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**OPINION COMMITTEE**



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Criminal District Attorney  
Bexar County, Texas

February 11, 2016

FILE # ML-47964-16

I.D. # 47964

**RQ-0098-KP**

Honorable Ken Paxton  
Attorney General of Texas  
Attn: Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

RE: Request for opinion regarding whether a county can exclude county employees from contracting with the county in a private capacity for goods or services wholly unrelated to their official duties absent some risk of a conflict-of-interest or self-dealing.

Dear Attorney General Paxton:

This is to request that the Attorney General of Texas issue an opinion pursuant to Section 402.042 of the Texas Government Code.

**QUESTIONS PRESENTED**

1. Can a county categorically exclude employees from contracting with the county in a private capacity for goods or services wholly unrelated to their official duties where there is no risk of a conflict-of-interest or self-dealing?
2. Would such a strict policy constitute an impermissible restriction on the competition required by existing competitive bidding law?

**ARGUMENT AND AUTHORITIES**

A county is a political subdivision of limited jurisdiction and exercises only such powers as have been expressly delegated to it by the constitution or the legislature or which exist by clear and unquestioned implication. See Tex. Att'y Gen. Op. No. JC-0319; *Canales v. Laughlin*, 214 S.W.2d 451 (Tex. 1948). With regard to the County Purchasing Act, if the Act does not expressly authorize a county to impose a restriction on bidders, any restriction on competition must be implied. See Tex. Att'y Gen. Op. No. JC-319 (2000). A resolution of the questions presented by this request should consider the authority a county is granted, either expressly or impliedly, through the County Purchasing Act.

Generally, the purpose of the County Purchasing Act (the "Act") is to stimulate competition, prevent favoritism and secure the best work and materials at the lowest practicable price. *Tex. Highway Comm'n v. Tex. Ass'n of Steel Importers., Inc.*, 372 S.W.2d 525, 527 (Tex. 1963):

Competitive bidding requires that all bidders be placed upon the same plane of equality and that they each bid upon the same terms and conditions involved in all the items and parts of the contract, and that the proposal specify as to all bids the same, or substantially similar specifications. Its purpose is to stimulate competition, prevent favoritism and secure the best work and materials at the lowest practicable price, for the best interests and benefit of the taxpayers and property owners. There can be no competitive bidding in a legal sense where the terms of the letting of the contract prevent or restrict competition, favor a contractor or materialman, or increase the cost of the work or of the materials or other items going into the project.

Under the Act, a governmental body is required to promote unrestricted competition and may not adopt policies or issue bid solicitations or specifications that have the effect of restricting competition unless the policies, solicitations or specifications have a definite and objective relationship to matters of quality and competence or are adopted pursuant to clear legislative authority. *See* Attorney General Opinion DM-1213 (1992) at 7; JM-712 (1987). Accordingly, absent direct legislative authority, when a governmental body adopts policies or specifications which impact or restrict free and open competition, those policies or specifications must specifically relate to issues of quality or competence.

A number of previous opinions have concluded that a county lacked authority to create policies or impose restrictions on the competitive bidding process as established under the Act. For example, your predecessor considered whether a county could adopt a policy making attendance at a prebid conference mandatory. *Tex. Att'y Gen. Op. No. JC-0319*. That opinion determined that such a policy was neither expressly or impliedly authorized by the Act. *Id.* Accordingly, a county could not adopt a policy of conditioning acceptance of a bid on the bidder's attendance at a prebid conference. *Id.* Similarly, another opinion found that a court would likely conclude that the Act did not authorize a county to include the payment of living wages as a factor in a request for competitive proposals. *Tex. Att'y Gen. Op. No. GA-1090*. Importantly, that opinion reiterated the standard for whether a prospective policy or restriction on competition is permissible. That is, whether the particular policy or specification is "*definitively and objectively related to the quality of services* provided under a specific contract such that it can be included as an evaluation factor." *Id.* (Emphasis added).

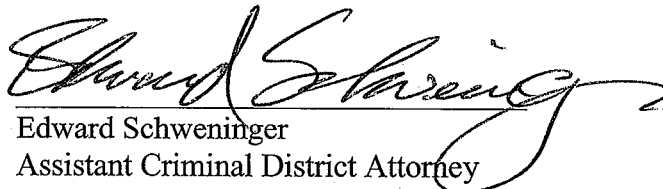
Here, the restriction on open competition at issue relates to the categorical exclusion of employees purely based on the employment relationship without regard to any other factor. Another of your predecessors has already determined that there is no general statutory prohibition which prevents a county employee from contracting with the county in a private

capacity. Tex. Att’y Gen. Op. No. JM-99 (1983). That opinion concluded that as long as there was no conflict of interest, self-dealing, or potential for dereliction of duties, an employee *could* contract with a county.<sup>1</sup>

As has been stated, there is no general prohibition of a county employee contracting with a county in private capacity without some showing of a conflict of interest or self-dealing. *See* Attorney General Opinion JM-99. Absent self-dealing or a conflict of interest, a county policy which categorically excludes county employees from contracting with the county based on the employment relationship alone apparently lacks the definite and objective relationship to matters of quality and competence which would allow such a policy to be upheld.<sup>2</sup> Accordingly, it would appear that such a policy would improperly restrict competition without any justification and the county would lack the express or implied authority under the Act to adopt it.

Respectfully submitted,

NICHOLAS “NICO” LAHOOD  
BEXAR COUNTY CRIMINAL DISTRICT ATTORNEY

  
Edward Schweninger  
Assistant Criminal District Attorney  
Chief – Civil Section

cc: Bexar County Judge Nelson W. Wolff  
Bexar County Commissioner Precinct 1, Sergio “Chico” Rodriguez  
Bexar County Commissioner Precinct 2, Paul Elizondo  
Bexar County Commissioner Precinct 3, Kevin Wolff  
Bexar County Commissioner Precinct 4, Tommy Calvert  
Mary E. Quinones, Bexar County Purchasing Agent

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<sup>1</sup> Tex. Att’y Gen. Op. No. JM-99 indicated that the only applicable prohibition would be a common law conflict of interest which could render a contract void on public policy grounds. *Id.* The basis for determining whether a conflict of interest would exist requires an evaluation as to whether the county employee can provide services or materials in his private capacity which are separate and wholly unrelated to his duties as a county employee. *Id.* The opinion set out the standard for determining whether a conflict of interest exists as whether there was a reasonably arguable case that a conflict of interest exists. If so, the county should avoid entering into that contractual relationship. *Id.*

<sup>2</sup> An alternative to excluding all county employees from contracting with county in a private capacity would be to require bidders to submit disclosure statements developed by the county for purposes of determining whether the services the employee will provide in his private capacity are wholly unrelated to their duties as a county employee or whether there is reason to conclude there would be a conflict in interest such that the county should not consider contracting with that employee. Tex. Att’y Gen. Op. No. JC-0521 concluded requiring bidders to submit information about their business relationships with county officers and employees may impose a burden on bidders but would encourage competition by reducing the likelihood that contracts will be awarded due to favoritism.