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FLORENCE SHAPIRO

**RECEIVED** Texas State Senator  
District 8

APR 20 2010

April 15, 2010

FILE # ML-46434-10  
I.D. # 46434

**OPINION COMMITTEE**

The Honorable Greg Abbott  
Attorney General of Texas  
209 West 14<sup>th</sup> Street  
P. O. Box 12548  
Austin, Texas 78711

**RQ-0880-GA**

Re: Request for Opinion regarding the usage of a Request for Competitive Sealed Proposal and Invitation to Bid pursuant to Chapter 44 of the Texas Education Code.

Dear General Abbott,

At the behest of the Fort Worth Independent School District, as Chair of the Senate Education Committee, I am requesting an opinion regarding the interpretation and application of the statutes relating to the usage of a Request For Competitive Proposal and the usage of Invitations For Bid, under Chapter 44 of the Texas Education Code and Chapter 71 of the Texas Natural Resources Code, by a school district seeking oil and gas leases on property owned by the school district. The ability to lease property for oil and gas drilling has become a crucial revenue source for the Fort Worth Independent School District ("FWISD" or "District"). In an effort to lease their mineral interests, the FWISD recently issued a Request for Competitive Sealed Proposals ("RFCSP"), seeking bids from those parties who might have an interest in the lease of FWISD land for the purpose of obtaining the underlying minerals. Subsequent to the issuance of that RFCSP, the FWISD became aware that Chapter 71 of the Texas Natural Resources Code sets out the process under which minerals are leased by a political subdivision and defines that process as requiring that a request for the lease of minerals by a political subdivision should occur through the use of a "bid" request. Concerned that their invitation for bids might be challenged by an unsuccessful bidding party based on the fact that the FWISD used the term "proposal" in the title of their request, rather than "bid," I am requesting an opinion from you to clarify the issue. The pivotal question presented here is whether the FWISD's "Request for Competitive Sealed Proposal" satisfied the terms of the Texas Natural Resources Code, which contemplates the lease of mineral interests by political subdivisions through the use of "bids," rather than "proposals."

**Are the words "bid" under the Chapter 71 of the Texas Natural Resources Code and "proposal" under Chapter 44 of the Texas Education Code synonymous?**

The following facts may be helpful to provide context for your review. In an effort to solicit bids for oil and gas leases, the FWISD published a Request for Competitive Proposals, a copy of which is attached hereto as Exhibit "A." The RFCSP was a 51 page application packet which requested, among other things, a potential lessee's bid price for oil and gas leases owned by the District. The

actual text of the RFCSP contains over 200 references to "bids/RFCSPs" and "bidders/proposers," where the terms are used interchangeably. Likewise, the packet also contains at least 37 references to "bid" or "bidder" without the terms "RFCSP" or "proposal" included. In fact, the section of the packet entitled "Oil and Gas Lease Bid Instructions" contains only references to "bids" and "bidders" without the terms "RFCSP" or "proposer" included at all. This particular section defines the responsibilities of the "bidder," and states that "said lease shall be awarded, at the discretion of the Board of Education of the Fort Worth Independent School District, to the highest and best bidder." The section goes on to describe the "minimum standards of bid." In determining whether the FWISD is soliciting "proposals" or "bids," the packet's actual text supports the argument that the FWISD intended the words to be used interchangeably and carry the same meaning, despite its potentially misleading title -- "Request for Competitive Sealed Proposals." The FWISD now seeks guidance to determine if the RFCSP packet, in its current form, complies with relevant provisions of Texas law. In particular, given FWISD's interchangeable use of the words "bid" and "proposal" in its RFCSP packet, does the FWISD's Request for Competitive Sealed Proposals satisfy Section 71 of the Natural Resources Code, which requires that political subdivisions give notice of their intent to lease mineral interests held by them and that "bids" be considered for the lease of those minerals?

*1. Review of Bid requirements under Chapter 71 of the Texas Natural Resources Code will help guide the analysis.*

*Chapter 71, Texas Natural Resources Code requirements for the lease of minerals by political subdivisions:*

The Natural Resources Code mentions only "bids" in the context of leases made by political subdivisions. It does not use the term "proposal."

- 71.04 Before a lease is made under this subchapter, notice must be given and a public hearing must be held for consideration of bids. (emphasis added).
- 71.05 (a) After the governing body determines that it is advisable to lease land belonging to the political subdivision, it shall give notice of intention to lease the land.  
(b) The notice shall describe the land to be leased and designate the time and place at which the governing body will receive and consider bids for the lease. (emphasis added).  
(c) The notice shall be published once a week for three consecutive weeks in a newspaper published in the county and with general circulation in the county.

Advertisement for bid requirements are also found in Chapter 44 of the Texas Education Code:

44.031(g) Notice of the time by when and place where the bids or proposals, or the responses to a request for qualifications, will be received and opened shall be published in the county in which the district's central administrative office is located, once a week for at least two weeks before the deadline for receiving bids, proposals, or responses to a request for qualifications. If there is not a newspaper in that county, the advertising

shall be published in a newspaper in the county nearest the county seat of the county in which the district's central administrative office is located. In a two-step procurement process, the time and place where the second-step bids, proposals, or responses will be received are not required to be published separately.

In compliance with the advertisement requirement for bids under both Chapter 71 of the Natural Resources Code and Chapter 44 of the Education Code, the FWISD ran advertisements for "sealed proposals" on 12/21/09, 12/28/09, and 1/4/10 before publicly reading the bids aloud on January 19, 2010. This obviously met the Education Code's requirement of advertising "once a week for at least two weeks before the deadline for receiving bids" and the Natural Resources Code requirement of advertising "once a week for three consecutive weeks in a newspaper published in the county and with general circulation in the county."

**2. How are the terms "bid" and "proposal" defined in Black's Law Dictionary?:**

Black's Law Dictionary defines the term "bid" as:

*A buyer's offer to pay a specified price for something that may or may not be for sale.*

Black's defines the term "competitive bid" as:

*A bid submitted in response to public notice of an intended sale or purchase.*

Black's defines the term "sealed bid" as:

*A bid that is not disclosed until all submitted bids are opened and considered simultaneously.*

Black's Law Dictionary 171 (8<sup>th</sup> ed. 2004).

Black's defines the term "proposal" as:

*Something offered for consideration or acceptance.*

Black's Law Dictionary 1255 (8<sup>th</sup> ed. 2004).

**3. Use of the terms "bid" and "proposal" within the Texas Education Code.**

The Texas Education Code governs those "bids" made to the FWISD regarding oil and gas leases. Tex. Educ. Code Ann. § 44.031 (Vernon's 2001). While the Tex. Educ. Code Ann. § 44.031 fails to give a working definition of either term, it does utilize both the term "bid" and the term "proposal" when referencing purchasing contracts. *Id.* Specifically, it provides the following language:

§ 44.031. Purchasing Contracts. (a) Except as provided by this subchapter, all school district contracts, except contracts for the purchase of produce or vehicle fuel, valued at \$25,000 or more in the aggregate for each 12-month period shall be made by the method, or the following methods, that provides the best value for the district:

- (1) competitive bidding;
- (2) competitive sealed proposals;
- (3) a request for proposals, for services other than construction services;
- (4) a catalogue purchase as provided by Subchapter B, Chapter 2157, Government Code;
- (5) an interlocal contract;
- (6) a design/build contract;
- (7) a contract to construct, rehabilitate, alter, or repair facilities that involves using a construction manager;
- (8) a job order contract for the minor construction, repair, rehabilitation, or alteration of a facility;
- (9) the reverse auction procedure as defined by Section 2155.062(d), Government Code; or
- (10) the formation of a political subdivision corporation under Section 304.001, Local Government Code.

Tex. Educ. Code Ann. § 44.031 (Vernon's 2001).

Thus, the Education Code utilizes both "competitive bidding" and "competitive sealed proposals," though it is not clear whether the Education Code views those terms as mutually exclusive or whether their alternative use simply evidences an attempt to create an exhaustive list of the manner by which bids may be sought by a school district. Neither term is defined by the Education Code.

#### ***4. Rules of Grammar and Common Usage***

The Texas Government Code governs the construction of statutes. It states that words and phrases shall be read in context and construed according to the rules of grammar and common usage. Tex. Gov't Code Ann. § 311.011 (Vernon's 2001). The common usage of the word "bid," as defined by Webster's Dictionary, is "a statement of what one will give or take for something; an offer of a

price.” *Webster’s 10<sup>th</sup> New Collegiate Dictionary* 111 (1993). Likewise, common usage for the word “proposal” as defined by Webster’s is “an act of putting forward or stating something for consideration.” *Webster’s 10<sup>th</sup> New Collegiate Dictionary* 936 (1993).

5. **“Bid” and “Proposal” as defined by Texas Case Law.**

Texas case law calls any distinction between the terms “bid” and “proposal” into question, indicating that the difference between “bid” and “proposal” may not be of any substantive consequence. The Court of Appeals in Austin, in determining whether two parties had entered into a binding contract, stated the following definition of “proposal”:

The word proposal as applied to contract law is the equivalent of the word offer.

*Daugherty v. Missouri-Kansas-Texas R. Co of Tex.*, 221 S.W.2d 928, 931 (Tex. Civ. App. – Austin 1949, no writ.).

Likewise, the Court of Appeals in San Antonio, in determining whether a party had waived a right to object to a contract, construed “bid” to mean:

Under contract law, a contractor’s bid merely constitutes an offer to contract.

*Sedona Constr., Inc. v. Ford, Powell, & Carson, Inc.*, 995 S.W.2d 192, 197 (Tex. App. – San Antonio 1999, pet. denied).

In the context of discussing solicitations from the City of Dallas for electrical work, the Dallas Court of Appeals used the terms “sealed proposals” and “sealed bids” almost identically. In fact, the court’s only distinction seemed to be that a solicitation by the City was called a “sealed proposal,” whereas the electric companies’ responses were called “sealed bids.” Specifically, the court stated:

Conclusions of Fact – In July, 1897, the City of Dallas, by action of its council, asked for **sealed proposals** to furnish the city with from 200 to 300 arc lights, for a term of from one to three years, under expiration of the then existing arrangements for lighting the city. In pursuance of said request, appellant and the electric company made **sealed bids**. The bid of the beaten electric company being the cheapest, the contract was awarded it, but having failed to comply with the requirements of the bid, appellant, the Dallas Electric Company, submitted a supplemental bid which was accepted by the city council on July 27, 1897.

*Dallas Electric Co. v. City of Dallas*, 58 S.W. 153, 153 (Tex. Civ. App. – Dallas 1900, writ ref’d).

Under the *Daugherty* and *Sedona* cases above, Texas courts have stated that the terms “proposal” and “bid” can be interpreted as “offers.” Likewise, the *Dallas Electric* case has used both terms almost interchangeably in describing contract solicitations from the City of Dallas. This case law should not be interpreted to mean that “proposal” and “bid” carry identical meanings, or can be used

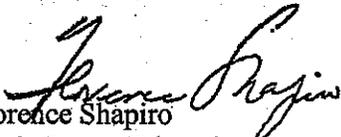
interchangeably without potentially affecting a party's legal rights. Rather, these cases can be read and argued to support the notion that there is no substantive difference in meaning between the two terms.

In determining whether the FWISD was soliciting "proposals" or "bids," the packet's actual text supports the argument that the FWISD intended the words to be used interchangeably and carry the same meaning, despite its potentially misleading title -- "Request for Competitive Sealed Proposals."

**6. Conclusion**

It is unclear whether the packet's usage of the term "proposal" rather than "bid" alters the legal rights of either the FWISD or its potential lessee, but, as noted above, use of the term "proposal" might be challenged by a losing participant as being something less than a definite bid of a specific price to be paid for a lease. In the event such a challenge is made, I am seeking guidance on behalf of the FWISD to determine, in the Attorney General's opinion, whether the FWISD's use of the word "proposal" in the title of its request seeking bids for the lease of its mineral interests constituted a violation of the Texas Natural Resources Code that contemplates the lease of mineral interests by political subdivisions through the use of "bids."

In light of the important nature of this issue and its impact on revenue to fulfill FWISD's educational mission, I would request that an expedited opinion be provided.

  
Florence Shapiro  
Chair Senate Education Committee