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COUNTY OF GONZALES
OFFICE OF THE COUNTY AUDITOR

BECKY WESTON
COUNTY AUDITOR
bweston@co.gonzales.tx.us
www.co.gonzales.tx.us

427 SAINT GEORGE STREET, SUITE 302
GONZALES, TEXAS 78629
(830) 672-6397
(830) 672-6591 FAX

September 4, 2020

The Honorable Ken Paxton
Office of the Attorney General
Attention Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RE: Budget and Procurement Statutes

Dear Attorney General Paxton and the Opinion Committee:

This letter serves as a formal request for your opinion on the clarification of budgetary and procurement statutes as they apply to the Gonzales County Attorney, and the duty of the County Auditor to see to the strict enforcement of the law regarding the County Purchasing Act (Local Government Code 262).

BACKGROUND

The Gonzales County Attorney purchased a laptop computer through an online retailer on June 2, 2020 using the County credit card. Gonzales County has exceeded the \$50,000 bid limit on 'high technology items' inclusive of the commodity code (classified by the Texas Comptroller of Public Accounts, Class 204 Computer Hardware et al). The online retailer is not part of the State or any other cooperative purchasing program. Additionally, funds were not budgeted, nor requested in the County Attorney's departmental budget to pay for this purchase (i.e. purchase exceeds budget).

REVIEW OF CURRENT STATUTES

Competitive Bidding Definitions

In this situation, it is important to look at the definition section of the law as related to "Item". The Local Government Code §262.022 states in relevant part:

- (4) "High technology item" means a service, equipment, or good of a highly technical nature, including:
- (A) data processing equipment and software and firmware used in conjunction with data processing equipment;
 - (B) telecommunications, radio, and microwave systems;
 - (C) electronic distributed control systems, including building energy management systems; and
 - (D) technical services related to those items.

(5) "Item" means any service, equipment, good, or other tangible or intangible personal property, including insurance and high technology items. The term does not include professional services as defined by Section [2254.002](#), Government Code.

Competitive Bidding Requirement

The County Purchasing Act generally requires counties to make certain purchases using competitive bidding, Chapter 262 of the Local Government Code. Section 262.023(a) of the Local Government Code provides that before a county may purchase one or more items under a contract that will require an expenditure exceeding \$50,000, the commissioners court of the county must:

- (1) comply with the competitive bidding or competitive proposal procedures prescribed by this subchapter;
- (2) use the reverse auction procedure, as defined by Section 2155.062(d), Government Code, for purchasing; or
- (3) comply with a method described by Chapter 2269, Government Code.

Local Government Code, Section 262.023(c) states, in applying the requirements established by Subsection (a), all separate, sequential, or component purchases of items ordered or purchased, with the intent of avoiding the requirements of this subchapter, from the same supplier by the same county officer, department, or institution are treated as if they are part of a single purchase and of a single contract. In applying this provision to the purchase of office supplies, separate purchases of supplies by an individual department are not considered to be part of a single purchase and single contract by the county if a specific intent to avoid the requirements of this subchapter is not present.

Discretionary Exemptions for Competitive Bidding

The Gonzales County Commissioner's Court has not declared that this purchase meets any discretionary exemption (*Local Government Code, Chapter 262 Purchasing and Contracting Authority of Counties, Subchapter C Competitive Bidding, Section 262.024 Discretionary Exemptions*) under the competitive bidding statutes.

Application of Competitive Bidding Statutes

In applying section 262.023(a), "all separate, sequential, or component purchases of items ordered or purchased, with the intent of avoiding the requirements of this subchapter, from the same supplier by the same county officer, department, or institution are, treated as if they are part of a single purchase and of a single contract."

To purchase 'high technology items' and items specifically classified under the Texas Comptroller of Public Accounts commodities of 'computer hardware and peripherals for microcomputers' class and items, Gonzales County uses alternative procurement methods authorized under Local Government Code Chapter 271, Subchapter D State Cooperation in Local Purchasing Programs, Subchapter F Cooperative Purchasing Program, and Subchapter G Purchases from Federal Schedule Sources of Supply, Subchapter.

Bidding laws are based on knowing the current budget expenditures in the fiscal year will exceed \$50,000 for like items (computer equipment). Overlooking the requirement up until the \$50,000 level is reached in the fiscal year constitutes separate, sequential purchasing.

Hot Check Fund

The Gonzales County Attorney has not authorized the use of Hot Check funds to pay for this purchase which would negate the need to follow either procurement or budgeting statutes as determined by prior Attorney General Opinions (see Attorney General Opinions: [DM-0357](#), [GA-0475](#), [JC-0168](#)).

Specialized Local Entity

The Gonzales County Attorney was created under the Government Code, Chapter 45 County Attorney, Section 45.189 “(a) *In Gonzales County, the county attorney of Gonzales County shall perform the duties imposed on and have the powers conferred on district attorneys by general law*” and is not a District Attorney or Criminal District Attorney as a designed ‘specialized local entity’ as defined Section 140.003 of the Local Government Code. Attorney General Opinion JM-1136 affirms that the County Attorney is not a ‘specialized local entity’ as defined by Section 140.003 of the Local Government Code.

Budgetary Appropriations

The Gonzales County Attorney does not have budgeted funds in his departmental budget to pay for this purchase, as exhibited by the budget hereto attached.

Responsibility of the County Auditor

The purchase of the laptop computer by the County Attorney was not competitively bid and it does not qualify under alternate procurement procedures. Cooperative purchasing contract alternatives were offered to the Gonzales County Attorney, utilizing these methods were declined. Further, Attorney General Opinion JM-1254 affirms, “Spot purchases may not be used to avoid the competitive bidding process.”

Local Government Code §111.092 states that the “*The county auditor shall oversee the warrant process to ensure that the expenses of any department do not exceed the budget appropriations for that department.*” The purchase by the Gonzales County Attorney of the laptop exceeds his departmental budget, attached hereto and such line items are marked for the exhibit.

Local Government Code §113.064 expressly provides that a claim, bill, or account may not be allowed or paid until it has been examined and approved by the county auditor unless it incurred as provided by law. Attorney General Opinion GA-0247, cites “The language of these statutes is mandatory. They impose on the auditor the responsibility, before approving a claim, to determine whether it strictly complies with the law governing county finances.” *Smith v. McCoy*, 533 S.W.2d 457, 459 (Tex. Civ. App.-Dallas 1976, writ dismissed) (addressing the statutory predecessors to Local Government Code sections 113.064-.065, former articles 1660 and 1661). As summarized by Attorney General Opinion GA-0247, “If the county auditor determines that the county awarded a contract without complying with the County Purchasing Act, section 113.065 of the Local Government Code prohibits the auditor from approving a claim for payment on the contract.”

AG Opinion GA-0604 as quoted from the summary, “It is a county auditor’s duty under the statutory mandates of that office to decide whether to approve a claim, bill, or account. A county auditor is not, therefore, bound by the advice or opinion of the county attorney regarding the lawfulness of a claim, bill, or account against a county.”

QUESTION PRESENTED

Does Local Government Code §262.023 only apply to items purchased under a contract? For example, if a department purchases an item outside of a contract or bid, but the county is or will exceed the \$50,000 bid limit on said item, is this purchase exempt from bidding?

Do the statutes for competitive bidding apply only after the \$50,000 threshold is met?

Do the statutes for competitive bidding apply when it is known current budget and expenditures in the fiscal year will exceed \$50,000 for like items (computer equipment)?

Does overlooking the requirement up until the \$50,000 level is reached in the fiscal year constitute separate, sequential purchasing?

Based on the above information is the County Auditor mandated to deny this claim?

I respectfully request an Attorney General's Opinion responding to the inquiries set out above.

Thank you for your time and consideration to this matter. Please feel free to contact me should you need any additional information or details regarding this request.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Becky Weston", written in a cursive style.

Becky Weston
Gonzales County Auditor