

RQ-0027-KP

**From:** Terri Mathis <Terri.Mathis@senate.state.tx.us>  
**Sent:** **RECEIVED** Tuesday, June 09, 2015 10:50 AM  
**To:** Hoelscher, Jennie  
**Cc:** JUN 09 2015 Terri Mathis  
**Subject:** FW: City of Kerrville Request for Attorney General Opinion  
**Attachments:** **OPINION COMMITTEE** 2015-23 Cailloux Foundation Properties, LLC for purchase of land for soccer, baseball, and softball fields.pdf; 150604\_kerrville\_bond\_ltr\_rle\_mayor\_council (2).pdf

FILE # ML-47744-15  
I.D. # 47744

**Importance:** High

Jennie, Senator Fraser ask me to forward this request for an AG's opinion. He has been ask by the City of Kerrville for the opinion. Please let me know if you need anything else from our office.

Thank you,

Terri Mathis  
Chief of Staff  
Office of Senator Troy Fraser  
State Capitol, Room E1.12  
Office: (512) 463-0124  
Fax: (512) 475-3732

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**From:** Todd Parton [mailto:Todd.Parton@kerrvilletx.gov]  
**Sent:** Friday, June 05, 2015 2:59 PM  
**To:** Terri Mathis  
**Cc:** City Council; Jack Pratt (jpratt@jackpratt.net); Mike Hayes  
**Subject:** FW: City of Kerrville Request for Attorney General Opinion  
**Importance:** High

Dear Ms. Mathis,

I am writing on behalf of the City of Kerrville to request that Senator Fraser request an opinion from the Attorney General regarding a contract of sale between the City of Kerrville and the Cailloux Foundation. This is a purchase contract whereby the city is acquiring land and improvements from the Cailloux Foundation for an athletic complex that will accommodate baseball, softball, and soccer. Attached is an executed copy of the contract for the land purchase in addition to a letter from a local attorney who is challenging the means by which the facility is to be constructed.

Here is a brief overview from Mike Hayes, Kerrville City Attorney, outlining the facts and the issue and providing a legal analysis:

Facts:

The City has started the process and intends to issue ~\$9M in certificate of obligation bonds ("Bond") to fund a portion of the acquisition and development of an athletic complex ("Complex"). Toward this end, the City has entered into a contract of sale ("Contract") with a local nonprofit foundation ("Foundation") for both the acquisition of land and the building of the complex. The undeveloped land (approximately 105 acres) is currently owned by the Foundation. Pursuant to the Contract, the Foundation will have the Complex built to agreed specifications between the parties. Once the Complex is built, the Foundation will deed the land, including the newly constructed improvements

(soccer/baseball fields, pro-shop, restrooms) to the City. Under this “build to suit” agreement, the City will pay \$9M for the land. The Foundation in turn will contribute the value of the land and approximately \$1.5M toward the improvements.

As for the Complex, the parties have agreed to the scope of the Complex and both parties must approve of the specific construction plans as they are created and prior to construction. Once construction begins, the proceeds of the Bonds, which will be escrowed, will be utilized to pay for completion of work, which also must go through an inspection and approval process of the parties.

Issue:

Does the purchase of the land in this manner require the construction work for the Complex to be competitively bid in accordance with Ch. 252, Texas Local Government Code?

Analysis:

At its fundamental core, the City is purchasing land. Under §252.022(a)(6), the purchase of land is exempt from the competitive bidding requirements of Ch. 252. As provided above, the parties have crafted their transaction to be a “build to suit” contract, wherein the City is buying land and prior to purchasing the land, is having the seller build improvements to suit the City’s interests. This is similar to the way one might purchase a new home in a new development, wherein the buyer chooses the lot, the house plans, and the seller, prior to conveying the property by deed, builds the new home. Only after the new home is completed, does the property transfer to the buyer.

“Land”, as used by the bidding exemption found in §252.022(a)(6), is not defined by this Chapter, though Chapter 252 includes a definition section (see §252.001). Nor did the parties find any case law or attorney general opinions that analyze the define the meaning of “land” by this section. It is submitted that “land” does not mean the purchase of only raw, unimproved land. Instead, “land” as used here also includes improved land, which is the case here. To argue otherwise would illogically conclude the whenever a city seeks to purchase a building, the city would need to competitively bid this acquisition, which would no doubt result in situations where the city either doesn’t receive the exact type of building that it desires and/or is forced to accept a building that doesn’t meet its needs. Again, this seems to be an illogical conclusion in the reading of the statute that more importantly, would work significant hardships upon cities.

The City of Kerrville greatly appreciates Senator Fraser’s assistance.

Sincerely,

Todd Parton  
City Manager  
City of Kerrville  
701 Main Street  
Kerrville, Texas 78028  
(830) 257-1501

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JUN 09 2015

OPINION COMMITTEE

RICHARD L. ELLISON, P.C.

Attorney at Law  
Broadway Bank Bldg.  
500 Main St. Suite J  
Kerrville, Texas 78028  
Phone: (830) 792-5601  
Facsimile: (830) 792-5602

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and Personal Injury Trial Law,  
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Texas Board of Legal Specialization*

E-Mail: [rellison@richellison.com](mailto:rellison@richellison.com)

June 4, 2015

Kerrville Mayor Jack Pratt  
Councilman Stephen P. Fine  
Councilwoman Bonnie White  
Councilman Gary Stork  
Councilman Gene Allen  
701 Main St.  
Kerrville, TX 78028

Re: Request for Attorney General Opinion on Contract of Sale Between Cailloux Foundation Properties, LLC and City of Kerrville, Texas (Youth Athletic Complex)

Dear Mayor Pratt and Council Members:

This letter is prompted by the *Notice of Intention to Issue Combination Tax and Revenue Certificates of Obligation* to commit the taxpayers to debt of \$9,000,000, published in the Hill Country Community Journal on April 22, 2015, "for the purpose of paying contractual obligations to acquire, construct and equip an athletic complex."

Based on my review of the City's contract with Cailloux Foundation Properties, LLC ("Cailloux") and provisions of the Local Government Code, it is my opinion that the contract is illegal and void, and the proposed Certificates of Obligation will be illegal and void. Further, if the City enters this contract and subjects taxpayers to \$9 Million in debt, it runs the risk of a very expensive lawsuit. If a contract is made without obtaining competitive bids, it is void and the performance of the contract, including the payment of any money under the contract, may be enjoined by any property tax paying resident of the city. See Tex. Loc. Gov't Code § 252.061.

The way this has been handled by the City is highly irregular, and it certainly does not represent the will of the citizens and taxpayers. As the Kerrville Daily Times Editorial Board noted, when Council voted 3-1 to approve the contract, the dissenting member, Carson Conklin, objected that the agreement precluded a public bidding process on the construction project that will cost taxpayers at least \$9 Million (*How we see it: A contract for taxpayer funding should be public,*

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KDT weekend ed. May 2-3, 2015). A public opinion poll showed that 82.7% of the respondents believe that all municipal projects should be publicly bid on.

Another KDT editorial stated: "The contract wasn't made public before the vote and council members didn't receive a copy until 6 p.m. Tuesday, but one thing that was known beforehand was that under the terms of the deal, the city will 'loan' the money to the Cailloux Foundation,<sup>1</sup> which will build the facility and then donate it to the city. This process will bypass the state law requirements that publicly funded projects be publicly bid on.... A public bidding process ensures transparency in how taxpayer dollars are spent. When the taxpayers are not allowed to see how these decisions are made, it clouds the public's view and erodes trust" (*Public bidding process critical to taxpayer trust*, Kerrville Daily Times, April 30, 2015).

That is not just someone's opinion – that is the law. Local Govt. Code § 252.021(a) provides that before a municipality may enter into a contract that requires an expenditure of more than \$50,000 from one or more municipal funds, the municipality must obtain competitive sealed bidding or competitive sealed proposals.

If a contract is made without complying with Chapter 252, it is void and the performance of the contract, including the payment of any money under the contract, may be enjoined by any property tax paying resident of the city. Tex. Loc. Gov't Code § 252.061.

The drafters of the contract obviously knew they have a serious problem, since they stuck in this clause: "WHEREAS, pursuant to Section 252.022(a)(6) of the Texas Local Government Code, the purchase of land is exempt from competitive building requirements," the City is not required to obtain bids. This flies in the face of the true nature of this contract. It is *not* a contract for the purchase of land; rather, it is a combined land purchase *and construction contract*, that makes Cailloux the general contractor. Section 4(a) is captioned "Development Matters," and states that "prior to closing, Seller covenants and agrees to cause to be designed and constructed the athletic fields and related facilities (the 'Project Improvements')". Under the caption Recitals, it states: "Seller desires to improve with athletic facilities, including softball fields, baseball fields, soccer fields, and restrooms in anticipation of transferring such land to Purchaser for use as a public facility."

There are numerous other problems with this contract. First, how do we know what the City is really paying for, when the contract doesn't state the construction costs? What is "Cailloux Foundation Properties, LLC, a Texas limited liability company"? Is it a tax exempt nonprofit, or a for profit entity? Taxpayers deserve to know, since the contract essentially makes it a general contractor for a land development/construction project.

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<sup>1</sup> The contract is not with the Cailloux Foundation; it is with Cailloux Foundation Properties, LLC, a Texas limited liability company.

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The manner in which this contract was negotiated is of great concern to Kerrville residents and taxpayers. Council members didn't even have time to read it before voting to approve it. This reminds me of Nancy Pelosi saying that congress members would have to pass the Obamacare act to find out what was in it. That hasn't turned out so well. Claiming that the contract is just for the purchase of land is like Obama claiming that "if you like your insurance policy you can keep it." Saying it is so doesn't make it true.

The Kerrville Daily Times' lead editorial on May 2-3, 2015 was titled "A contract for taxpayer funding should be public." The Texas Municipal League states that the main reason for requiring competitive bids is the fear of corruption the process.

As a Kerrville resident and taxpayer, I request that before Council votes to incur \$9 Million in debt on an illegal and void contract, that it obtain an opinion from the Texas Office of the Attorney General. You will probably have to ask one of our district attorneys or the county attorney to make the request to the OAG. The procedures for requesting the opinion are found in Govt. Code §§ 402.042 and .043.

Sincerely yours,



Richard L. Ellison

Cc: Brenda Craig, City Secretary  
Mark Armstrong, KDT