



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 15, 2021

The Honorable Russell W. Malm
Midland County Attorney
500 North Loraine, Suite 1103
Midland, Texas 79701

Opinion No. KP-0391

Re: County compliance with competitive bidding procedures before renewing or extending a contract for management of a county facility (RQ-0406-KP)

Dear Mr. Malm:

On behalf of the Midland County Judge, you ask several questions about a particular contract between Midland County (the “County”) and a vendor.¹ Your primary question is whether a county must comply with the competitive procedures of Local Government Code, chapter 262, subchapter C, “before renewing or extending a contract for management of a county facility that was originally awarded through a request for proposals[.]” Request Letter at 1.

Background

You tell us the County owns a multi-purpose facility, which is managed by an independent contractor. *See id.* This facility is “leased out to host a variety of events, including livestock shows, rodeos, equestrian competitions, concerts, sporting events, trade shows, conventions, community events, quinceañeras,” wedding receptions, and the annual County fair. *Id.* You inform us that the County first awarded the contract at issue to the independent contractor in 2005 after a request-for-proposal process. *See id.* at 1–2. You state that the County has renewed the contract with the independent contractor three times since 2005 but “did not go through another bidding or request for proposal process” for those subsequent renewals. *Id.* at 1. You also tell us about a transfer of ownership and name change of the independent contractor. *See id.* at 2. You attach the current and previous contracts and highlight language in each providing that “the agreement may renew for an additional specific time frame by the written and mutual consent of both parties.” *Id.*; *see also* Attachments A–D. You also refer us to language in the 2018 contract

¹*See* Letter and attachments from Honorable Russell W. Malm, Midland Cnty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1–2 (Apr. 23, 2021), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0406KP.pdf> (“Request Letter” and “Attachments,” respectively).

acknowledging an anticipated transfer of ownership from the original vendor to a successor vendor. *See* Request Letter at 2; *see also* Attachment D.

As an initial matter, this office does not approve or construe specific contracts in the opinion process. *See* Tex. Att’y Gen. Op. No. KP-0041 (2015) at 4 (stating that “construction of a contract is beyond the scope of an attorney general opinion”). Accordingly, we cannot opine about the legality of the specific contracts you submit but can offer general advice about the legal authority to enter into agreements. *See* Tex. Att’y Gen. Op. No. KP-0099 (2016) at 1.

Competitive Bidding Requirements in Local Government Code, Chapter 262, Subchapter C

In your first question, you ask about the applicability of competitive bidding requirements in Local Government Code chapter 262, subchapter C, known as the County Purchasing Act (the “Act”). *See* Request Letter at 1; TEX. LOC. GOV’T CODE § 262.021. Subchapter C sets out the competitive processes a county must use for purchases exceeding \$50,000. TEX. LOC. GOV’T CODE § 262.023(a); *see also id.* § 262.023(b) (providing for the applicability of subsection (a) based on specified funding methods). While subchapter C contains discretionary and mandatory exemptions, you do not suggest any exemptions apply to the contracts about which you ask. *See id.* §§ 262.024 (discretionary exemptions), .0241 (mandatory exemptions).

Authority for County Parks and other Resources in Local Government Code, Chapter 319

Instead, you ask whether the specific authority granted in Local Government Code chapter 319 allows a commissioners court to enter into a contract without complying with the competitive bidding requirements of chapter 262. *See* Request Letter at 2. Chapter 319 of Local Government Code, Title 10, subtitle B governs county parks and other recreational and cultural resources. Concerning horticultural and agricultural exhibits, it authorizes a commissioners court to provide for annual exhibits of a variety of products and establish and maintain a building or other improvement to aid in that exhibition. *See* TEX. LOC. GOV’T CODE §§ 319.001–.002. Subsection 319.004(a) specifically authorizes a commissioners court to “contract for the complete management of, and for the conducting, maintenance, use, and operation of, buildings, improvements, and exhibits authorized by this chapter.” *Id.* § 319.004(a); *see also id.* § 319.004(b) (authorizing a commissioners court to “lease the buildings, improvements, or exhibits”).

You refer us to two prior attorney general opinions that concluded “a lease entered into under section 319.004 . . . is not void or voidable if it was entered into without complying with chapter 263.” Request Letter at 3 (citing Tex. Att’y Gen. Op. No. JC-0582 (2002) and Tex. Att’y Gen. LO-98-057). These opinions considered chapter 319’s operation against Local Government Code chapter 263, which contains competitive bidding requirements similar to those in chapter 262. *See* Tex. Att’y Gen. Op. Nos. JC-0582 (2002), LO-98-057; *compare* TEX. LOC. GOV’T CODE § 262.023(a), *with id.* § 263.001(a).

Opinion LO-98-057 characterized chapter 263 as providing general procedures for the sale or lease of county land. *See* Tex. Att’y Gen. LO-98-057, at 2. It contrasted the express authority

of chapter 319 to lease a specific kind of real property. *See id.* The opinion concluded that, because of that specific authority, “chapter 263 do[es] not apply.” *Id.* Years later, Opinion JC-0582 relied on LO-98-057 to similarly conclude that “a lease entered into under section 319.004 . . . is not void or voidable if it was entered into without complying with chapter 263.” Tex. Att’y Gen. Op. No. JC-0582 (2002) at 5.

Other opinions from this office considered the mandatory nature of chapter 263 in connection with other county sale or lease authority and determined that when a statute authorizes a specific kind of transaction, its general competitive bidding provisions do not apply. *See* Tex. Att’y Gen. Op. No. JM-335 (1985) at 1–2 (concluding that “when counties sell real estate by other means authorized by the constitution or statutes, compliance with [chapter 263’s predecessor statute] is not mandatory”).²

Though we find no Attorney General or judicial opinion that reaches the same conclusion with respect to the Act as against other statutes providing authority for county contracts, a court could rely on these opinions to conclude that the Act is not mandatory when a county has other specific authority to contract for services. Thus, to the extent the contracts about which you ask were authorized by chapter 319, compliance with the competitive procedures of chapter 262 is not mandatory, either for an initial contract or for renewals or extensions thereof.³

Transfer of Ownership

Your third and fourth questions relate to the transfer of ownership of the original vendor. You question whether a contract between the County and a vendor becomes void or voidable if the vendor is sold during the terms of the contract. *See* Request Letter at 1. Then you ask whether our answer changes if the contract contained language acknowledging that the company would be sold. *See id.* at 2.

You do not provide details about the transfer of ownership from the original vendor to the successor organization, but we presume the contract with the County was either an asset conveyed to the successor organization (i.e., an asset purchase), or was a transfer of the shares or other similar equity in the original vendor (i.e., a share purchase) as part of the transfer. Under general contracting principles, and absent a contractual provision or law prohibiting or conditioning another party’s consent for an assignment, an assignee stands in the same position as his assignor and acquires all the assignor’s rights and obligations. *See Crowell v. Bexar Cnty.*, 351 S.W.3d 114, 118 (Tex. App.—San Antonio 2011, no pet.). And in the exercise of its powers to manage its own affairs, a governmental body may execute contract terms “similar to those made by

²*See* Tex. Att’y Gen. Op. No. DM-131 (1992) at 3–4 (recognizing Revised Civil Statute article 1577 as predecessor statute to Local Government Code section 263.001 and concluding that section 286.077(b) of the Health and Safety Code authorized a hospital district’s board of directors to lease district facilities and therefore section 263.001 of the Local Government Code “has no application”); *see also* Tex. Att’y Gen. Op. No. JM-1197 (1990) at 7 (relying on Opinion JM-335 to conclude that compliance with Local Government Code section 263.001 was unnecessary because other law authorized a commissioners court to enter into a lease with an appraisal district).

³Given this conclusion, we need not address your second question which was contingent upon an affirmative answer to your first. *See* Request Letter at 2; *see generally* Tex. Att’y Gen. Op. No. GA-0247 (2004) at 5–7 (discussing the voidability of a contract that violates chapter 262).

citizens.” Tex. Att’y Gen. Op. Nos. JC-0354 (2001) at 4, JM-1043 (1989) at 2, H-1025 (1977) at 2 (quoting *Ehlinger v. Clark*, 8 S.W.2d 666, 671 (Tex. 1928) (referring to county authority to include automatic-extension provision in lease)); *see also Comm’rs Ct. of Titus Cnty. v. Agan*, 940 S.W.2d 77, 79 (Tex. 1997) (recognizing the Texas Constitution’s establishment of the commissioners court as the principal governing body of the county, and that the duties of commissioners courts “include aspects of legislative, executive, administrative, and judicial functions”); TEX. CONST. art. V, § 18(b). Accordingly, a commissioners court may agree to reasonable terms in a contract, including an assignment clause, provided such terms are consistent with applicable statutes and constitutional provisions regarding county contracting and the authority of the commissioners court generally. *See* Tex. Att’y Gen. LO-98-057, at 2. As the Act does not impose limits on the types of terms a contract may contain, it does not address your questions. Instead, your questions are answered by the specific provisions of the contracts at issue, which this office does not construe.

S U M M A R Y

The commissioners court of a county may renew a lease agreement authorized by Local Government Code chapter 319 without complying with the competitive purchasing procedures of Local Government Code chapter 262.

While this office does not construe contracts, as a general matter a commissioners court may agree to reasonable terms in a contract, including an assignment clause, provided such terms are consistent with applicable statutes and constitutional provisions regarding county contracting and the authority of the commissioners court generally.

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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