



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 25, 2016

The Honorable Joseph C. Pickett
Chair, Committee on Transportation
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0077

Re: Authority of the Texas Department of
Transportation to enter into design-build
contracts during the 2016-2017 fiscal
biennium (RQ-0063-KP)

Dear Representative Pickett:

You ask for clarification regarding “the authority of the Texas Department of Transportation (“Department”) to enter into design-build contracts during the 2016-2017 fiscal biennium.”¹ You explain that your question arises due to a potential conflict between section 223.242 of the Transportation Code and a rider to the General Appropriations Act of the Eighty-fourth Legislature. Request Letter at 1.

Section 223.242 of the Transportation Code authorizes the Department to enter into design-build contracts for highway projects in certain circumstances. *See* TEX. TRANSP. CODE § 223.242.² Relevant to your request, subsection (d) authorizes the Department to “enter into a design-build contract for a highway project with a construction cost estimate of \$150 million or more.” *Id.* § 223.242(d).³ Furthermore, the Department “may not enter into more than three contracts” under section 223.242 in each fiscal year. *Id.* § 223.242(d-1). The Eighty-fourth Legislature’s General Appropriations Act likewise includes restrictions related to the cost of the Department’s design-build contracts and the total number of design-build contracts that the Department may enter into. Rider 47 to the Department of Transportation’s appropriations states:

¹Letter from Honorable Joseph C. Pickett, Chair, House Comm. on Transp., to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Oct. 29, 2015), <https://www.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

²“Design-build method” is defined as “a project delivery method by which an entity contracts with a single entity to provide both design and construction services for the construction, rehabilitation, alternation, or repair of a facility.” TEX. TRANSP. CODE § 223.241(2).

³In 2015, the Legislature amended section 223.242 by increasing from \$50 million to \$150 million the minimum project construction cost estimate for a design-build contract. *See* Act of May 29, 2015, 84th Leg., R.S., ch. 314, § 7, 2015 Tex. Gen. Laws 1449, 1451 (codified at TEX. TRANSP. CODE § 233.242(d)).

Limitation on Expenditures for Design-Build Contracts. The Department of Transportation is authorized to expend funds appropriated by this Act to enter into no more than ten design-build contracts in the 2016-2017 biennium for highway projects that have an estimated construction cost to the department of \$250,000,000 or more per highway project. If provisions in Transportation Code §223.242, or similar general law, establish a limit on the number of design-build contracts that the Department of Transportation may enter into in each fiscal year or biennium that is less than the amount authorized by this section, then the limitation established by general law prevails.

General Appropriations Act, 84th Leg., R.S., ch. 1281, art. VII-31, 2015 Tex. Gen. Laws 4343, 5070. In light of section 223.242 of the Transportation Code, you ask whether Rider 47 is valid and the extent of the Department's "authority to enter into design-build contracts during the 2016-2017 fiscal biennium." Request Letter at 4. Section 223.242 and Rider 47 include restrictions on both the number of design-build contracts that the Department may enter into and the estimated construction cost per project, and we will address each in turn.

With regard to the number of design-build contracts that the Department may enter into, section 223.242 limits the Department to no more than three design-build contracts per fiscal year. *See* TEX. TRANSP. CODE § 223.242(d-1). In contrast, Rider 47 limits the Department to "no more than ten design-build contracts in the 2016-2017 biennium for highway projects that have an estimated construction cost to the department of \$250,000,000 or more per highway project." *See* General Appropriations Act, 84th Leg., R.S., ch. 1281, art. VII-31, 2015 Tex. Gen. Laws 4343, 5070. Thus, the two provisions conflict to the extent that Rider 47 authorizes the Department to enter into more design-build contracts in a fiscal year. Rider 47 acknowledges the possibility of a conflict, however, and it recognizes that "the limitation established by general law prevails." *Id.* Pursuant to the general law found in section 223.242, during a fiscal year the Department "may not enter into more than three" design-build contracts for highway projects. TEX. TRANSP. CODE § 223.242(d)(1).

With regard to the minimum construction cost estimate of design-build contracts, section 223.242 authorizes the Department to enter into such a contract with an estimated construction cost of \$150 million or more, so long as the other statutory requirements are met. *Id.* § 223.242(d). You suggest that Rider 47 may establish "a minimum project construction cost estimate of \$250 million." Request Letter at 2. Rider 47 limits only the number of design-build contracts with estimated costs exceeding \$250 million that the Department may enter into. *See* General Appropriations Act, 84th Leg., R.S., ch. 1281, art. VII-31, 2015 Tex. Gen. Laws 4343, 5070. It does not speak to or otherwise limit the Department from entering into design-build contracts with an estimated construction cost of between \$150 and \$250 million. Thus, Rider 47 is a restriction or qualification on the use of appropriated funds that does not conflict with the general law in section 223.242. *See Strake v. Ct. App. for First Sup. Jud. Dist. of Tex.*, 704 S.W.2d 746, 748 (Tex. 1986) (explaining that a rider may not alter existing substantive law). The Department may therefore enter into a design-build contract for a highway project with a construction cost estimate of \$150 million or more.

S U M M A R Y

Pursuant to section 223.242 of the Transportation Code, the Department of Transportation may enter into a design-build contract for a highway project with a construction cost estimate of \$150 million or more. The Department may not enter into more than three such contracts in each fiscal year.

Very truly yours,

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

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