



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 15, 2020

The Honorable Roberto Serna
District Attorney
293rd Judicial District
458 Madison Street
Eagle Pass, Texas 78852

Opinion No. KP-0315

Re: Application of article III, section 53 of the Texas Constitution to invoices submitted to a county under an amended service contract for services performed prior to the amendment (RQ-0323-KP)

Dear Mr. Serna:

On behalf of the Maverick County Auditor, you ask whether approval and payment of certain Maverick County (“County”) invoices is lawful.¹ You describe an invoice pertaining to the County’s retention of a law firm to serve as bond counsel for a pending project.² *See* Request Letter at 1–3. You recite the following facts:

On June 19, 2017, Maverick County approved the terms included in an engagement letter from Bracewell dated June 12, 2017, with provision[s] including a fee of \$70,000 [and expenses and reimbursements for the project;]

The Commissioners Court on May 13, 2019, approved an Order authorizing issuance of Certificates of Obligation relating to [the project];

On September 23, 2019, the Commissioners Court approved an Order amending its May 13, 2019 Order and authorizing amendment of the agreement with counsel;

¹*See* Letter from Honorable Roberto Serna, Dist. Att’y, 293rd Jud. Dist., to Honorable Ken Paxton, Tex. Att’y Gen. at 1–2 (Dec. 6, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

²You indicate the County Auditor has similar concerns about another contract and amendment for a different law firm that serves as general counsel for the same project. *See id.* at 2–3.

On September 26, 2019, . . . the first installment of the funding relating to the project was transmitted to the County . . . ;

By invoice also dated September 26, 2019, Bracewell requested payment of \$135,000 plus [fees and expenses related to the project];

A Letter of Engagement from Bracewell dated October 23, 2019, included provisions for payment of \$135,000 plus [fees and expenses] to Bracewell for its work on the project.

Id. at 1–2. You state the auditor is concerned that “payment by the County of the amount as requested by Bracewell would be in violation” of Texas Constitution, article III, section 53. *Id.* at 2. You explain the auditor recognizes the contract was amended on September 23, 2019, but is concerned that it appears a great part of the work on the project was done before the amendment and performed pursuant to the terms of the previous agreement. *See id.* While the propriety of payment of a particular invoice is a factual matter not for resolution as a matter of law in an attorney general opinion, we can provide general advice on article III, section 53. *See Tex. Att’y Gen. Op. No. JC-0221 (2000) at 8–9 (considering the question whether a particular payment complies with the law and recognizing it “is a factual determination based on a review of the surrounding circumstances and is beyond the scope of the opinion process”).*

Article III, section 53, in relevant part, prohibits the Legislature from authorizing a county or municipal authority to grant extra compensation “after service has been rendered, or a contract has been entered into, and performed in whole or in part.” TEX. CONST. art. III, § 53. The provision was adopted “to prevent the counties or municipalities from freely giving away public moneys for services previously rendered or for which no valid legal authorization existed and for which the public would receive no return.” *Lee v. El Paso Cty.*, 965 S.W.2d 668, 673 (Tex. App.—El Paso 1998, pet. denied); *see also Tex. Att’y Gen. Op. No. JC-0376 (2001) at 2.* “Extra compensation” means “any sum given in addition to the contract price or salary.” *Rhoads Drilling Co. v. Allred*, 70 S.W.2d 576, 582 (Tex. [Comm’n Op.] 1934); *see also Dallas Cty. v. Lively*, 167 S.W. 219, 220 (Tex. 1914). The prohibition means that “the state and its political subdivisions may not pay additional funds for contractual performance already required by an existing contract.” *Tex. Att’y Gen. Op. No. GA-0204 (2004) at 3 (citing Rhoads Drilling Co., 70 S.W.2d at 581).*

But article III, section 53 does not prohibit the State and its political subdivisions from modifying their contracts, provided that any additional payments are made in return for new consideration.³ *See id.*; *cf. City of Greenville v. Emerson*, 740 S.W.2d 10, 13 (Tex. App.—Dallas 1987, no writ). As prior opinions from this office illustrate, a contract modification or amendment that involves additional payment for additional services does not violate article III, section 53. *See, e.g., Tex. Att’y Gen. Op. Nos. JC-0165 (2000) at 4, MW-68 (1979) at 1.* Opinion JC-0165 involved a school district’s implementation of an early exit plan for employees. *Tex. Att’y Gen. Op. No. JC-0165 (2000) at 1.* This office said “where the payee offers additional consideration for

³Consideration is “a present exchange bargained for in return for a promise and consists of benefits and detriments to the contracting parties.” However, “[w]here a party agrees to do what he is already bound to do by an original contract, there is not sufficient consideration to support a supplemental contract or modification.” *McCoy v. Alden Indus., Inc.*, 469 S.W.3d 716, 729 (Tex. App.—Fort Worth 2015, no pet.) (citations omitted).

the additional payments, there is no violation” of article III, section 53. *Id.* at 4. Opinion MW-68 concerned a school district’s salary increase after the commencement of the school year and the start of the teachers’ yearly contracts. Tex. Att’y Gen. Op. No. MW-68 (1979) at 1. The opinion concluded that the school district could not make the increase absent additional consideration. *Id.* at 2. “The school board may, however, renegotiate a contract already performed in part where new consideration passes to the district in exchange for new benefits provided.” *Id.*

Here, payment of the amount owed under the original contract for services required by that contract is not extra compensation in violation of article III, section 53. *See* Tex. Att’y Gen. LO-93-057, at 2. It would only be extra compensation to pay more than what was required by the original contract for the same scope of services required by that contract. And though some services may have already been provided under the original contract, if the amended contract was supported by new consideration, payment of an invoice submitted thereunder would comply with article III, section 53 provided the new consideration was sufficient. A change in the scope of work to require additional services in exchange for additional payment likely constitutes adequate consideration in support of the amendment, but that is a question for the commissioners court in the first instance. *See* Tex. Att’y Gen. Op. No. MW-91 (1979) at 3–4.

S U M M A R Y

Article III, section 53 of the Texas Constitution prohibits a county or municipal authority from granting extra compensation “after service has been rendered, or a contract has been entered into, and performed in whole or in part.”

A county’s payment of an amount owed under a contract for services required by that contract is not prohibited extra compensation. Though some services may have already been provided under an original contract, if an amended contract is supported by new consideration, payment of an invoice submitted thereunder would comply with article III, section 53 provided the new consideration is sufficient. A change in the scope of work to require additional services in exchange for an additional payment likely constitutes adequate consideration in support of the amendment, but that is a question for the commissioners court in the first instance.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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