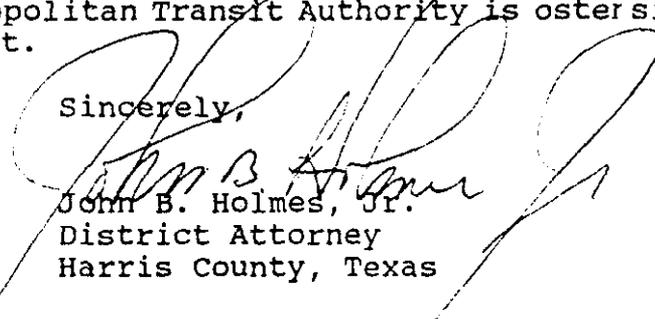
Dear Sir:

This office has received reports from more than one complainant that the Metropolitan Transit Authority of Harris County intends to issue a Request for Proposal to private industry in preparation for the award of a contract to design, build, operate and maintain a rail or fixed guideway transit system. The reports indicate that the Authority intends to award the contract by competitive negotiation with the selection being based on other factors in addition to cost. Pursuant to V.T.C.A., Government Code, § 402.043, this office is hereby requesting the written opinion of the Attorney General with regards to the following questions:

1. Does the construction of a rail, monorail or fixed guideway transit system constitute an improvement to real property?
2. Is the purchase of such a transit system subject to the competitive bid requirements of Section 14(a) of Article 1118x V.A.C.S.?

This office has briefed the questions and a copy of our memorandum of law addressing the issue is enclosed along with a copy of the opinion of the Authority's private counsel Jonathan Day. Your prompt consideration of this matter is greatly appreciated, since the Metropolitan Transit Authority is ostensibly near the award of a contract.

Sincerely,


John B. Holmes, Jr.
District Attorney
Harris County, Texas

cc: Mr. Anthony Hall
Metropolitan Transit Authority
of Harris County

ACCOMPANIED BY ENCLOSURES —
FILED SEPARATELY

MEMORANDUM OF LAW

ISSUE: 1. Does the construction of a rail, monorail or fixed guideway transit system constitute an improvement to real property?

The Metropolitan Transit Authority of Harris County, hereinafter referred to as "the Authority", exists by virtue of Tex. Rev. Civ. Stat. Ann. Art. 1118x, §14(a) (Vernon's 1975), which requires generally in Sec. 14(a) that with certain exceptions, all contracts for construction of improvements or contracts of purchase in excess of \$10,000 be awarded by competitive bid. The competitive bid requirement specifically applies to all contracts of over \$10,000 for the purchase of material, machinery, equipment supplies and all other property except real property. Section 14 exempts "personal and professional services" or "the acquisition of existing transit systems" from the operation of this section.

The Board of the Authority is empowered by said statute to provide for rules permitting a waiver of the bid requirement in the event of an emergency, or in the event the needed materials are available from only one source. The Authority is also permitted to make rules permitting the waiver of this bid requirement "in the event that, except for construction of improvements on real property, in a procurement requiring design by the supplier competitive bidding would not be appropriate and competitive negotiation, with proposals solicited from an adequate number of qualified sources, would permit reasonable competition consistent with the nature and requirements of the procurement, or in the event that, except for construction of improvements on real

property, after solicitation it is ascertained that there will be only one bidder". (emphasis added)

Obviously, whether the Authority made appropriate findings and had an appropriate factual basis for said findings would be a question of fact. To determine whether the Authority has the ability to make rules permitting the waiver of bidding requirements for the purchase of their proposed "rail" system, however, one must first address the issue of whether such contracts are contracts for the "construction of improvements on real property".

There is no statutory definition of "improvements to real property" but the term has been treated extensively in actions by tenants or trespassers to recover for "improvements" made to real property belonging to another and in the area of public improvements.

Historically the term "improvements" has been used when referring to additions to real property that are permanently affixed to the land (understanding that in this day and time nothing is "permanent") and either add value to the property or adapt the property to some particular use (42 C.J.S. Improvements § 421). This is true even though the addition is not appropriate for the use the owner wishes to make of the land (42 C.J.S. Improvements § 422).

In Nine Hundred Main, Inc., v. City of Houston, 150 S.W.2d 468, 472 (Tex. App. - Galveston 1941, writ dism'd judgment cor.), the Court, citing several cases, reasoned "that the term "improvements" comprehends all additions to the freehold, except "trade fixtures" which can be removed without injury ...". Likewise there was no

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The Texas Courts have opted, however, to treat railroad rail and crossties as personal property in several cases. In 1888, in Preston v. Sabine & E.T. Ry. Co., (70 Tex. 375, 7 S.W. 825) (1888), the Court was confronted with a landowner's attempt to recover for track laid by a railroad as a trespasser and removed by the railroad; the landowner claiming that the track was annexed to the land. In an opinion that indicates that the Court did not have time to "review the cases bearing on the question" as the end of the term was at hand, the Court held that railway constructed without authority on the land of another does not become the property of the landowner. In 1941, in Texas & N. O. R. Co. v. Schoenfeld, 146 S.W.2d 724 (Tex. 1941), the Supreme Court citing Preston, held "(T)he rule has long been established in this State that material in railroad tracks is regarded as being personal property, and in erecting spur tracks on land not owned by it, upon discontinuance of the tracks the railroad company could remove the material of which they were made. It has also been held that material in a railroad track remains personal property, and does not become a part of the underlying real estate". In 1962, the Fort Worth Court of Civil Appeals in City of Fort Worth v. Southwest Magazine, 358 S.W.2d 139 (Tex. Civ. App. - Ft. Worth 1962, writ ref'd n.r.e.), cert. denied, 372 U.S. 914 (1963), then quoted this "established" rule of law from Texas & N.O.R. Co. v.

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A careful reading of Preston demonstrates that the ruling was based in part on "Railroad Co. v. Hays, 5 Tex. Law Rev. 771", holding that a landowner was not entitled to recover for the value of a track laid by a trespassing railroad company in a subsequent condemnation action by that railroad company. In 1896, the Court of Civil Appeals in Tex. & Pac. Ry. Co. v. C.S. Hays, 3 Willson 58, (Tex. Ct. App. 1896), held that "improvements erected by a railway company on the right of way or other easement prior to condemnation do not pass as fixtures to the land, so as to be estimated as damages in condemning the land under the right of eminent domain." The Court offered the additional explanation that "(O)ur view also was that the right of the company to use the land in question being temporary, for temporary uses, the fixtures erected by it for such use would be movable, analogous to the case of a tenant under a lease, who constructs his own convenience improvements solely to enable him to enjoy the premises during the period of his lease, and that in such case the improvements would not be deemed a dedication to or improvements of the freehold." The court then held that under the facts of that particular case the temporary pumping stations erected by the railroad were improvements to the land and title passed to the owner of the land pursuant to a reversion provision governing ownership of the land. This review of the law was consistent with Tex. & Pac. Ry. Co. v. C.S. Hays, 3 Willson 58 (Tex. Ct. App. 1896), cited above wherein the Court

referred to Greve v. St. Paul & Pacific R.R. Co., 26 Minn. 66, 1 N.W. 816 (1879) as standing for the proposition "that, though the company was a trespasser because entering under a void charter, and whatever it affixed to the soil became a part of the land, and strictly belonged to the owner of the soil, yet, as in these condemnation proceedings, the question is, what is fair, just and equitable compensation to be paid to the owner for taking the land, and damages arising from the same, such owner is not entitled to have included as a part of such compensation the value added to the land by the road-bed, ties, rails, etc., placed on it by the company."

The true basis for the ruling in Preston and its progeny is the logical proposition that a trespasser who had authority to condemn the property for the public use is liable for the value of the property as it existed before the trespass and not as improved for the simple reason that the taking for the public benefit would have happened anyway and the just compensation is the value as it existed when taken. The Court of Civil Appeals in 1894, recognized this principle in International Bridge & Tramway Co. v. McLane, 8 Tex. Civ. App. 665, 28 S.W. 454 (Tex. 1894), wherein they dealt with a trespass by one without the power of eminent domain and held the bridge to be an improvement and put the bridge company in the posture of a trespasser trying to recover an improvement made in good faith.

The United States Supreme Court in Jackson v. Ludeling, 99

U.S. 513 (1878), recognized repairs made to a dilapidated railroad in Louisiana as improvements and allowed a bad faith trespasser compensation for such improvements based upon the Spanish Partidas and the Code Napoleon then in effect in Louisiana.

The Supreme Court of Texas in 1897, apparently recognized the incongruous nature of its decision in Preston that structures placed on the land did not become a part of the land and offered an appropriate explanation in City of San Antonio v. Grandjean, 91 Tex. 439, 41 S.W. 477 (Tex. 1897), "(O)rdinarily, whatever a trespasser annexes to the land of another becomes the property of the owner of the land; and hence the case of a railroad can only be distinguished upon the ground that the company had the original right to take the easement, and that the owner was merely entitled to the compensation, with the power to hold the property until the compensation should be properly assessed and paid."

This more rational reasoning was approved by the Waco Court of Civil Appeals in G.H. Nagel v. Texas Pipe Line Co., 336 S.W. 2d 265, (Tex. Civ. App. - Waco, 1960, no writ), when they held:

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The landowner, upon subsequent condemnation, is only

entitled to compensation for his land, together with the reasonable rental value of the land for the period such improvements were thereon without benefit of condemnation." (emphasis added by the Court)

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Logical analysis, therefore, suggests that both the pipeline in Nagel and the railroad in Preston were improvements, but because the respective utilities had the power of eminent domain, no title to the facility built for the public benefit passed to the landowner. Thus having addressed and recognized those cases setting forth an exception, one is still left with the general rule that items permanently affixed to the land are "improvements". The 14th Court of Civil Appeals while giving lip service to Preston thus held in Moore v. Rotello, 719 S.W.2d 372 (Tex. App. - Houston [14th Dist.] 1986, writ ref'd n.r.e.), that gravel roadbed from a railroad track was a part of the realty. Likewise, the Supreme Court in 1904 in Missouri, K. & T. Ry. of Texas v. Mott, 98 Tex. 91, 81 S.W. 285 (Tex. 1904), referred to stock pens built by a railroad as improvements.

Limited guidance in determining whether or not the construction of such a transit system is an "improvement" to real property may be found by reviewing the statutes of the State of Texas. Tex. Rev. Civ. Stat. Ann. Art. 6345 (Vernon's 1925), which deals with the authority of Railway Companies to borrow money,

Metropolitan Transit Authority being a body politic (Tex. Rev. Civ. Stat. Ann. Art. 1118x, § 6(a) (Vernon's 1975)) with power of eminent domain (Tex. Rev. Civ. Stat. Ann. Art. 1118x, § 6C(b) (Vernon's 1975)), and its exercise of power being for public purpose (Tex. Rev. Civ. Stat. Ann. Art. 1118x, § 6C(a) (Vernon's 1975)), its construction activities should be classed as public improvements. [In a similar vein, the construction of public parking facilities by municipalities has been held to be a public improvement (J.M. Amstater v. Andreas, 273 S.W.2d 95 (Tex. Civ. App. - El Paso 1954, writ ref'd n.r.e.), Navarro Auto-Park, Inc. v. City of San Antonio, 574 S.W.2d 582 (Tex. Civ. App. - San Antonio 1978, writ ref'd n.r.e.).]

2. Is the purchase of such a transit system subject to the competitive bid requirements of Tex. Rev. Civ. Stat. Ann. Art. 1118x, § 14(a) (Vernon's 1975)?

Article 1118x Sec. 14.(a) provides that "(C)ontracts for more than \$10,000 for the construction of improvements or the purchase of material, machinery, equipment supplies and all other property except real property, shall be let on competitive bids after notice published once a week for two consecutive weeks, the first publication to be at least 15 days before the date fixed for receiving bids, in a newspaper of general circulation in the area in which the authority is located. The board may adopt rules governing the taking of bids and the awarding of such contracts and providing for the

waiver of this requirement in the event of emergency, in the event the needed materials are available from only one source, in the event that, except for construction of improvements on real property, in a procurement requiring design by the supplier competitive bidding would not be appropriate and competitive negotiation, with proposals solicited from an adequate number of qualified sources, would permit reasonable competition consistent with the nature and requirements of the procurement, or in the event that, except for construction of improvements on real property after solicitation it is ascertained that there will be only one bidder. This subsection does not apply to personal and professional services or to the acquisition of existing transit systems."

The Legislature in requiring competitive bidding by the Authority exempted "existing transit systems" (Tex. Rev. Civ. Stat. Ann. Art. 1118x, § 14.(a)). Presuming that the Legislature does not do a useless act, and having previously provided that purchases of materials available from only one source are exempt (Tex. Rev. Civ. Stat. Ann. Art. 1118x, § 14.(a)) the implication is obvious that purchase of new transit systems is specifically governed by the bid requirement.

The design of any system to be purchased by the Authority must necessarily determine the type of station and terminal complexes required for such system, i.e. light rail, monorail, magnetic

levitation, "people-movers" or fixed-guideway buses. Reading all of Article 1118x supra in its entirety and specifically Sec.6C authorizing the purchase of fee simple or "easements, rights-of-way, rights of use of air space or subsurface space or any combination thereof, adjacent to or accessible to stations or other mass transit facilities, developed or to be developed by the authority, that may be required for or in aid of the development of one or more station or terminal complexes, as part of a mass transit system ..." and providing in subsection (c) of Section 6C. that "(A)ny lands or interests in land acquired for a station or terminal complex must be part of or contained within a station or terminal complex designated as a part of the system within a comprehensive transit plan ..." leads to the conclusion that purchase of any such transit system is in effect an improvement to real property and makes purchase of the entire system subject to the competitive bid requirement. Tex. Rev. Civ. Stat. Ann. Art. 1118x, § 6(c) (Vernon's 1975).

CONCLUSION

Purchase of any portion of a new transit system, which portion is affixed to the land, is an improvement to real property and as such is governed by the competitive bid requirements of Tex. Rev. Civ. Stat. Ann. Art. 1118x, § 14.(a). Purchase of any transit system that materially affects the land purchase for and design of rights-of-way and station or terminal complexes similarly is an

improvement to real property and is subject to the same competitive bid requirement.



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 10, 1991

Honorable John B. Holmes, Jr.
District Attorney
Harris County
201 Fannin, Suite 200
Houston, Texas 77002

Re: Whether construction of a rail or monorail or fixed
guideway transit system constitutes an improvement to real
property

Whether purchase of such a transit system is subject to
competition bid requirements (RQ-64)

Dear Mr. Holmes:

This will acknowledge your letter of March 21, 1991,
requesting an opinion from our office.

We have assigned your request for this opinion for study,
and as soon as the opinion has been prepared and is ready for
release, we will advise you.

By copy of this letter we are notifying those listed
below of your request and asking them to submit briefs if they
would care to do so. If you are aware of other interested
parties, please let us know as soon as possible.

Yours very truly,


Madeleine B. Johnson
Chair, Opinion Committee

MJ/SA/jn

cc: Texas Transit Association
Dallas Area Rapid Transit Board
Metropolitan Transit Authority
Texas Municipal League
Association of General Contractors
VIA Metropolitan Transit Authority

Ref.: RQ-64
ID# 12005

DON STRICKLIN
FIRST ASSISTANT



DISTRICT ATTORNEY'S BUILDING
201 FANNIN, SUITE 200
HOUSTON, TEXAS 77002

RQ 64

JOHN B. HOLMES, JR.
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HARRIS COUNTY, TEXAS

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March 21, 1991

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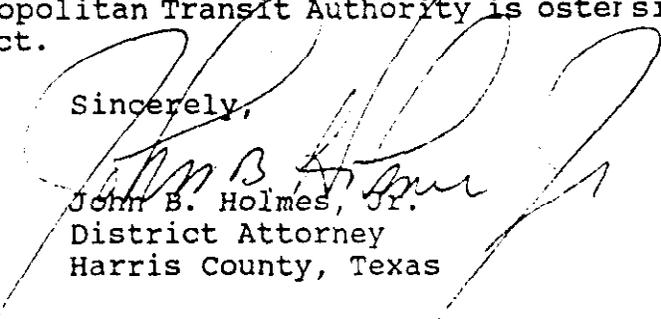
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The Legislature in requiring competitive bidding by the Authority exempted "existing transit systems" (Tex. Rev. Civ. Stat. Ann. Art. 1118x, § 14.(a)). Presuming that the Legislature does not do a useless act, and having previously provided that purchases of materials available from only one source are exempt (Tex. Rev. Civ. Stat. Ann. Art. 1118x, § 14.(a)) the implication is obvious that purchase of new transit systems is specifically governed by the bid requirement.

The design of any system to be purchased by the Authority must necessarily determine the type of station and terminal complexes required for such system, i.e. light rail, monorail, magnetic

levitation, "people-movers" or fixed-guideway buses. Reading all of Article 1118x supra in its entirety and specifically Sec.6C authorizing the purchase of fee simple or "easements, rights-of-way, rights of use of air space or subsurface space or any combination thereof, adjacent to or accessible to stations or other mass transit facilities, developed or to be developed by the authority, that may be required for or in aid of the development of one or more station or terminal complexes, as part of a mass transit system ..." and providing in subsection (c) of Section 6C. that "(A)ny lands or interests in land acquired for a station or terminal complex must be part of or contained within a station or terminal complex designated as a part of the system within a comprehensive transit plan ..." leads to the conclusion that purchase of any such transit system is in effect an improvement to real property and makes purchase of the entire system subject to the competitive bid requirement. Tex. Rev. Civ. Stat. Ann. Art. 1118x, § 6(c) (Vernon's 1975).

CONCLUSION

Purchase of any portion of a new transit system, which portion is affixed to the land, is an improvement to real property and as such is governed by the competitive bid requirements of Tex. Rev. Civ. Stat. Ann. Art. 1118x, § 14.(a). Purchase of any transit system that materially affects the land purchase for and design of rights-of-way and station or terminal complexes similarly is an

improvement to real property and is subject to the same competitive bid requirement.
