

RECEIVED

By Opinion Committee at 11:00 am, Jun 28, 2023

RQ-0001-JS

FILE# **ML-49290-23**

I.D.# **49290**



June 28, 2023

The Honorable John Scott
Acting Texas Attorney General
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711

Attention: Opinion Committee

Via email: opinion.committee@oag.texas.gov

Dear General Scott,

Section 441.006 of the Government Code authorizes the Texas State Library and Archives Commission (commission) to receive a donation or gift of money, property, or services on any terms and conditions it considers proper as long as the state does not incur financial liability.¹ Recently, a suggestion has been made that a private individual or entity may wish to make a donation to the commission in the form of services by providing funds directly to a third party to provide those services. The services would consist of repair and rehabilitation work on a historic house the commission owns in Liberty, Texas. The commission respectfully requests your opinion under section 402.042 of the Government Code regarding the following questions:

1. Is there a limitation on the definition of "services" such that the commission would be prohibited from accepting a donation of repair, rehabilitation, or construction work for a specific purpose?
2. Does Government Code, §441.006 authorize the commission to accept a donation of "services" if those services are paid for by a third party?
3. If §441.006 does authorize the commission to accept a donation of services paid for by a third party, must the selection of an entity to provide those services comply with state procurement and contracting requirements?
4. If the commission is authorized to accept a donation of services in the form of repair, rehabilitation, or construction work, whether or not those services were donated directly or donated by an entity selected by a third party, would the commission retain oversight authority over the project?

¹ Tex. Gov't Code §441.006(b)(2).

TSLAC

Preserving yesterday
Informing today
Inspiring tomorrow

Lorenzo de Zavala
State Archives and
Library Building

1201 Brazos Street
Austin, Texas
78701

P.O. Box 12927
Austin, Texas
78711-2927

512-463-5474

www.tsl.texas.gov

Commission Chair

Martha Wong

Members

David C. Garza

David Iglesias

Arthur T. Mann

Nancy Painter Paup

Bradley S. Tegeler

Darryl Tocker

Director and Librarian

Gloria Meraz

Assistant State Librarian

Tim Gleisner

Background

The commission's main headquarters are located in Austin, Texas, in the Lorenzo de Zavala State Archives and Library Building. The commission also operates the State Records Center in Austin, a satellite records storage facility also in Austin, and the Sam Houston Regional Library and Research Center in Liberty, Texas. The Sam Houston Regional Library and Research Center (center) is a component of the commission's Archives and Information Services Division and serves as the regional historical resource depository for ten counties surrounding the center. The center is situated on land donated to TSLAC by former Governor Price and Jean Daniel in 1973. Since 1973, several historic buildings have also been donated and moved to the grounds of the center.

In addition, in 1983, the commission was gifted the Cleveland-Partlow House (Partlow House) in downtown Liberty. The Partlow House was conveyed by gift deed to the commission with the stated purpose that it may be "properly restored in order that it may be viewed by visitors to Liberty and to the Sam Houston Center." Conveyance was conditioned on the commission assuming responsibility for seeing that the home is restored, preserved, and maintained, provided that a tax-exempt organization or entity "assumes the details of executing such responsibilities, and without the obligation to use State funds for such purposes unless such funds are contributed to the State therefor."²

The Partlow House is in need of a great deal of repair, ranging from ADA Accessibility issues to the restoration of interior rooms and repairs to the driveway. Over the years, different entities have contributed to the repair efforts. It has been under renovation by the commission since 2017 using a combination of funds gifted to the agency for that purpose and general revenue as approved by the commission. Currently, the commission does not have the funds for the remaining needed repairs, and legislative appropriations for the commission's Liberty-based properties have been directed only toward the buildings located on the grounds of the center. Recently, the commission was approached regarding the possibility of a private individual or entity donating funds to a third party so that third party could perform repair and rehabilitation services on the Partlow House.

Discussion

Section 441.006(b)(2) of the Government Code provides that the commission may receive a donation or a gift of money, property, or services on any terms and conditions it considers proper as long as the state does not incur financial liability. Chapter 441 does not define "services." Though not necessarily applicable, Government Code, §2155.001, the definitions section for terms used in the general state purchasing statutes, defines "service" as "the furnishing of skilled or unskilled labor or professional work" (with some exclusions, such as professional or consulting services). The lack of a specific definition within Government Code, Chapter 441, combined with the definition within Government Code, Chapter 2155, would seem to indicate the meaning of "services" in §441.006 is quite broad. However, the commission would appreciate confirmation that this is the case or guidance, should the definition be more limited.

State procurement and contracting laws require state agencies to engage in a process designed to ensure fair competition, ethical practices, quality assurance, and best value to the state, beginning with

² See Gift Deed attached as Exhibit A.

project planning through contract close-out. Depending on the type of goods or services needed and the estimated dollar amount of those goods or services, a state agency may be required to issue a competitive solicitation to identify prospective contractors and evaluate the responses based on measurable, objective criteria prior to awarding a contract. For contracts involving construction services, including repair and rehabilitation of buildings and structures, the Texas Facilities Commission (TFC) may be in charge of both the project and the selection of contractors, depending on the location of the building or structure, the type of services needed, and the applicability of any exemption that could apply that would allow the agency to procure the services directly.

Government Code, Chapter 2165 establishes the general authority of TFC with respect to the control, maintenance, and repair of state buildings, grounds, and property. TFC has "charge and control" of all public buildings, grounds, and property and is responsible for the proper care and protection of state property from damage, intrusion, or improper use.³ TFC has a general requirement to provide for and direct the repair or improvement of a building or office when an agency head brings it to TFC's attention.⁴ There are broad exceptions to TFC's "charge and control," not applicable to the commission.⁵ State law further requires TFC to provide "facilities management services" (defined as "any state agency facilities management service that is not unique to carrying out a program of the agency . . . [including] facilities construction, facilities management, general building and grounds maintenance, cabling, and facility reconfiguration"⁶) for all state agency facilities in Travis County or an adjacent county, and specifically excludes several types of facilities and entities from this requirement, including "a regional or field office of a state agency."⁷

Government Code, Chapter 2166 establishes procedures and requirements for building construction projects of the state, the acquisition of real property for state purposes, and the disposition of real property owned by the state. "Construction" in this chapter is defined to include acquisition and reconstruction⁸ but does not apply to a repair or rehabilitation project, except a major renovation, of buildings and grounds on TFC's inventory or to a repair or rehabilitation project requiring the use of contract labor, if the project has been excluded from this chapter by TFC rule and does not require the advance preparation of working plans or drawings.⁹

Turning to TFC's rules, two chapters appear to be instructive – 5 TAC Ch. 116, Property Management Division, Subchapter A, State Owned Property, and 5 TAC Ch. 123, Facilities Design and Construction. By

³ Gov't Code, §2165.001(a).

⁴ Gov't Code, §2165.052.

⁵ TFC's charge and control does not apply to buildings and grounds of an institution of higher education, a state agency to which control has been specifically committed by law, and a state agency that has demonstrated ability and competence to maintain and control its buildings and grounds and to which TFC delegates that authority. Gov't Code, §441.154 gives the commission authority to remodel and maintain regional research centers. As such, the commission would not be required to use TFC for regional research centers.

⁶ Gov't Code, §2165.007(a).

⁷ Gov't Code, §2165.007(b)(8).

⁸ Gov't Code, §2166.001(1-b).

⁹ Gov't Code, §2166.003(a)(5), (7).

rule, facilities¹⁰ on TFC's inventory may not be modified except by or under the control of TFC.¹¹ The Partlow House does not appear to be on the TFC inventory (<http://www.tfc.state.tx.us/divisions/facilities/prog/leasing/mapil.html>). This would seem to indicate that TFC would not have exclusive authority over modification of the Partlow House.

These rules also provide that TFC is responsible for the administration of "projects" for all state agencies except as otherwise provided by state law, including Gov't Code, §2165.007 (which excludes a regional or field office of a state agency from the requirement that TFC provide facilities management services) and Government Code, §2166.003 (which excludes a repair or rehabilitation project, except a major renovation, of buildings and grounds on TFC's inventory and a repair or rehabilitation project requiring the use of contract labor, if the project has been excluded from this chapter by TFC rule and does not require the advance preparation of working plans or drawings).¹² TFC has, by rule, excluded the same two types of projects excluded by Government Code, §2166.003 (among other exclusions not applicable here): (1) a repair or rehabilitation project, except a major renovation, of buildings and grounds on TFC's inventory, and (2) a repair or rehabilitation project requiring the use of contract labor, if the project has been excluded from this chapter by TFC rule and does not require the advance preparation of working plans or drawings.¹³ The rule further provides an application process for a determination by TFC that a project is excluded from TFC authority.

Thus, it appears that the commission is not required to engage TFC with respect to repair or rehabilitation work on the Partlow House. However, the commission historically has engaged TFC for this type of work as the commission lacks the staff expertise to create a solicitation for and oversee this type of work.

Since 2017, repairs to and rehabilitation of the Partlow House have been paid for with funds donated by the Jean and Price Daniel Foundation and the Atascocita Historical Society. Using these funds in conjunction with capital project GR funds appropriated to the commission, and with TFC's coordination, the commission has been able to correct drainage conditions impacting the foundation, stabilize and waterproof the foundation piers, complete structural repairs to the exterior of the building, upgrade interior lighting and electrical to meet code, and repaint the exterior. It has been challenging to locate contractors that are willing and qualified to work on a historic property in this region that also have sufficient resources to compete within required state processes. The commission has never received sufficient funding by donation to completely repair and rehabilitate the Partlow House and the interior of the house remains in a state of disrepair making it unavailable to the community and/or the public.

A suggestion has been made that a private entity pay directly for necessary repair and/or rehabilitation services that are then donated to TSLAC. Such an arrangement would theoretically save the state time and money and allow local stakeholders a mechanism to contribute to the renovation and also provide an opportunity to use community members/local providers for the work needed to reopen the historic house to the public. This type of simplified process might encourage greater participation in the

¹⁰ A "facility" is defined as a "building, utility system, or grounds or other physical entity under the inventory of [TFC]." 1 TAC §116.1(1).

¹¹ 1 TAC §116.3.

¹² 1 TAC §123.23.

¹³ 1 TAC §123.26.

rehabilitation effort, leading to results that the commission has been unable to achieve due to the lack of funding. As such, this suggestion leads to the main question at hand, which is whether such an arrangement would be considered a donation of services or money.

- A. If it is considered a donation of services, can the donor then select a vendor of their choosing to provide the services?
- B. Would the commission retain oversight authority over the repairs and/or rehabilitation services if a third party donated funds to a vendor to perform those services?
- C. If a donation of services paid for by a third party is considered a donation of money, since statute authorizes the commission to accept money "on any terms and conditions it considers proper so long as the state does not incur financial liability," would the commission be required to follow standard state procurement and contracting requirements or would a simplified process subject to commission oversight to ensure professional work be acceptable?

Conclusion

Thank you for your consideration of this opinion request. If you need any additional information to facilitate your review, please do not hesitate to contact me at gmeraz@tsl.texas.gov.

Sincerely,



Gloria Meraz
Director and Librarian

#2034

GIFT DEED

THE STATE OF TEXAS X
 COUNTY OF LIBERTY X

KNOW ALL MEN BY THESE PRESENTS:

That we, Price Daniel, Sam Partlow, and Ray Dozier Partlow of Liberty County, Texas, Trustees of the Miriam Partlow Charitable Unitrust, hereinafter called Grantors, for and in consideration of the work and efforts of the Texas Library and Archives Commission in preserving the historic Miriam Partlow house, and the desire of Grantors to have the said house preserved for future generations, have granted, given and conveyed, and by these presents grant, give and convey to the Texas Library and Archives Commission, hereinafter called Commission or Grantee, for the purposes set forth herein and subject to the conditions and reservations hereinafter made, the following described property:

FIRST TRACT: That certain lot fronting 131 feet, more or less, on Grand Avenue at its intersection with San Jacinto Street, together with the Miriam Partlow home and furnishings at 2131 Grand Avenue, the same being the family home of her parents, Mr. and Mrs. W. S. Partlow, and the lot being approximately 131 feet in width on the North and South lines and approximately 307 feet in length on the East and West lines;

SECOND TRACT: Lot 1 of Tract B of Outer Block 15 of the City of Liberty, containing 0.6210 acres, which Lot was set aside to Miriam Partlow and is particularly described in a Partition Deed of April 1, 1961, of record in Vol. 525, Page 602 of the Liberty County Deed Records.

The purpose of this conveyance is that the above described house and furnishings may be maintained and preserved on the present site by Grantee, and that it may be properly restored in order that it may be viewed by visitors to Liberty and to the Sam Houston Center. To accomplish such purpose, Grantors agree to provide for payment of the cost thereof as provided in a contract heretofore executed between Grantors, Grantee, and the

VOL 1003 PAGE 268

Libertad Chapter of the Daughters of the American Revolution, so that Grantee is not obligated to pay any portion of such costs from State funds unless they are contributed to the State for such purposes.

This conveyance to the Commission is conditioned on the following agreements made by the Commission:

(a) Acceptance of the title to such property and the responsibility for seeing that the Miriam Partlow home is restored, preserved and properly maintained in accordance with the contract above referred to; provided, however, that the Libertad DAR Chapter or some other tax-exempt organization or entity assumes the details of executing such responsibilities, and without the obligation to use State funds for such purposes unless such funds are contributed to the State therefor. During such time the Commission will pay over to the DAR Chapter all of the maintenance and construction funds which it receives by gift or grant for any of such purposes, including the home's restoration, decoration, repairs, additions and other permanent improvements.

(b) The Commission shall contract with any other tax-exempt successor organization or entity, preferably located in Liberty, Texas, if the Libertad DAR Chapter should fail to carry out its contract or if it should give notice of termination as provided therein. Reference is made to the existing contract above referred to for all purposes.

TO HAVE AND TO HOLD the above described property, for the purposes and subject to the conditions above set forth.

WITNESS OUR HANDS THIS 26th day of April, A. D. 1983.

Price Daniel
PRICE DANIEL

Sam Partlow
SAM PARTLOW

ACCEPTED ON THE DATE ABOVE WRITTEN.

TEXAS LIBRARY AND ARCHIVES COMMISSION

Ray Doster Partlow
RAY DOSTER PARTLOW

BY: Dorman H. Winfrey
Dorman H. Winfrey
Director and Librarian

TRUSTEES

THE STATE OF TEXAS }
COUNTY OF LIBERTY }

BEFORE ME, the undersigned authority, on this day personally appeared Price Daniel, Sam Partlow, and Ray Dozier Partlow, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed, and in the capacities therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 26th day of April, A. D., 1983.

Laverne G. Capps

Laverne G. Capps
Notary Public in and for
Liberty County, Texas



LAVERNE G. CAPPS
Notary - State of Texas
My Commission Expires July 31, 1984

FILED FOR RECORD

1984 FEB 21 PM 1:46

Wanda Barker
COUNTY CLERK
LIBERTY COUNTY, TEXAS

STATE OF TEXAS }
COUNTY OF LIBERTY }
I, WANDA BARKER, hereby certify that this instrument was FILED in the number sequence on the date and at the time stamped hereon by me, and was duly RECORDED in the volume and page of the named RECORDS of Liberty County, Texas as indicated hereon by file on

FEB 22 1984



Wanda Barker
COUNTY CLERK
LIBERTY COUNTY, TEXAS

DEED RECORDS

