



Texas
Education
Agency

ID#12710
mjs

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AUSTIN, TEXAS 78701-1494

(512) 463-9734

June 11, 1991

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Opinion Committee

The Honorable Dan Morales
Texas Attorney General
Supreme Court Building
P. O. Box 12548
Austin, TX 78711-2548

Re: Request for Attorney General Opinions - Surety Bonds;
Handicapped Access

Dear Mr. Morales:

Enclosed please find a request by Carolyn Honea Crawford, Chairman of the State Board of Education, regarding surety bonds and handicapped access. Also enclosed is correspondence from the law firm of Grambling & Mounce on behalf of the El Paso Independent School District which provides the legal and factual background for this request.

Please send a copy of the opinion to the undersigned.

Sincerely,

Kevin O'Hanlon
General Counsel
Office of Legal Services

KO:jg

Enclosures

**ACCOMPANIED BY ENCLOSURES -
FILED SEPARATELY**

State Board Of Education

1701 North Congress Avenue
Austin, Texas 78701-1494
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Interim Commissioner of Education
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June 8, 1991

The Honorable Dan Morales
Texas Attorney General
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for Attorney General Opinions -
Surety Bonds; Handicapped Access

Dear Mr. Morales:

I am writing pursuant to Texas Government Code section 402.042(B)(5), to request that you issue a written opinion on three questions presented to me by the El Paso Independent School District. I have determined that the following questions affect the public interest within the meaning of that statute:

(1) Can Texas' school districts require corporate sureties on bid bonds, and performance and payment bonds under Article 5160, V.A.T.S., to be sufficiently financially solvent under the Texas Insurance Code to issue these bonds without the necessity for reinsurance?

(2) If the answer to question one is "no," can Texas' school districts either (a) require that any reinsurance company be admitted and authorized to do business in Texas, and licensed to issue surety bonds in Texas, or (b) require the reinsurer to meet minimum financial standards set by the school district?

(3) Can a Texas municipality refuse to issue building permits or certificates of occupancy to an independent school district or a common school district for failing to comply with municipal building code requirements on handicapped accessibility even though the school district complies with, or has obtained

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a waiver under, the accessibility standards and specifications of the Elimination of Architectural Barriers Act?

The attached correspondence from the law firm of Grambling & Mounce on behalf of the El Paso Independent School District provides the legal and factual background for this request. The State Board of Education does not take a position with regard to the proper resolution of these questions.

Sincerely,



Carolyn Honea Crawford, Chairman
State Board of Education

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June 5, 1991

Dr. Carolyn Crawford
Chairperson of the State
Board of Education
3395 Harrison
Beaumont, Texas 77706

Re: Request for Attorney General Opinion - Surety Bonds

Dear Dr. Crawford:

This firm represents the El Paso Independent School District (the "District"). We are seeking your assistance in obtaining an opinion of the Attorney General with regard to the right of the District on its construction projects to require that the surety on bid bonds, and performance and payment bonds under Article 5160, V.T.C.S., be sufficiently solvent to issue the bonds without reinsurance, or in the alternative, if the District does permit reinsurance, if it can impose certain restrictions on, or establish minimal requirements for, the reinsurance company. It has recently come to our attention that under current Texas law, the District would have no discretion to reject a bond issued by a surety authorized and licensed to issue such bonds in Texas in the absence of some defect or deficiency in the bond itself. Assuming that this is a correct statement of current Texas law, then we would pose the following specific questions:

1. Can the District require each corporate surety to have sufficient financial solvency under the Insurance Code to issue the particular bonds without the necessity for reinsurance?

2. If the District cannot require the corporate surety to have sufficient financial solvency to issue the bonds without reinsurance, can the District either (i) require that any reinsurance company be admitted and authorized to do

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business in Texas, and licensed to issue surety bonds in Texas, or (ii) require the reinsurer to meet certain minimal, financial guidelines established by the District?

The answers to the questions are dependent upon the interpretation of four primary statutes. Article 5160, V.T.C.S. provides, in pertinent part, that each payment and performance bond "shall be executed by a corporate surety or corporate sureties duly authorized and admitted to do business in this State and licensed by this State to issue surety bonds." Article 7.19-1 of the Insurance Code provides that any bond required or permitted by certain entities, which would include the District, may be executed by a surety company qualified to do business in the State and, once executed, "shall be in all respects a full and complete compliance with every law, charter, rule or regulation" Article 5.75-1 of the Insurance Code governs reinsurance requirements for insurance companies covered by Chapter 5 of the Insurance Code, which would include casualty companies issuing fidelity, surety and guaranty bonds. Finally, if the insurance company is authorized to write fire and allied lines of insurance, then Article 6.16 prohibits any such company from exposing itself to any one risk in an amount that exceeds ten percent (10%) of its paid-up capital stock and surplus, unless the excess is reinsured by another solvent insurer.

Texas Courts have often concluded that bonds issued by a corporate surety authorized to do business in Texas must be accepted by various governmental entities under Article 7.19-1 of the Insurance Code in the absence of some deficiency or defect in the bond. (See Lawyers Surety Corporation v. Rankin, 500 S.W.2d 181 (Tex. Civ. App. - Houston [14th Dist.] 1973, writ ref'd n.r.e.); International Fidelity Insurance Co. of Newark, New Jersey v. Sheriff of Dallas County, 476 S.W.2d 115 (Tex. Civ. App. - Beaumont 1972, writ ref'd n.r.e.). It is understood, therefore, that if the insurance company (i) is authorized and admitted to do business in Texas and licensed to issue such bonds, and (ii) if such company is authorized to write fire and allied lines of insurance, and it meets the risk limitations of Article 6.16 of the Insurance Code, then the District would be required to accept any bond issued by the insurance company, in the absence of some defect or deficiency in the bond.¹ If the surety is not authorized to write fire and allied lines of insurance, then (ii)

¹The Attorney General has concluded that Article 6.16 applies to all lines of insurance written by a company authorized to write fire and allied lines. See Attorney General Opinion, JM-850 (1988).

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of the preceding sentence would not be required, and it is not clear what, if any, financial requirements would have to be met.

The District does not desire to rely upon a reinsurer to perform the obligations under the bonds. As counsel for the District, we have had conversations with representatives of the State Board of Insurance, who have related that the reinsurers do not have to be licensed in Texas, do not have to provide any financial information to the State Board of Insurance, and do not have to maintain any minimum capital or surplus. If true, this causes great concern to the District since District funds would be required to pay any losses it may incur that would otherwise be paid by solvent insurers and reinsurers. As a result, the District desires to require that all surety companies meet the minimum requirements for writing and issuing the bonds without reinsurance. Under this policy, a corporate surety authorized to issue fire and allied lines of insurance could write bonds only in an amount less than ten percent (10%) of its paid-up capital and surplus. Again, it is not clear what limitations are imposed upon insurance companies that are not authorized to issue fire and allied lines of insurance, other than perhaps the limits imposed upon incorporation in Article 2.02 of the Insurance Code.

Although 5.75-1 of the Insurance Code permits reinsurance for casualty companies, neither it nor any other statute the District has found would require the District to accept a surety that must rely upon reinsurance. In fact, Article 5.75-1 raises additional concerns since it provides that the District would not have any rights against the reinsurer that are not specifically set forth in the contract of reinsurance, presumably because of the lack of privity. Normally, the District would not even be given a copy of the reinsurance agreement.

Finally, we would bring to the attention of the Attorney General the case of Southern Underwriters v. Dyche, 141 S.W.2d 674 (Tex. Civ. App. - El Paso 1940, no writ), which the District construes to permit it to insist that the surety on its bonds be independently qualified to issue the bonds without reinsurance. In Dyche, the surety argued that the Clerk of Pecos County had no right to question the sufficiency of the surety on a superceded bond. The surety did not have sufficient assets to write the bond. The surety then resubmitted the bond with another company as reinsurer and the Clerk promptly refused to accept that bond unless both the original surety and the reinsurance company agreed to be jointly and severally liable. The Court noted that it was not shown that the reinsurance company was the original surety on the bond or that the surety was solvent to the extent necessary to issue the bond. It may be inferred, therefore, that the District or some other governmental entity is not required to accept

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reinsurance unless the reinsurance company actually becomes a surety (not just a reinsurer) that is jointly and severally liable with the original surety. Thus, if the reinsurance company does not act as a surety, jointly and severally liable, then the District would have the right under the Dyche case to reject reinsurance and demand that the surety have sufficient solvency to issue the bond.

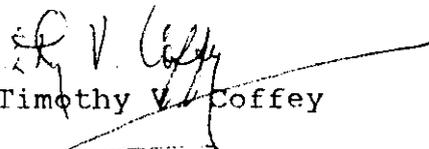
Article 5160, V.T.C.S., requires that each bond be executed by a corporate surety or sureties admitted and authorized to do business in the State and licensed to issue surety bonds. It does not specifically permit or refer to reinsurance, but does allow multiple corporate sureties. Article 5160 seems to support the proposition that the District would not be required to accept reinsurance, but would be permitted to accept multiple corporate sureties, each of which must be authorized and admitted to do business in the State and licensed by the State to issue surety bonds. In effect, the District could require that the reinsurer execute the bond as a surety, assuming that the reinsurer would otherwise be authorized to execute a bond under Article 5160 and the Insurance Code.

In conclusion, it appears that the District is compelled to accept a bond issued by a corporate surety admitted and authorized to do business in Texas and licensed to issue such bonds in Texas, but is nowhere required to accept reinsurance; and thus, the District can require that the surety or sureties have sufficient assets to issue the bonds, without reinsurance.

The District would appreciate it if you could submit these questions to the Attorney General for his opinion. Please do not hesitate to contact us if you have questions. As always, we appreciate your assistance.

Very truly yours,

GRAMBLING & MOUNCE


Timothy V. Coffey

TVC/bbs
cc: Mr. Rene Nunez
Dr. Stan Paz, Superintendent

(3624.tvc)