

TIM CURRY
CRIMINAL DISTRICT ATTORNEY
401 WEST BELKNAP STREET
FORT WORTH, TEXAS 76106-0201 (817) 884-1620

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Opinion Committee

RQ-0052-JC

April 1, 1999

Attorney General John Cornyn
P. O. Box 12548
Austin, Texas 78711

C.M./R.R.R. # Z 308 646 167

FILE # ML-40768-99 Re:
I.D. # 40768

Civil Division Opinion: 99-OP-113
Competitive Bidding Requirements in
Regard to Sheriff's Department
Commissary Funds

Dear General Cornyn:

By prior opinion (Op. Tx. Atty. Gen. LO-98-071) my office has learned that the sheriff must rebid the commissary every five years when he licenses a private vendor to perform the commissary service. A new question has arisen for which I seek your opinion. The sheriff now has in excess of three hundred thousand dollars in fees paid by the vendor for performing this service. The question for your deliberation follows:

Is the sheriff required to comply with the requirements of Chapter 262 of the Texas Local Government Code (competitive bidding) in spending the fees paid by the vendor of the commissary services authorized by section 351.0415 of the Texas Local Government Code?

In 1982 Attorney General Mark White concluded that items purchased with profits from the jail commissary were subject to the competitive bid requirements the same as other purchases made for county officers. See Op. Tex. Atty. Gen. MW-439 (1982). After the passage of section 351.0415 of the Texas Local Government Code, Attorney General Jim Mattox concluded in explaining the intent of this new act:

We conclude that by virtue of the express language of section 351.0415, the sheriff may enter into a contract regarding the county jail commissary without consulting the county purchasing agent or being subject to action taken by the commissioners court in a competitive bidding process under section 262.023.

Op. Tx. Atty. Gen. No. JM-1121 (1989).

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We have taken JM-1121 to place in the discretion of the sheriff the selection of the commissary vendor. It appears that section 351.0415 and JM-1121 have reversed the result of MW-439. In 1993 Attorney General Dan Morales issued an opinion which by analogy may require the sheriff to follow Chapter 262 of the Texas Local Government Code in the use of proceeds from the commissary operation. In that year General Morales was faced with a question regarding whether the Cameron County Attorney had to follow Chapter 262 of the Texas Local Government Code in purchasing a phone system with an amount of money in excess of \$10,000 from proceeds awarded under Chapter 59 of the Texas Code of Criminal Procedure. General Morales was reluctant to construe the competitive bidding statute strictly and decided that expenditures under Chapter 59 of the Texas Code of Criminal Procedure were subject to the competitive bidding process. Op. Tex. Atty. Gen. No. DM-246 (1993).

Section 351.0415(c) of the Texas Local Government Code is silent on the procedure to follow in spending the proceeds. It does limit the purposes for which the funds may be spent. What we do know is that the violation of 262.011 is a crime. The criminal penalty provides:

(m) A person, including an officer, agent, or employee of a county or of a subdivision or department of a county, commits an offense if the person violates this section. An offense under this subsection is a misdemeanor punishable by a fine of not less than \$10 or more than \$100, by confinement in the county jail for not less than 30 days or more than one year, or by both the fine and confinement. Each act in violation of this section is a separate offense.

Since an officer or employee commits a crime by violating section 262.011, we have looked at several subsections for guidance in divining the legislative intent regarding whether these proceeds are subject to Chapter 262. For example, subsection (d) provides:

(d) The county purchasing agent shall purchase all supplies, materials, and equipment required or used, and contract for all repairs to property used, by the county or a subdivision, officer, or employee of the county, except purchases and contracts required by law to be made on competitive bid. A person other than the county purchasing agent may not make the purchase of the supplies, materials, or equipment or make the contract for repairs.

This subsection seems to clearly require that any purchase by an officer of the county must be made by the county purchasing agent, including a sheriff making a purchase under section 351.0415 of the Texas Local Government Code. In the only case

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that interprets section 262.011 the Texas Supreme Court concluded that a park board must follow chapter 262 of the Texas Local Government Code unless it is explicitly excluded from those provisions. *Lohec v. Galveston County Commissioners Court*, 841 S.W.2d 361, 365 (Tex. 1992).

Since subsection (d) implicates purchases for which competitive bidding is not required, we have also studied the competitive bidding statute. See Tex. Loc. Gov't Code Ann. § 262.021 *et seq.* Competitive bidding is required when the expenditure exceeds \$15,000 of current funds, bond funds or time warrants. Tex. Loc. Gov't Code Ann. § 262.023 (a) & (b). The definition of current funds includes "funds in the county treasury that are available in the current tax year . . ." Tex. Loc. Gov't Code Ann. § 262.022(3).

Are the funds the sheriff collects from the commissary contract current funds? It appears that the answer is yes. Chapter 116 of the Texas Local Government Code describes the funds and security regarding the county depository. That chapter "applies to money collected or held by a district, county, or precinct officer in a county and by the officers of a defined district or subdivision in the county, including the funds of a municipal or quasi-municipal subdivision or corporation that has the power to select its own depository but has not done so. The money shall be deposited under this chapter, and the money shall be considered in fixing, and is protected by, a county depository's bond." Tex. Loc. Gov't Code Ann. § 116.002 (a).

In 1993 Attorney General Morales determined that county treasury included the term county depository. See Op. Tex. Att'y Gen. No. DM-257 (1993). Our research would indicate that by analogy the analysis of DM-246 overruled controls in this request also. We therefore respectfully request your opinion regarding whether purchases from the proceeds paid by the commissary vendor are governed by Chapter 262 of the Texas Local Government Code.

Sincerely,



TIM CURRY

TC/sdb