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

RE: **REQUEST FOR OPINION**

ISSUE:

Whether a County "shall", "must", or "may" require each contractor for a road and/or bridge project to carry a performance bond and/or payment bond, or both?

FACTS

Sterling County(County) currently has an ongoing road construction project(public works project) funded by a bond election. The County initially contracted with a road construction company, Trifecta Equipment Contracting(contractor 1) to construct roads in phases who was required to purchase performance and payment bonds in increments coinciding with the phases of the project. as specified by Article § 2253.021. Performance and Payment Bonds Required. Tx. Govt. Code. Partway through the contract the construction company has become insolvent and has failed to complete the project. The County and the bond company found a different road construction company, JSI(contractor 2), to complete the bonded phase of the project. The County intends to contract with contractor 2 or a different contractor to complete the remaining phase(s) of the project without requiring a performance or payment bond.

ARGUMENTS AND AUTHORITIES

Reading Article § 2253.021. Performance and Payment Bonds Required. Tx. Govt. Code and relevant caselaw argument is to be made that a governmental entity can waive the requirement of contractor's purchasing performance and payment bonds for road construction contracts no matter the costs involved. Prairie Valley Independent School Dist. v. Sawyer, (App. 2 Dist. 1984) 665 S.W.2d 606. Tex. Atty. Gen. Op. JM-1220 (1990).

Purpose of these types of bonds are to protect subcontractors and suppliers for any work or supplies the contractor may fail or refuse to pay. Dealers Elec. Supply Co. v. Scroggins Const.

Co., Inc. (Tex. 2009) 292 S.W.3d 650 and Dudley Construction, Ltd. v. Act Pipe & Supply, Inc., (Tex. App-Texarkana (6th Dist.) 2016), 531 S.W.3D 744.

Consequently, a governmental entity waiving the requirement of these types of bond may be directly responsible to pay to subcontractors and suppliers for any work or supplies a contractor may fail or refuse to pay. Prairie Valley Independent School Dist. v. Sawyer, (App. 2 Dist. 1984) 665 S.W.2d 606. Tex. Atty. Gen. Op. 13 JM-1220 (1990).

RELEVANT STATUTES AND CASE AUTHORITIES

Article § 2253.021. Performance and Payment Bonds Required. Tx. Govt. Code.

Prairie Valley Independent School Dist. v. Sawyer, (App. 2 Dist. 1984) 665 S.W.2d 606.

Dealers Elec. Supply Co. v. Scroggins Const. Co., Inc., (Tex. 2009) 292 S.W.3d 650.

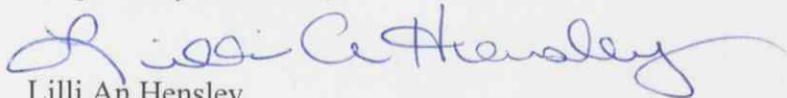
Dudley Construction, Ltd. v. Act Pipe & Supply, Inc., (Tex. App-Texarkana (6th Dist.) 2016), 531 S.W.3D 744.

Tex. Atty. Gen. Op. p.13 JM-1220 (1990).

SUMMARY

Article § 2253.021. Performance and Payment Bonds Required. Tx. Govt. Code does not mandate a County to require a contractor to purchase or carry a performance bond and/or payment bond, or both for a public works project. Where the County does not require but in essence waives the requirement the County will be subsequently liable for payment to subcontractors and suppliers should the contractor fail or refuse to pay the sub-contractors or suppliers.

Respectfully submitted,



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