



**THE ATTORNEY GENERAL
OF TEXAS**

January 27, 1988

**JIM MATTOX
ATTORNEY GENERAL**

Honorable Ray Farabee
Chairman
Committee on State Affairs
Texas State Senate
P. O. Box 12068
Austin, Texas 78711

LO-88-10

Dear Senator Farabee:

By letter of January 14, 1988, you requested advice from this office on the process by which a county may contract with a private vendor for correctional facilities under Senate Bill No. 251 of the 70th Legislature. Acts 1987, 70th Leg., ch. 18, §6, at 94, 101-03 (amending article 5115d, V.T.C.S.). Article 5115d, as amended, allows a commissioners court to contract with a private vendor "to provide for the financing, design, construction, leasing, operation, purchase, maintenance, or management of a jail, detention center, work camp, or related facility." S.B. No. 251, §6; V.T.C.S. art. 5115d, §(c).

The specific questions you ask about contract formation are as follows:

1. May a county desiring to enter into a contract with a private vendor under article 5115d(c) and (e), V.T.C.S., issue requests for proposals in lieu of invitations for bids?

2. If your answer to the above question is in the affirmative, may a county issuing such requests for proposals select one or more of the highest ranking proposers with whom to negotiate programmatic content and cost per day figures?

Your questions are similar to those posed several months ago by Mr. James Lynaugh, Director of the Texas Department of Corrections. By letter of October 7, 1987, Mr. Lynaugh asked this office whether the Texas Department of Corrections could, under article 6166g-2, V.T.C.S.,

negotiate the price and content of a proposal with a private vendor. We responded, by letter of October 12, 1987, that article 6166g-2, as amended, authorizes a request for proposals -- as distinguished from a competitive bidding procedure -- and that negotiations are therefore permissible. That conclusion was based on the unambiguous language of Senate Bill No. 251, codified at article 6166g-2, V.T.C.S.:

Sec. 3. (a) The Texas Board of Corrections may not award a contract under this article unless the board requests proposals and receives a proposal that meets or exceeds, in addition to requirements specified in the request for proposals, the requirements specified in Subsections (b), (c), and (d) of this section. (Emphasis added.)

By its adoption of the foregoing language, the legislature clearly indicated that the Texas Board of Corrections is not to be subjected to competitive bidding requirements. See System Development Corporation v. Department of Health and Rehabilitative Services, 423 So.2d 433 (Fla. Dist. Ct. App. 1982) (distinguishing invitation for bids from request for proposals); 64 Am. Jur.2d Public Works and Contracts, §34 (competitive bidding is required only where a statute or constitutional provision imposes such a requirement).

With regard to counties, though, Senate Bill No. 251 manifested a wholly different legislative intent. The bill did impose certain substantive requirements on county contracts; see V.T.C.S. art. 5115d, §§(e)-(g). It did not, however, attempt to set out a procedural framework for those arrangements. Nowhere, for example, did the bill mention "requests for proposals" in the context of county contracts. Rather, the procedure for county contracting was left to pre-existing law.

That pre-existing law leaves little room for debate on the requirement of competitive bidding for county contracts. See the County Purchasing Act, Local Gov't Code §§262.021-262.034 (formerly article 2368a.5, V.T.C.S.). That act provides, in part:

(a) Before a county may purchase one or more items under a contract that will require an expenditure exceeding \$5,000, the commissioners court of the county must comply with the competitive bidding or

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competitive proposal procedures prescribed
by this subchapter. All bids or proposals
must be sealed.

Local Gov't Code §262.023. The act thus requires competi-
tive bidding on virtually all county purchases over
\$5,000. See Attorney General Opinion JM-385 (1985).

The act does exempt certain types of purchases. See
Local Gov't Code §§262.024, 262.030. Some contracts
authorized under article 5115d, V.T.C.S., may fall within
one or more of those exceptions. Most contracts under
article 5115d, however, will be subject to competitive
bidding requirements.

Yours very truly,



Rick Gilpin, Chairman
Opinion Committee

RG/SG/CR/er