



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

April 3, 1997

The Honorable Frank Madla
Chair, Committee on Nominations
Texas State Senate
P.O. Box 12068
Austin, Texas 78711

Letter Opinion No. 97-030

Re: Authority to contract with a private vendor to provide telephone services to county jail inmates, and related question (ID# 39378)

Dear Senator Madla:

Pursuant to authority conferred by section 511.009 of the Government Code, the Texas Commission on Jail Standards has promulgated rules requiring county jails to provide telephone services to county jail inmates. See 37 T.A.C. §§ 259.119, .220, .515, .615, 261.219, 265.7, 291.1. Specifically, a rule of the Texas Commission on Jail Standards on the inmate telephone plan provides the following:

Each facility shall provide for reasonable access, both local and long distance, between an inmate and his or her attorney, family, and friends. This may be on a prepaid or collect basis. The plan shall contain procedures for the handling of emergency calls.

37 T.A.C. § 291.1(2). The rule was adopted under the commission's authority to adopt reasonable rules establishing minimum standards for the construction, equipment, maintenance, and operation of county jails, and for the custody, care, and treatment of prisoners. Gov't Code § 511.009(a)(1), (2). You indicate in your letter requesting an opinion that at least one company is interested in providing telephone services to county jail inmates, with the inmates paying the cost of the services and the counties receiving some portion of the revenue generated from the use of the telephones. You ask two questions regarding the award of such a contract:

1. Who has authority to award and enter into a contract with a private vendor to provide telephone services to county jail inmates, the county sheriff or the county commissioners' court?
2. By what authority and through what method should such a contract be awarded and entered into?

We understand you to refer in your questions to the provision of both local telephone service and long distance telephone service, with the services being paid for on a collect basis. We further understand you to ask about private vendors' leasing or somehow obtaining rights to use space in

county jail facilities and maintaining the actual physical space from which such long distance telephone calls are made, as well as providing the telecommunications equipment that will be used. We do not understand you to ask about the mere provision of local or long distance telephone line access.

We conclude, first, that the commissioners court, not the sheriff, has the authority to award such a contract. Second, we conclude that the method by which such a contract should be awarded will be determined by the sort of right or interest the commissioners court intends to convey to the vendor offering to provide the service. We will turn to your specific questions.

You first ask who has the authority to enter into a contract with a private vendor to provide long distance telephone services to county jail inmates, the commissioners court or the sheriff. Generally, the sheriff does not have authority to enter into binding contracts for the county. *Anderson v. Wood*, 152 S.W.2d 1084 (Tex. 1941); Attorney General Opinion DM-19 (1991). However, the legislature has conferred specific authority on the sheriff to enter into contracts for the operation of a jail commissary. Subchapter C of chapter 351 of the Local Government Code governs the operation of county jails. Section 351.041 of the code imposes a duty on the sheriff with respect to the operation of their county jails:

(a) The sheriff of each county is the keeper of the county jail. The sheriff shall safely keep all prisoners committed to the jail by a lawful authority, subject to an order of the proper court.

(b) The sheriff may appoint a jailer to operate the jail and meet the needs of the prisoners, but the sheriff shall continue to exercise supervision and control over the jail.

Section 351.0415 of the code confers specific authority on county sheriffs to operate jail commissary facilities for county jail inmates:

(a) The sheriff of a county may operate, or contract with another person to operate, a commissary for the use of the prisoners committed to the county jail. The commissary must be operated in accordance with rules adopted by the Commission on Jail Standards.

(b) The sheriff:

(1) has exclusive control of the commissary funds;

(2) shall maintain commissary accounts showing the amount of proceeds from the commissary operation and the amount and purpose of disbursements made from the proceeds; and

(3) shall accept new bids to renew contracts of commissary suppliers every five years.

(c) The sheriff may use commissary proceeds only to:

(1) fund, staff, and equip a program addressing the social needs of the county prisoners, including an educational or recreational program and religious or rehabilitative counseling;

(2) supply county prisoners with clothing, writing materials, and hygiene supplies;

(3) establish, staff, and equip the commissary operation; or

(4) fund, staff, and equip a library for the educational use of county prisoners.

(d) At least once each county fiscal year, or more often if the commissioners court desires, the auditor shall, without advance notice, fully examine the jail commissary accounts. The auditor shall verify the correctness of the accounts and report the findings of the examination to the commissioners court of the county at its next term beginning after the date the audit is completed.

At issue is whether the provision of long distance telephone services for inmates falls within the definition of "commissary." If it does, then the authority to enter into contracts to provide such services is reposed with the sheriff. If it does not, then the authority lies with the commissioners court.

In Attorney General Opinion DM-19, we were asked whether proceeds received from pay telephones at the county jail are governed by section 351.0415 of the code. If the proceeds fell within section 351.0415, the sheriff would have exclusive control over the commissary funds, but could expend such funds only for specified purposes. *See* Local Gov't Code § 351.0415(b), (c). If the proceeds did not fall within section 351.0415, then the sheriff, like other county officials, would be required to pay over the money to the county treasurer. *Id.* §§ 113.003, .021. In the opinion, we declared that such proceeds would be governed by that section only if the legislature intended pay telephones to be part of the commissary. Noting that telephone privileges and commissary privileges have been listed as separate categories since a rule regarding inmate privileges was first adopted by the Commission on Jail Standards in 1976, we concluded that it did not:

The rules of the commission [*i.e.*, the Commission on Jail Standards] do not contain a definition of "commissary." *See* 37 T.A.C. § 253.1 (definitions). The commission's rules regarding inmate privileges in county jails, however, clarify the commissioner's use of the term. . . . 37 T.A.C.

§ 291.1(1), (3). That categorization indicates that the commission did not understand the term "commissary" to include pay telephones. Therefore, proceeds from pay telephones in county jails are not governed by section 351.0415 of the Local Government Code. Any proceeds the sheriff receives should be paid to the county treasurer.

Attorney General Opinion DM-19 (1991) at 2-3 (footnote omitted).

In a subsequent related letter opinion, we were asked whether the Commission on Jail Standards is empowered by rule to make county jail telephone services for inmates part of the jail commissary services provided for in section 351.0415 of the Local Government Code. Based on our reasoning in Attorney General DM-19, we concluded that the commission had no such authority:

As indicated in Attorney General Opinion DM-19, we think it reasonable to suppose that the legislature, in adopting section 351.0415, did so in the understanding, based on the distinction between telephone and commissary privileges made in commission rules since 1976, that telephone privileges were not part of the commissary scheme it was providing for in that section. . . . Accordingly, we conclude that the commission is not authorized now to adopt a rule to include telephone service within the commissary services provided for in section 351.0415.

Letter Opinion No. 96-032 (1996) at 3.

As we noted at the outset, while the sheriff has no general contracting authority with respect to county matters, he has specific contracting authority to provide for and operate a jail commissary. However, because the provision of telephone services does not fall within the commonly understood definition of "commissary," we conclude that a sheriff has no contracting authority regarding the provision of telephone services to jail inmates. We conclude that the commissioners court has such authority. *See, e.g., Anderson v. Wood*, 152 S.W.2d 1084 (Tex. 1941); Attorney General Opinion DM-111 (1992) (commissioners court has authority to contract with licensed physician to provide medical services to inmates incarcerated in county jails and county sheriff has authority to schedule medical services for the county jails). We turn to your second question.

You next ask by what authority and through what method should such a contract be awarded and entered into? You do not include with your request a copy of any proposed contract, nor do you indicate in your letter exactly what sort of right or interest a commissioners court might intend to convey to a vendor offering such services. Therefore, our answer to your second question will necessarily be general in its scope. We note that what is at issue is not an instance of a county purchasing goods or services from a telecommunications provider; hence, competitive bidding provisions are not relevant to this discussion. What is at issue, rather, is the county, in effect, "selling" something, in this instance, the right to provide collect local and long distance telephone service to county jail inmates, with the inmates paying for the cost of the services and the county receiving a portion of the revenue generated by the service.

There are several statutes, some of which are limited in scope and some are of general application, that address the manner and authority by which public property may be leased. Currently, section 263.001 of the Local Government Code, which is applicable only to counties and to no other type of political subdivision, permits a commissioners court to designate a commissioner to lease county property at public auction following notice, as provided in the section. *See, e.g.*, Attorney General Opinion JM-449 (1986).

Section 272.001 of the Local Government Code permits the governing bodies of municipalities, counties, and certain other political subdivisions to sell or exchange land owned by the political subdivision after notice and receipt of sealed bids, as provided by subsection (a). The notice and bidding requirements do not apply to certain types of land or real property interests set forth in subsection (b) of section 272.001, including "narrow strips of land, or land that because of its shape, lack of access to public roads, or small area cannot be used independently under its current zoning or under applicable subdivision or other development control ordinances."

As an alternative to section 272.001, section 263.007 of the Local Government Code permits a commissioners court to sell or lease any real property owned by the county, including space in a building, through a sealed-bid procedure or sealed-proposal procedure. And finally, section 292.001 of the Local Government Code authorizes a commissioners court to "purchase, construct, or provide by other means, or may reconstruct, improve, or equip a building or rooms, other than the courthouse, for the housing of county or district offices," including county jail facilities and to "lease or rent . . . any part of the building or rooms that are not necessary for [public] purposes."

We noted at the outset that you did not ask us about any particular agreement, nor did you indicate what sort of right or interest such a contract is intended to create or convey. It appears that, when the aforementioned statutes permit a commissioners court to "lease" real property owned by the county to a person, the interest in real property that is conveyed is, in all likelihood, either a leasehold estate or an easement. But if the commissioners court intends to confer a privilege to use the property for a limited purpose without also conveying an interest in the real property subject to the agreement, the privilege conferred typically is a license.

A license in real property is a privilege or authority given by a person or retained by a person to do some act or acts on the land of another; such license conveys no interest in real property. *See, e.g., Digby v. Hatley*, 574 S.W.2d 186 (Tex. Civ. App.—San Antonio 1978, no writ); *Arant v. Jaffe*, 436 S.W.2d 169 (Tex. Civ. App.—Dallas 1968, no writ); *see also Jack v. State*, 694 S.W.2d 391 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (contract for exclusive use of park land considered "lease" and subject to notice and auction provision); *Beutell v. United Coin Meter Co.*, 462 S.W.2d 334 (Tex. Civ. App.—Waco 1970, writ ref'd n.r.e.) (document that gave lessee right of ingress and egress to leased premises, *i.e.*, specific portion of laundry room, and right to quiet enjoyment during lease term, and which bound the "parties hereto, their heirs, executors, successors, assigns, and personal representatives" was in fact "lease" and not merely a license to locate equipment in laundry room.; *Hancock v. Bradshaw*, 350 S.W.2d 955 (Tex. Civ. App.—Amarillo 1961, writ ref'd n.r.e.) (exclusive concession agreement under which owner was authorized to place his machines upon certain property was only privilege and did not convey a leasehold estate or interest in land).

The Local Government Code is silent as to the manner in which a commissioners court may enter into a contract that confers a license. However, we believe that, while public auction or sealed bids are not required, a commissioners court may not act without limitation in crafting the terms of any such agreement:

In considering any lease of public property, a political subdivision is free to negotiate terms very much like private parties unless public auctions or bids are required. The significant limitation is that public property may not be leased at less than its fair market value.

35 DAVID B. BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 9.23 (Texas Practice 1989). An agreement providing for rental or lease payments at less than fair market value would amount to a gift or grant of public money in violation of article XVI, section 52 of the Texas Constitution.

We note that neither rule nor statute authorizes the county to profit from providing telephone services to inmates. Attorney General Opinion MW-143 decided that a jail commissary could be operated at a profit if all profits are spent for the "benefit, education, and welfare" of the jail inmates. Attorney General Opinion MW-143 (1980). This conclusion was codified in section 351.0415 of the Local Government Code. Attorney General Opinion DM-19 (1991). We believe that revenues generated by providing access to telephone service, as required by commission rule, should be treated in the same fashion, even in the absence of legislation dictating that result. The provision of jails, in compliance with law, is, moreover, a governmental function, not a proprietary function. *See generally, Miller v. El Paso County*, 150 S.W.2d 1000 (Tex. 1941); Attorney General Opinion WW-192 (1957) (county may not engage in profit-making enterprise). An inmate is entitled to reasonable access to telephone service. If the price of the service is greater than the actual cost of providing the service, then the issue as to the reasonableness of the price could be raised.

S U M M A R Y

The commissioners court, not the sheriff, is empowered to enter into a contract with a private vendor to provide telephone services to county jail inmates. The authority and manner by which a commissioners court may enter into such a contract depends upon the right or interest that the commissioners court intends to create and convey.

Yours very truly,



Rick Gilpin
Deputy Chief
Opinion Committee