KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 22, 2019

The Honorable Timothy J. Mason
Andrews County/District Attorney
121 Northwest Avenue A
Andrews, Texas 79714

Opinion No. KP-0234

Re: Authority of a county commissioners court over disbursing funds received from a compact waste disposal facility under Health and Safety Code section 401.244 (RQ-0236-KP)

Dear Mr. Mason:

You ask several questions regarding "Andrews County's responsibilities after the Commissioners Court disburses money received under Health and Safety Code [section] 401.244."[1] Andrews County (the "County") receives five percent of the gross receipts from a compact waste disposal facility located in the County. TEX. HEALTH & SAFETY CODE § 401.244(a) (providing for payment). Subsection 401.244(b) authorizes the commissioners court to "spend the money for public projects" in the County or to "disburse the money to other local entities or to public nonprofit corporations to be spent for local public projects." *Id.* § 401.244(b)(1)–(2).

You tell us the County, along with other local taxing entities, created a committee to "receive proposed projects, vet the projects and recommend qualified projects on which to spend these funds." Request Letter at 1. You state that some potential projects include building facilities and purchasing property or services that "would normally require compliance with state procurement laws and various other laws if the projects were considered under the direct jurisdiction" of the commissioners court. *Id.* You inform us further that the committee recommended a large project proposed by a local nonprofit corporation which involves constructing and furnishing a building. *See id.*

Your second question, whether the funds the County receives under section 401.244 are public funds, is fundamental to each of your questions so we address it first. *See id.* 2. Chapter 401 does not define "public funds." *See generally* TEX. HEALTH & SAFETY CODE § 401.003 ("Definitions"). The Government Code contains a statutory definition of the term "public funds," defining the term for purposes of the Public Information Act to mean "funds of the state or of a

[1]Request Letter from Honorable Timothy J. Mason, Andrews Cty./Dist. Att'y, to Honorable Ken Paxton, Tex. Att'y Gen. at 1–2 (June 1, 2018), https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs ("Request Letter").

governmental subdivision of the state." TEX. GOV'T CODE § 552.003(5). A Texas court of appeals defined "public funds" in the context of the Public Funds Investment Act to mean

> funds belonging to the state or to any county or political subdivision of the state; more specifically taxes, customs, moneys, etc., raised by the operation of some general law, and appropriated by the government to the discharge of its obligations, or for some public or governmental purpose; and in this sense it applies to the funds of every political division of the state wherein taxes are levied for public purposes. The term does not apply to special funds, which are collected or voluntarily contributed, for the sole benefit of the contributors, and of which the state is merely the custodian.

See San Antonio Bldg. & Constr. Trades Council v. City of San Antonio, 224 S.W.3d 738, 746 (Tex. App.—San Antonio 2007, pet. denied) (quoting Tex. Att'y Gen. Op. No. DM-489 (1998) at 2–3 (citations omitted)). Recently this office noted the definition's several characteristics in determining whether funds are public, such as whether the funds belong to the government or are held in a custodial role and whether the funds are to be used for a public purpose or for only the benefit of an individual. *See* Tex. Att'y Gen. Op. No. KP-0142 (2017) at 2–3; *cf.* Tex. Att'y Gen. Op. No. GA-0257 (2004) at 3 (stating that certain "funds were not public funds because they did not belong to the state, because the Department held them as a mere custodian, and because they would not be used to discharge a general public purpose").

As an analog, those characteristics of "public funds" are relevant to law outside the Public Funds Investment Act context, and we use them to address your second question. Here, the County receives money under section 401.244 as payment for the County serving as a host county for receipt of low-level radioactive waste. TEX. HEALTH & SAFETY CODE § 401.244(a)(1); *see id.* § 403.006 art. II, § 2.01(7) (defining, in Article II, "host county" as "a county in the host state in which a disposal facility is located or is being developed"). Moreover, these funds are not held by the County in a custodial role for the benefit of any individual. *See id.* § 401.244. Because the funds are raised by operation of law for a public or governmental purpose and are not held by the County as a custodian or in trust, a court would likely conclude that the funds the County receives under Health and Safety Code section 401.244 are public funds. *See Lower Colo. River Auth. v. Chem. Bank & Tr. Co.*, 185 S.W.2d 461, 468 (Tex. Civ. App.—Austin) (holding that funds of a river authority, whether raised by taxation or by operation of the authority, which may be used only for a public purpose, are "intrinsically" public funds), *aff'd*, 190 S.W.2d 48 (Tex. 1945).

You also ask about the interaction between the funds the County receives under section 401.244 and article III, sections 51 and 52 of the Texas Constitution. *See* Request Letter at 2. Article III, sections 51 and 52 are complementary provisions limiting the Legislature's appropriation of public funds and resources for private purposes. *See Byrd v. City of Dallas*, 6 S.W.2d 738, 740 (Tex. 1928) (observing that both article III, sections 51 and 52 prohibit the State and its political subdivisions from gratuitously paying public funds for private purposes). Section 51 provides that the "Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever." TEX. CONST. art. III, § 51. Similarly, section 52(a) prohibits the

Legislature from authorizing any political corporation or subdivision of the State "to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever." *Id.* art. III, § 52(a). An expenditure of public funds for a legitimate public purpose to obtain a clear public benefit is not a gratuitous grant of public funds. *See Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995). Because the funds received under section 401.244 are public funds, they are subject to article III, sections 51 and 52.

The Texas Supreme Court articulated a three-part test to determine whether an expenditure of public funds is constitutional. *See Tex. Mun. League Intergov't Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 384 (Tex. 2002); *see also* Tex. Att'y Gen. Op. No. KP-0181 (2018) at 3 (acknowledging that compliance with article III, section 51 is determined by the same three-part test as is section 52(a)) (*citing Edgewood Indep. Sch. Dist.*, 917 S.W.2d at 739–40). A governmental entity considering a public expenditure must (1) ensure that the expenditure is to "accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and (3) ensure that the political subdivision receives a return benefit." *Tex. Mun. League*, 74 S.W.3d at 384. It is for the governing body of the governmental entity to determine whether an expenditure satisfies the three-part test. *See* Tex. Att'y Gen. Op. No. KP-0208 (2018) at 2–3 ("The determination whether a particular expenditure satisfies the three-part test is for the [governmental entity] to make in the first instance, subject to judicial review for abuse of discretion.").

In your related third and fifth questions, you ask about the continuing role of the commissioners court after disbursing the funds to an entity under subsection 401.244(b)(2) and whether the commissioners court may relinquish oversight responsibilities to the awarded entity. *See* Request Letter at 2. Subsection 401.244(b)(2) authorizes the County to disburse the money to local entities or nonprofits to be spent for local public projects. TEX. HEALTH & SAFETY CODE § 401.244(b)(2). The second prong of the *Texas Municipal League* three-part test requires that the governmental entity *retain control* over the funds to ensure the public purpose is met and to protect the public's investment. 74 S.W.3d at 384. In many instances, this control may be achieved through a contract. *See* Tex. Att'y Gen. Op. No. KP-0181 (2018) at 3 ("[A] public entity may retain public control over the use of its resources by entering into an agreement or contract that imposes an obligation on the recipient to perform a function benefiting the public."); *see also Key v. Comm'rs Ct. of Marion Cty.*, 727 S.W.2d 667, 669 (Tex. App.—Texarkana 1987, no writ) (distinguishing cases that involve contractual agreements for services between governmental entity and private business with "retention of formal control" by governmental entity and that, where consideration is some accomplishment of public purpose, "some form of continuing public control is necessary"). Yet, such a contract must nonetheless contain some element of oversight by the governmental entity to ensure the public purpose is met and to protect the public's investment and is not a means for a governmental entity to relinquish all responsibility over the public funds. *See* Tex. Att'y Gen. Op. No. GA-0528 (2007) at 3 (concluding, in a situation involving the expenditure of city funds to build a seawall on privately owned land, that the expenditure would not comply with article III, section 52(a) unless the city retained sufficient control over the project by acquiring a sufficient interest in the real property to enable the city to protect the public's interest in the seawall). Subsection 401.244(b)(2)'s authorization to disburse the funds to certain entities does not relieve the County of its obligation under article III, sections 51 and 52 to ensure the receiving entity uses the funds for a public purpose. Thus, in answer to these questions, the County may not

relinquish all oversight responsibilities once it disburses the funds under subsection 401.244(b)(2), and it must retain sufficient control to ensure the public purpose is served. The exact nature and scope of that control must be determined by the county commissioners court.

Your remaining question is whether the entities receiving the funds must "comply with the procurement laws relating to the use of public funds[.]" Request Letter at 2. Chapter 262 of the Local Government Code governs county purchasing. *See* TEX. LOC. GOV'T CODE § 262.021 (titling subchapter C as the "County Purchasing Act"); *see also id.* §§ 262.021–.037 ("Subchapter C"). Subsection 262.023(a) requires that a county purchasing "one or more items under a contract that will require an expenditure exceeding $50,000" must comply with competitive bidding or competitive proposal procedures in subchapter C, chapter 262. *Id.* § 262.023(a). Subchapter C, chapter 262, does not define "county." *See id.* § 262.022 ("Definitions"). One intermediate court concluded that "under its plain and ordinary meaning, th[e] term includes a Texas county, . . . but does not include an independent conservation and reclamation district." *Harris Cty. Flood Control Dist. v. Great Am. Ins. Co.*, 359 S.W.3d 736, 742–43 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (considering waiver of sovereign immunity for a conservation and reclamation district in purchasing context in the absence of competitive bidding). Another procurement statute, chapter 271 of the Local Government Code, which provides for the financing of the acquisition of public property, applies to governmental agencies. *See* TEX. LOC. GOV'T CODE §§ 271.001–.009. A "governmental agency" under chapter 271 includes a "municipality, county, school district, conservation and reclamation district, hospital organization, or other political subdivision of this state." *Id.* § 271.003(4). You do not provide specific information about the local nonprofit corporation anticipated to receive the funds, so we cannot determine whether it is a county or a governmental entity within the scope of these procurement statutes. *But see* TEX. GOV'T CODE § 2254.002(1)(C) (defining "governmental entity" to include a "local government corporation or another entity created by or acting on behalf of a political subdivision in the planning and design of a construction project"). The Texas Supreme Court has recognized that county purchasing requirements may also extend to purchases by entities separate from but under the supervision of a county. *See Lohec v. Galveston Cty. Comm'rs Ct.*, 841 S.W.2d 361, 365–66 (Tex. 1992) (concluding that purchases by a county beach park board were subject to county control). The court in *Lohec* determined that the beach park board had many characteristics of a county, was meant to function under county supervision, and was not intended to be an independent and autonomous entity exempt from meaningful public oversight. *See id.* The court continued that as an entity subject to county supervision, its purchases must be approved by the county auditor who must strictly enforce the laws governing county finances. *See id.* at 366. Under the analysis of *Lohec*, the local nonprofit corporation would likely be exempt from county purchasing requirements only if it is an independent and autonomous entity not meant to function under county supervision.

SUMMARY

Because the funds received by Andrews County under section 401.244 of the Health and Safety Code are raised by operation of law for a public or governmental purpose and are not held by the County as a custodian or in trust, a court would likely conclude that the funds are public funds. As such, they are subject to the restrictions on public spending in Texas Constitution article III, sections 51 and 52.

Article III, sections 51 and 52 require a governmental entity to retain sufficient controls over a public expenditure to ensure the public purpose is met and to protect the public's investment. Accordingly, the County may not relinquish all oversight responsibilities once it disburses the funds to a receiving entity under subsection 401.244(b)(2) and it must retain sufficient control over the disbursed funds to ensure the public purpose is served. The exact nature and scope of that control is for the county commissioners court to determine.

Under the Texas Supreme Court case *Lohec v. Galveston County Commissioners Court*, the local nonprofit corporation receiving funds from the County under section 401.244 is likely exempt from county purchasing requirements if it is an independent and autonomous entity not meant to function under county supervision.

Very truly yours,

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