

# Texas Department of Transportation

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August 9, 1999

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Opinion Committee

RQ - 0150 - jc

The Honorable John Cornyn  
Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Whether counties may bid on state highway maintenance contracts

Dear General Cornyn:

Recently, a magazine called *Texas County Progress* published an article by Knox County Judge David N. Perdue, president of the County Judges and Commissioners Association of Texas, in which Judge Perdue urges counties to bid on state highway maintenance contracts as a means of obtaining "additional funds." A copy of the article is enclosed. I would like an opinion from your office on whether a county may compete in this manner for a highway improvement contract.

Section 223.001 of the Transportation Code requires that each highway improvement contract be awarded by competitive bid. On the other hand, Section 224.033 of the Transportation Code allows the Transportation Commission to contract with a county for highway maintenance. Contracts with counties under Section 224.033 are normally of the type that provide mutual benefit so that no payment is due the county, but in no event, would the State be authorized to pay a county more than its actual costs under such a contract. Judge Perdue proposes that counties contract with the State under Section 223.001 rather than Section 224.033 so that they can earn a profit.

Chapter 223 of the Transportation Code and its accompanying regulations, found in 43 TAC Chapter 9, Subchapter B, were clearly not designed to cover intergovernmental contracts. Counties bidding on these projects would also be subjecting themselves to requirements regarding construction experience, financial stability, DBE participation, liability insurance, bonding, and indemnification that are not normally required of governmental entities.

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In *Texas Highway Comm'n. v. Texas Ass'n. of Steel Importers Inc.*, 372 S.W.2d 525, 527 (Tex. 1963), the Texas Supreme Court quoted favorably the following language regarding competitive bidding:

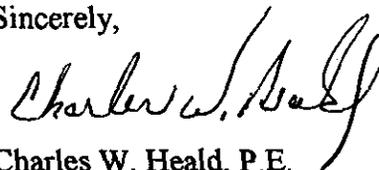
"Competitive bidding" requires due advertisement, giving opportunity to bid, and contemplates a bidding on the same undertaking upon each of the same material items covered by the contract; upon the same thing. It requires that all bidders be placed upon the same plane of equality and that they each bid upon the same terms and conditions involved in all the items and parts of the contract, and that the proposal specify as to all bids the same, or substantially similar specifications. Its purpose is to stimulate competition, prevent favoritism and secure the best work and materials at the lowest practicable price, for the best interests and benefit of the taxpayers and property owners. There can be no competitive bidding in a legal sense where the terms of the letting of the contract prevent or restrict competition, favor a contractor or materialman, or increase the cost of the work or of the materials or other items going into the project.

*Sterrett v. Bell*, 240 S.W.2d 516, 520 (Tex. Civ. App.--Dallas 1951, no writ). It does not appear, based on this language, that TxDOT could waive any of its contractual requirements for a county without waiving them for private sector contractors as well.

Of particular concern to the department is the requirement found in Section 223.042 of the Transportation Code, captioned "Privatization of Maintenance Contracts." This statute requires the department to spend 50% of its maintenance project costs on competitively bid contracts. Given its caption and its reference in subsection (d) to "private sector contracts," the statute clearly does not contemplate governmental entities competing against the private sector for this type of contract. If we must accept bids from counties, we would like an opinion on whether the amount paid to a county under such a contract would count toward the 50% privatization requirement found in 223.042.

My staff and I are available to assist your office. If you have any questions, please call Richard Monroe, General Counsel, at 463-8630.

Sincerely,



Charles W. Heald, P.E.  
Executive Director

Enclosure