STEVEN B. PAYSON
DAWSON COUNTY ATTORNEY
P.O. Box 1268
Lamesa, Texas 79331

March 12, 1999

Office of the Attorney General
Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2110

RQ-0042-JC
FILE # ML-40721-99
I.D. # 40721

Re: Opinion on Purchasing Act

Dear Sirs;

Enclosed you will please find two questions and brief briefs concerning both which the Dawson County Commissioners' Court have requested that I ask you. Please respond as soon as possible since the matters in question are on hold until an opinion is rendered. Thank you.

Respectfully yours,

Steven B. Payson
Dawson County Attorney

QUESTION #1-Do the health and safety and the professional services exceptions provided for in 262.024 of the Local Government Code apply to an ambulance Service for Dawson County.

QUESTION # 2-Once a County accepts bids and opens them, can the County reject all bids and then claim an exemption from the bidding process and award a contract on the service originally bid upon to someone other than the lowest bidder?

FACTS

Dawson County has bid out the ambulance service for 10 years. The last two times have been for 4 year contracts with a County Subsidy, the last subsidy being $55,000 a year. The 4 year contract ended on January 1, 1999. The present ambulance service provider demanded a subsidy of $72,000. The County and Community were satisfied with the level of service. See attached minutes of January 12, 1999. The County Judge and a County Commissioner attempted to either get the demand lowered or to allow provider to be a County Employee with the County owning the service. Both parties agreed to submit the service to public bidding. The specifications were published and 4 bids were received. Prior to the opening of bids, provider published advertisements in the newspaper with 900 signatures supporting his ambulance service.

January 25, 1999. Bids were received and the current provider was demanding a $72,000. The lowest bidder was $52,800 and the next lowest was $54,300. The third bidder was an out of town ambulance service at $59,400. Both of the low bidders were former paramedics with current ambulance provider. The commissioners court made no decision and tabled the bids.

February 5, 1999 meeting was an open meeting with a retained counsel who offered a second opinion as to whether the bids could be rejected and the bidding process ended. All attorneys agreed that the Attorney General had determined that the ambulance service was exempted under the health and safety provision in 1971. Retained counsel and counsel for provider argued that the bids could be rejected and negotiations could be had with all interested parties. County Attorney and Assistant Attorney General John Fuller were of the opinion that once the bids were rejected there was a mandatory reissue of notice for bids.

February 8, 1999. The Commissioners rejected all bids at a special called meeting. At the next regularly scheduled meeting, the court requested that the County Attorney request an opinion from the Attorney General to determine the questions listed above. In the interim, the ambulance service is still with the previous provider at the amount he demanded on a month to month basis.

All the minutes of the Commissioner's Court that apply are included.

Brief on Question 1

On March 10, 1971, in Opinion No. M-806 on page 6, Crawford Martin that it was the opinion of his office that ambulance services may be contracted without the necessity of receiving competitive bids. This was based upon the statutory interpretation found in Hoffman v. City of Mount Pleasant, (CAT, 1936) 89 SW 2nd 193. The question dealt with the need for an emergency in order for the public health provision to be applied. The Court determined that a calamity was not necessary and that a sewer system was a public health concern. The Dawson County Attorney disagrees with the reasoning in that public health is too broad a brush to paint with without the limitation of public calamity. The intention of the competitive bidding law was to assure the lowest price to the public entity for the best service and to avoid as much as possible political cronieism and the establishment of an Old Boy network. The Dawson County Attorney recognizes that in this regard, his opinion is not worth spit, but he does however have a hope that since the statute has been reworded since 1936 and now codified, that a new and more enlightened statutory interpretation might be given.

The Dawson County Attorney agrees that an ambulance is indeed a public health issue. The question is whether precedent of taking bids for years and the custom of other counties in the area in doing the same in any way negates the applicability of the exception given the fact situation. As in many property and legal rights, precedent and adverse possession can indeed abrogate a statutory provision. In some circles, this is called custom and usage. There is also some matter of dispute as to whether the services of ambulances are so unique and personal as to make one by necessity preferred over another, as in the case of Doctors and Nurses. Again, given the veritable dearth of cases and opinions in this area, we look to Austin for guidance in this politically sensitive forest of unpleasant options.

Brief on Question 2

All exemptions which are provided for in Section 262.024 of the Local Government Code must be claimed by the Commissioners' Court with an order. Section 262.027 provides that:

"The officer in charge of opening the bids shall present them to the commissioner's Court in session. Except as provided by Subsection (e), the court shall:

(1) award the contract to the responsible bidder who submits the lowest and best bid; or

(2) reject all bids and publish a new notice

There appears to be only one case that even mentions this problem, which is CLAYTON vs. GALVESTON COUNTY (1899) 20 Civ. App. 591, 50 S.W. 737. In that situation, plans were used by the county in the construction of a county courthouse, but they were modified outside the specifications of the commissioner's court and accepted unopened by the Commissioner. When the modifications were revealed, the bid was rejected by the commissioners. The architect argued that he should have been given a chance to rebid within the specifications and the Court held that after his bid was rejected, the court was under no obligation to reissue bids. That case is a unique fact situation and predates VACS Art. 2368a.5, Section 7 as well as the present codification.

The intent of the law seems to be that once the competitive bidding process is elected, there is an expectation that a bid will eventually be accepted. Special provisions are given to allow the low bidders some due process if their bid is rejected, but only one alternative is provided for a situation where all of the bids are rejected. When the word "Shall" is used in a statute, the intent of the legislature and the interpretation of the courts has traditionally been that it is mandatory. It would appear that in such a mass rejection, the Commissioner Court must send out a notice for new bids. This is the case if the "new notice" requirement of 262.025 is being referenced. Based upon the position of the statute it is reasonable to assume that is the "notice" that is ordered.

It would further appear that there would be no obligation to present the same specifications if indeed the previous ones were inadequately drawn, but there seems to be no exemption for staying the course originally selected.

It is the opinion of the Dawson County Attorney that the Commissioner's Court of Dawson County cannot begin the bidding process and then go "Oops!" The ambulance bids notice should be reissued with whatever changes made in the specifications as is deemed necessary to assure the present level of care.