



**OFFICE OF
THE ATTORNEY GENERAL
AUSTIN, TEXAS**

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Hon. Joseph C. Ternus
County Attorney
San Patricio County
Sinton, Texas

Opinion No. V-506

Re: The necessity of letting contracts based on competitive bidding for road work to be done by the Commissioners' Court itself, rather than by a general contractor.

Dear Sir:

Reference is made to your recent request for an opinion of this Department, which reads, in part, as follows:

"Sometime ago the County of San Patricio voted a \$1,500,000.00 bond issue to improve and construct roads in this county. The money is now available and the commissioners expect to spend at least \$750,000.00 of this money on road improvements and construction done directly under their immediate supervision and direction; that is to say, it is not contemplated that the work would be let to a contractor under bid to do a completed job, but that the commissioners would, with the help of an engineer hired for that purpose, do their own road construction and rebuilding. This will necessitate many direct, individual expenditures of money since they contemplate purchasing road materials themselves, directly paying for hauling, etc. In other words, the commissioners do not contemplate contracting with anyone for an 'end item', i. e. a completed road.

"I would appreciate receiving an opinion from you concerning the questions hereinafter set forth.

"Question No. 1. Is there any law requiring the commissioners' court to let the San Patricio County road building and improvement program out on contract under competitive bids, or may the commissioners' court build and improve the roads, doing the job themselves? . . .

"Question No. 2. There will be considerable hauling to be done. The commissioners would like to hire local men in the county, who own trucks, to do most of the hauling. It is further contemplated to pay for the hauling on a yardage basis. It is further contemplated that, if a man were to start hauling for the county and hauled as long as the county had work for him to do, he would be paid a total in excess of \$2,000.00; however, the man would probably bill the county by the week which amount would probably be under \$2,000.00 per week. Does Art. 2368a, Section 2 (or any other law), require this type of work to be let under competitive bids?

"Question No. 3. It is contemplated that the commissioners' court would hire from the owner a dragline, the owner furnishing the operator and bearing the expenses and upkeep of the dragline, to be used in excavating road material and placing same in the dump trucks, the owner of the dragline to be paid at the rate of so much a yard loaded in the dump trucks. Would Art. 2368a, Section 2 (or any other law) require that the commissioners' court let this type of contract out for bids?

"Question No. 4. Assume that the dragline owner referred to above also furnished the road building materials, would not Art. 1659 apply so that in that case the contract would have to be let under bids?

"The dragline owner in both instances above would bill the county either by the day or by the week as the work progresses;

of any nature or character upon such county or any subdivision of such county or upon such city, without first submitting such proposed contract to competitive bids. . .

"Provided, that in case of public calamity, where it becomes necessary to act at once to appropriate money to relieve the necessity of the citizens, or to preserve the property of such county or city, or where it is necessary to preserve or protect the public health of the citizens of such county or city, or in case of unforeseen damage to public property, machinery, or equipment, this provision shall not apply; and provided further, that it shall not be applied to contracts for personal or for professional services, nor to work done by such county or city and paid for by the day, as such work progresses."

The purpose of these provisions is to enable counties to obtain the performance of any public work at the lowest possible cost to taxpayers. However, the Commissioners' Court has the option of carrying on the work itself and the provisions of Article 2368a do not apply to any work done under the direct supervision of the County Commissioners, and paid for by the day. *Gulf Bitulithic Company v. Nueces County* (Com. App.) 11 S.W. (2d) 305; 11 Tex. Jur. 643.

Therefore, it is our opinion that the Commissioners' Court has authority to do this work in the same manner that they provide for other construction on the county highway system instead of asking for bids from private concerns.

Inasmuch as your questions 2 and 3 are so closely related, and since the same rule of law will govern in each instance, we shall consider both questions together.

The provisions of the above quoted Article 2368a are somewhat different from Article 2368 (now repealed), but the same rule of law applicable under Article 2368 may now be applied under Article 2368a. We do not believe that such contracts as presented in the above questions are such as to require competitive bids. The Commissioners' Court may terminate the employment in each instance any time it desires to do so.

The case of *Jackson v. Noel*, 37 S.W. (2d) 787, was one in which the Commissioners' Court of Gray County has entered into a contract with appellant Jackson by which Jackson agreed to furnish certain road material for public roads for a price of \$3.00 per yard of gravel and material to be paid by Gray County; further the price agreed upon was greatly in excess of \$2,000.00.

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The court in passing upon the question of whether such a contract came within the provisions of Article 2368, had this to say:

"The contract made by the commissioners' court with Jackson through Cox, one of its commissioners, was for the hauling of material and for the spreading of same on the road. The record does not disclose that any contract was made with reference to the placing of such material upon any special number of yards of road, and no number of yards of gravel or caliche or other material was contracted for; hence it cannot be said that the making of the contract called for the expenditure of the sum of \$2,000 or more. In other words, it was such a contract for the delivery of material that work could be stopped at any time.

"That the contract now before this court is not controlled by article 2368, R.C.S. See Gulf Bitulithic Co. v. Nueces County (Tex.Com. App.) 11 S.W. (2d) 305.

"For the reason that the evidence fails to disclose that the contract as made with Jackson necessarily amounted to the sum of \$2,000, and for the reason that the commissioners' court, when having county road work done under its supervision, was not limited to such sum in the repair of the roads of the county and that they had the option as to whether such work should be submitted to competitive bidders, we reverse the judgment of the trial court, and remand the cause for another trial."

Therefore, in view of the foregoing, it is the opinion of this Department that your questions 2 and 3 should be answered in the negative.

Article 1659, V.C.S., is as follows:

"Supplies of every kind, road and bridge material, or any other material, for the use of said county, or any of its officers, departments, or institutions must be purchased on competitive bids, the contract to be awarded to the party who, in the judgment of the commissioners court, had submitted the lowest and best bid. The county auditor shall advertise for a period of two weeks in at least one daily newspaper, published and circulated in the county, for such supplies and material according to specifications, giving in detail what is needed. Such advertisements shall state where the specifications are to be found, and shall give the

time and place for receiving such bids. All such competitive bids shall be kept on file by the county auditor as a part of the records of his office, and shall be subject to inspection by any one desiring to see them. Copies of all bids received shall be furnished by the county auditor to the county judge and to the commissioners court; and when the bids received are not satisfactory to the said judge or county commissioners, the auditor shall reject said bids and readvertise for new bids. In cases of emergency, purchases not in excess of one hundred and fifty dollars may be made upon requisition to be approved by the commissioners court, without advertising for competitive bids."

In the case of East Texas Const. Co. v. Liberty County, 139 S.W. (2d) 669, the court in passing upon the question of whether gravel purchased by the county should be under competitive bids said:

"Since, on the allegations of the petition, the gravel in controversy was sold and delivered by appellant and accepted by appellee on contract without competitive bids, the contract was unauthorized by law."

See also Wyatt Metal and Boiler Works v. Fannin County, 111 S.W. (2d) 787.

Therefore, in view of the foregoing, it is our opinion that road building materials purchased by the county, must be submitted under competitive bids.

In compliance with your request, we are enclosing the following opinions: V-285, O-6369, O-6506, and O-2955.

SUMMARY

1. The Commissioners' Court is not required to let a contract under competitive bids to build county roads, but may supervise the building of the same itself. Art. V, Sec. 18, Art. XI, Sec. 2, Art. XVI, Sec 24, State Constitution; Art. 2351, V.C.S.; Gulf Bitulithic Co. v. Nueces Co. (Com. App.) 11 S.W. (2d) 305.

2. In the construction of county roads, the Commissioners' Court may employ persons to haul gravel and material, and pay them on a per yard basis, without requiring competitive bids. Jackson v. Noel, 37 S.W. (2d) 787.

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3. Road building material purchased by the county must be submitted under competitive bids. Art. 1659, V.C.S.; East Texas Const. Co. v. Liberty County, 139 S.W. (2d) 669.

Yours very truly,

ATTORNEY GENERAL OF TEXAS

s/ Bruce Allen

By

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APPROVED:

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