



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**JOHN L. HILL
ATTORNEY GENERAL**

December 20, 1973

The Honorable Dolph Briscoe
Governor of the State of Texas
State Capitol
Austin, Texas 78711

Letter Advisory No. 75

Re: Purchase of electronic
voting machine by House
of Representatives

Dear Governor Briscoe:

You have asked our opinion as to whether or not the requirements of the Constitution and laws of the State of Texas have been met in the requisition by the House of Representatives of an electronic voting system, in the submission of bids to the Board of Control and the acceptance of one bid in fulfillment of the requisition.

The legislative background of the requisition will be discussed in detail later in this opinion. Documents forwarded to us by the Committee on House Administration of the House of Representatives indicate that the committee, on June 28, 1973, voted to request the Board of Control to take bids on a new voting machine for the House. On July 28, the committee voted to approve and accept the bid of Control Data Corporation to construct the system.

Negotiations were undertaken which culminated in a written contract and purchase order dated September 12, 1973. In the meantime, the proposal was submitted to the State Auditor's Office for comments and, on August 10, the director of the Systems Division of that office wrote the Speaker of the House criticising the bidding procedure at length as not having been given adequate time or attention with the predicted result that the proposed system would not meet expectations.

The Board of Control determined that the purchase was within the provisions of Article 16, § 21, of the Constitution - a "constitutional"

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purchase - and thus required the approval of the Governor, the Secretary of State and the Comptroller. In fact the Purchase Order of September 12, 1973, has been approved by the Secretary of State's Office and by the Comptroller.

When you received it for your approval, you returned it to the Board of Control, unsigned, stating:

"The attached letter from the State Auditor's Office regarding that office's previous correspondence with the Speaker of the House raises sufficient questions about this matter that I believe a thorough legal review by the Attorney General is required. I am asking the Attorney General to conduct such a review and give me his opinion.

"I have been informed by members of the Planning Committee for the Constitutional Convention that the voting machine will not be needed by the Constitutional Convention. This eliminates the necessity for immediate action and will give us adequate time to resolve any questions.

"It is not my purpose to judge the need for this voting machine. That is a matter that properly concerns the House of Representatives. But I know that all appropriate state officials will join with me in making certain that the best interests of the State of Texas are served."

At the same time you wrote us:

"I am hereby asking for your opinion as to whether or not purchase order 01982 pursuant to requisition number HR-4-1-J and the authorization and bidding procedures relating thereto fulfill the requirements of the Constitution and laws of the State of Texas."

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On September 20, 1973, we received a copy of a letter from the Speaker of the House addressed to you, in which it was stated that the question propounded by your letter was moot, "as the Committee on House Administration was compelled because of delays in the finalization of the contract to terminate the proposed purchase."

Since then, however, we have been advised by your office that the opinion is still desired. Further, the House Committee on House Administration has requested that we proceed and answer your request. Accordingly, we have reviewed the legislative history of the purchase, its statutory and constitutional foundations, and the purchase procedures to some extent.

The normal requirements for the expenditure of State funds for any purchase, no matter by whom it is to be made, are: (a) pre-existing law authorizing the expenditure; (b) an appropriation by the Legislature of funds out of the Treasury of the State to make the purchase; (c) an exercise of whatever administrative discretion there may be as to whether the appropriated funds are to be actually spent; and (d) compliance with statutory provisions governing purchases generally.

Article 3, § 44 of the Constitution of the State of Texas provides:

"The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors, not provided for in this Constitution, but shall not grant extra compensation to any officer, agent, servant, or public contractors, after such public service shall have been performed or contract entered into, for the performance of the same; nor grant, by appropriation or otherwise, any amount of money out of the Treasury of the State, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law; nor employ any one in the name of the State, unless authorized by pre-existing law." (Emphasis added)

The classic definition of "pre-existing law" is found in Austin National Bank v. Sheppard, 71 S. W. 2d 242 (Tex. 1934) where the Court

said:

"We interpret this to mean that the Legislature cannot appropriate state money to 'any individual' unless, at the very time the appropriation is made, there is already in force some valid law constituting the claim the appropriation is made to pay a legal and valid obligation of the state. By legal obligation is meant such an obligation as would form the basis of a judgment against the state in a court of competent jurisdiction in the event it should permit itself to be sued." (71 S. W. 2d at 245)

In Austin National Bank v. Sheppard, supra, the Court rejected the contention that "pre-existing law" meant "pre-existing statutory law". It held that the common law rule that a person who pays an illegal tax under duress, either express or implied, has the right to secure a refund, was sufficient "pre-existing law" to support an appropriation by the Legislature refunding the money. The Court said:

"It is our opinion that a common-law right is a right under a 'pre-existing law' within the meaning of the constitutional provision under discussion here."
(71 S. W. 2d at 245)

See also State v. Connecticut General Life Insurance Company, 382 S. W. 2d 745 (Tex. 1964); Fort Worth Cavalry Club v. Sheppard, 83 S. W. 2d 660 (Tex. 1935); Matkins v. State, 123 S. W. 2d 953 (Tex. Civ. App., Beaumont, 1939, error dismissed, J. C.).

Of course, for the common law to be the pre-existing law authorizing an appropriation, the common law must not be inconsistent with any constitutional or statutory provision of the state. State v. Steck Co., 236 S. W. 2d 866 (Tex. Civ. App., Austin, 1951, error refused).

We are unable to find any constitutional or statutory law expressly authorizing the House of Representatives of the Legislature to purchase an electronic machine of the nature here involved. In fact, we find no express constitutional or statutory authorization for the Legislature to

purchase any furniture or equipment of any sort. However, the Constitution does vest the legislative power of this State in the Senate and House of Representatives (Article 3, § 1) and there is a well recognized principle that a constitutional grant of power carries with it the authority to do those things necessary to accomplish the purpose of the grant. Terrell v. King, 14 S. W. 2d 786 (Tex. 1929) and cases cited.

Article 16, § 21 of the Constitution of Texas provides:

"All stationery, and printing, except proclamations and such printing as may be done at the Deaf and Dumb Asylum, paper, and fuel used in the Legislative and other departments of the government, except the Judicial Department, shall be furnished, and the printing and binding of the laws, journals, and department reports, and all other printing and binding and the repairing and furnishing the halls and rooms used for the meetings of the Legislature and its committees, shall be performed under contract, to be given to the lowest responsible bidder, below such maximum price, and under such regulations, as shall be prescribed by law. No member or officer of any department of the government shall be in any way interested in such contracts; and all such contracts shall be subject to the approval of the Governor, Secretary of State and Comptroller."

While this may not be construed as expressly authorizing the "repairing and furnishing the halls and rooms used for the meetings of the Legislature and its committees", we certainly believe that it is an express recognition that the Legislature possesses, as a concomitant to its power to act as the Legislature, the rights to repair and furnish its chambers.

It is our opinion therefore that there is ample pre-existing law in our State Constitution and at common law to authorize the Legislature to appropriate funds to the House of Representatives to furnish its chambers including, if it were decided to be necessary, the provision of an electronic voting machine.

We further find that there is an appropriation for that purpose. House Bill 139 of the 63rd Legislature, the Appropriations Act for fiscal 1974-1975 at page VI-1, appropriates a substantial lump sum to the House of Representatives for each year of the biennium to cover many items including "capital outlay, building repair and remodeling, and other expenses for the House of Representatives." In our opinion, this is sufficient to authorize expenditure for an electronic voting machine.

This then brings us to the third essential of an expenditure of State funds: an administrative decision by the Legislature as to whether and how the funds should be expended.

We have been furnished a copy of House Simple Resolution No. 214, adopted by the House on May 28, 1973, the purpose of which was to designate the powers of the Speaker and the Committee on House Administration regarding the operation of the House when the 63rd Legislature was not in session. The Committee on House Administration was given broad authority, including authority "to purchase, remodel, repair, restore, or replace any furniture, fixtures, equipment, and other furnishings they deem necessary to the interim business of the House or appropriate to the dignity and good appearance of the Hall of the House, Members' offices, committee rooms, the Speaker's office and apartment, and all other space in the Capitol set aside for the use of the House", and to purchase or rent items which may be necessary in the keeping of records of the House. While, again, there is no specific language authorizing the House Committee to purchase an electronic voting machine, in our opinion the authorization is sufficiently broad to be interpreted as including the purchase of such equipment. See Rule 7, Section 9 Rules of the House of Representatives giving to the Committee on House Administration jurisdiction over "all property, equipment and supplies obtained by the House for its use and the use of its members", and "the electronic recording of the proceedings of the House of Representatives. . . ."

Although it is not clearly and expressly documented we cannot say that the House of Representatives did not authorize the Committee on House Administration to purchase the machine involved, or that the Committee had not decided to purchase the electronic voting machine. Therefore, the third requirement apparently is met.

We answer your question concerning the authorization for the purchase in question that the purchase would be within the constitutional authority of the Legislature, would be a proper expenditure of funds appropriated to the House of Representatives, and appears to have been ordered by the Committee on House Administration of the House of Representatives within the authorization of H. S. R. No. 214. We therefore are of the opinion that the purchase may be made.

Article 16, § 21 of the Constitution, which we have quoted above, requires that contracts for the "repairing and furnishing the halls and rooms used for the meetings of the Legislature" be given to "the lowest responsible bidder, below such maximum price, and under such regulations, as shall be prescribed by law. "

The procedures "prescribed by law" are found in Article 664-3, V. T. C. S., The State Purchasing Act of 1957. Although the scope of "each Department of the State Government" to which the Act is made applicable by § 5 (amended Acts 1971, 62nd Leg., p. 109, ch. 57) is not altogether clear, it is our opinion that the term does include the Legislature. Section 3, Art. 664-3, V. T. C. S.; Comment, "Contracting with the State of Texas-The Purchasing System", 44 Tex. Law Rev. 58 (1965); Attorney General Opinion M-316 (1968). Section 8 of The State Purchasing Act of 1957, as amended (Acts 1971, 62nd Leg., p. 2648, ch. 871) now requires:

"(a) Notice. Notice inviting bids shall be published at least once in at least one newspaper of general circulation in the state and at least seven days preceding the last day set for the receipt of bids. The newspaper notice shall include a general description of the articles to be purchased, and shall state where bid blanks and specifications may be secured, and the time and place for opening bids.

"(b) Bidders List. The Board shall maintain a bidders list and shall add or delete names from the list by the application and utilization of applicable standards set forth in subsection (e) of this section. In any case, bid invitations shall be sent only to those who have expressed a desire to bid on the particular types of items which are

the subject of the bid invitation. Use of the bidders list shall not be confined to contract purchases but it may be used by the Board as it may find desirable in making any purchase.

"(c) Bid Deposits. When deemed necessary by the Board bid deposits in amounts to be set by the Board shall be prescribed in the public notices and the invitation to bid. The Board shall establish and maintain records of bid deposits and their disposition with the cooperation of the State Auditor, and upon the award of bids or rejection of all bids, bid deposits shall be returned to unsuccessful bidders making bid deposits. The Board may accept a bid deposit in the form of a blanket bond from any bidder.

"(d) Bid Opening Procedure. Bids shall be submitted to the Board sealed and identified as bids on the envelope. Bids shall be opened by the Board at the time and place stated in the public notices and the invitation to bid; provided, the State Auditor or a member of his staff may be present at any bid opening. A tabulation of all bids received shall be available for public inspection under regulations to be established by the Board.

"(e) Award of Contract. The Board shall award contracts to the bidder submitting the lowest and best bid conforming to the specifications required by the Board. Complying with the specified time limit for submission of written data, samples or models on or before bid opening time is essential to the materiality of a bid, provided however that the Board shall have the authority to waive this provision if the failure to comply is beyond control of the bidder. In determining who is the lowest and best bidder, in addition to price, the Board shall consider:

"(1) The ability, capacity and skill of the bidder to perform the contract or provide the service required;

"(2) Whether the bidder can perform the contract or provide the service promptly, or within the time required, without delay or interference;

"(3) The character, responsibility, integrity, reputation, and experience of the bidder;

"(4) The quality of performance of previous contracts or services;

"(5) The previous and existing compliance by the bidder with laws relating to the contract or service;

"(6) Any previous or existing noncompliance by the bidder with specification requirements relating to time of submission of specified data such as samples, models, drawings, certificates or other information;

"(7) The sufficiency of the financial resources and ability of the bidder to perform the contract or provide the service;

"(8) The quality, availability and adaptability of the supplies, or contractual services, to the particular use required;

"(9) The ability of the bidder to provide future maintenance, repair parts, and service for the use of the subject of the contract;

"(10) The number and scope of conditions attached to the bid.

"(f) Rejection of Bids. If a bid is submitted in which there is a material failure to comply with the specification requirements, such bid shall be rejected and the contract awarded to the bidder submitting the lowest and best bid conforming to the specifications, provided, however, the Board shall in any event have the authority to reject all bids or parts of bids when the interest of the state will be served thereby.

"(g) Bid Record. When an award is made a statement of the basis for placing the order with the successful bidder shall be prepared by the purchasing division and filed with other papers relating to the transaction.

"(h) Tie Bids. In case of tie bids, quality and service being equal, the contract shall be awarded under rules and regulations to be adopted by the Board.

"(i) Performance Bonds. The Board may require a performance bond before entering a contract in such amount as it finds reasonable and necessary to protect the interests of the state. Any bond required under this subsection shall be conditioned that the bidder will faithfully execute the terms of the contract into which he has entered. Any bond required shall be filed with the Board and recoveries may be had thereon until it is exhausted."

Complaints have been leveled at the manner in which bids for the equipment in question were sought, received and accepted. Among other things, it is complained that insufficient time was allowed; that only three contractors submitted bids out of forty-one who were invited; that inadequate information was given and inadequate opportunity to secure information was allowed; that specifications only described generally what was wanted; and that evaluation of the three proposals was inadequate in that they were not thoroughly considered.

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The Constitution requires and the Purchasing Act would implement "competitive bidding". In Texas Highway Commission v. Texas Association of Steel Importers, Inc., 372 S. W. 2d 525 (Tex. 1963) the Supreme Court quoted as a good statement of the purpose and intent of competitive bidding the following from Sterrett v. Bell, 240 S. W. 2d 516 (Tex. Civ. App., Dallas, 1951, no writ):

" 'Competitive bidding' requires due advertisement, giving opportunity to bid, and contemplates a bidding on the same undertaking upon each of the same material items covered by the contract; upon the same thing. It 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." (372 S. W. 2d at 527)

The State Purchasing Act of 1957 places great discretion in the Board of Control. While it requires notice, it only requires that notice be published at least once and at least seven days preceding the last day for the receipt of bids. In awarding of the contract, the Board is not bound to accept the lowest bid. Rather it is instructed to consider who also is the best bidder based upon the ten factors specified in the statute. Whether or not the Board of Control in a particular situation has abused its discretion with the result that, in fact, there has been no competitive bidding, involves a fact determination which we cannot make. That determination must be made, in the first instance by those who are charged by the Constitution in Article 16, § 21, with the responsibility of approving contracts for repairing and furnishing the halls and rooms of the Legislature, i. e., the Governor, the Secretary of State and the Comptroller. If they are not satisfied, and do

not approve the contract, whether or not there has been full compliance may be a question to be determined by the courts. See Teer v. McGann, 65 S. W. 2d 362 (Tex. Civ. App., Austin, 1933, no writ).

One other complaint made concerning the purchase order is that the contract, as finally submitted, was for an amount in excess of the original bid, apparently reflecting the correction of errors made in the original bid.

It seems to be well settled in our jurisprudence that, even after acceptance of a bid but prior to execution of the contract, a bidder who has made a mistake may obtain equitable relief, either in rescision of the bid or against its enforcement. Generally, relief will be granted when a mistake is a clerical one; where it is of so great consequence that to enforce the contract would be unconscionable; where it relates to a material feature of the contract; where it must have been made regardless of the exercise of ordinary care and where the parties can be placed in status quo, that is, rescision must not result in damage to the other contracting party except for the loss of his bargain. State Highway Commission v. Canon, 250 S. W. 2d 439 (Tex. Civ. App., Austin, 1952, err. ref'd., n. r. e.); James T. Taylor and Son, Inc., v. Arlington Independent School District, 335 S. W. 2d 371 (Tex. 1960); Comment, "Contracting with the State of Texas - The Competitive Bidding Requirement", supra, at page 92-98. Occasionally, modification of a bid may be permitted to correct a mistake, but not if it destroys competitive bidding. Compare Attorney General Opinion H-24 (1973).

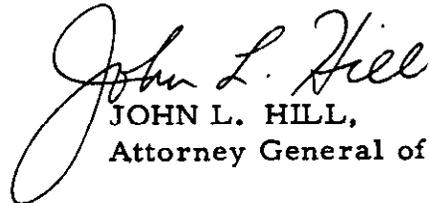
We therefore are of the opinion that whether or not there has been compliance with the statutory provisions governing purchases of this sort and with the constitutional requirement of competitive bidding is a fact question which will have to be resolved by those charged with the responsibility for awarding the contract and approving it.

SUMMARY

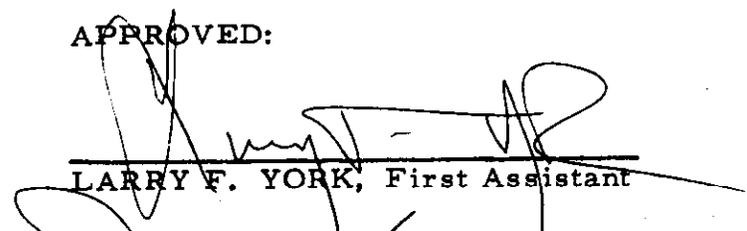
There is pre-existing law authorizing the purchase by the House of Representatives of an electronic voting system for which funds have been appropriated. It would

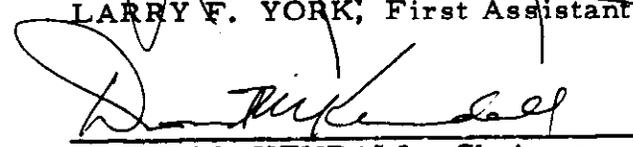
also appear that the House of Representatives has appropriately made the decision to purchase the equipment through its Committee on House Administration. Whether or not there has been compliance with the State Procurement Act of 1957 or the requirement of § 21 of Article 16, that there be competitive bidding, is a question of fact to be determined initially by those required by law to approve or disapprove the contract, and, ultimately, by the courts.

Very truly yours,


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