



# The Senate of The State of Texas

SENATOR RODNEY ELLIS  
District 13

PRESIDENT PRO TEMPORE  
1999 - 2000

July 10, 2006

The Honorable Greg Abbott  
Attorney General of Texas  
PO Box 12548  
Austin, TX 78711-2548

Dear General Abbott:

**RQ-0509-GA**

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The purpose of this letter is to request your formal opinion regarding the current validity of Attorney General Opinion DM-14 with respect to purchasing by a food service management company of food and supplies under a food service management agreement.

As you are aware, DM-14 addresses 2 questions: (1) whether the selection of a contractor for a food service management contract must be accomplished pursuant to competitive bidding; and (2) whether a school district may delegate to a food service management company the authority to purchase food and supplies required under a food service management agreement. My question is limited to the response to the 2<sup>nd</sup> question addressed by DM-14, by which the Attorney General expressed the opinion that a school district may not delegate the purchase of food products and supplies to a food service management company.

By way of background, most food service management agreements in the State of Texas are entered on a cost-reimbursement plus fee basis. Under this arrangement, the food service management company is reimbursed certain costs incurred in performing the food service management agreement and earns a fixed fee either on a specified periodic basis or based on the number of meals served. As permitted by federal regulation, however, the Texas Department of Agriculture (TDA), which is the state agency with oversight authority of school districts contracting with food service management companies, has also authorized food service management agreements to be entered on a fixed meal rate basis. Under this arrangement, the food service management company is paid a fixed price per meal served, which is intended to cover all operating and administrative costs in performing the food service management agreement. Based on the opinion expressed by your office in DM-14, TDA has prohibited school districts under either form of agreement from contracting with the food service management company to purchase food and supplies used in the performance of its obligations under a food service management agreement.

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It is my understanding that the statute governing purchasing by school districts at the time DM-14 was issued has been deleted from the Education Code. I also understand that subsequent to issuance of DM-14, the Texas Supreme Court in 1997 clarified the standards that courts should apply in order to determine whether a delegation is permissible. See *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454 (Tex.1997). Additionally, I have reviewed an informal opinion letter from your office dated June 22, 2005 providing preliminary legal advice to Commissioner Susan Combs concluding:

*A food services management contract between a school district and a food services management company that permits or requires the company to provide food for a district participating in the federal school nutrition programs does not involve a delegation of governmental authority to a private entity under the Boll Weevil, FM Properties, and Higginbotham cases.*

Based on the changes in the law, the subsequent cases interpreting permissible delegations, and your informal opinion expressed in June, 2005, my specific questions is whether the conclusion of Attorney General Opinion DM-14 is still controlling?

I would appreciate your formal response as to whether the opinion expressed in DM-14 effectively prohibiting a food service management company from purchasing food and supplies under a food service management contract is the proper interpretation of applicable state law, whether pursuant to a fixed meal rate or a cost-reimbursable food service management agreement. Should you need further information with respect to this request, please contact Kenneth Besserman in my office at 512-463-0113.

Sincerely,



Rodney Ellis

RE:kb