



November 27, 2002

The Honorable Michael J. Guarino
Galveston County Criminal District Attorney
722 Moody, Suite 300
Galveston, Texas 77550

Re: Whether a thermal energy plant is a "facility" under chapter 271, Texas Local Government Code, which permits a county to use the design-build method of construction, and related questions (Request No. 0630-JC)

Dear Mr. Guarino:

We have received your request for an attorney general opinion, dated November 15, 2002, and have designated it as Request No. 0630-JC. Please refer to that number in future correspondence with us about this matter. Section 402.042 of the Government Code provides that the Attorney General shall issue an opinion not later than the 180th day after the date that an opinion request is received. TEX. GOV'T CODE ANN. § 402.042(c)(2) (Vernon 1998). We received your request on November 18, 2002, setting a due date for your opinion of May 17, 2003. We will respond by that date, or before, if possible.

By copy of this letter we are notifying those listed below of your request and asking them to submit briefs if they would care to do so. If you are aware of other interested parties, please let us know as soon as possible. We ask that the briefs be submitted by January 2, 2003, to ensure that the Opinion Committee will have adequate time to review and consider arguments relevant to the request from all interested parties. Written submissions are most useful, as the members of the Opinion Committee are not available to comment on or discuss the merits of legal questions at issue in an opinion request. Parties may request an extension of time to file a brief by calling (512) 463-2110.

Very truly yours,

Susan Denmon Gusky
Chair, Opinion Committee

SDG/KKO/kld

Enclosure: Request No. 0630-JC

cc: **The Honorable James D. Yarbrough, Galveston County Judge**
 The Honorable Eddie Barr, Galveston County Commissioner, Precinct 1
 The Honorable Eddie Janek, Galveston County Commissioner, Precinct 2
 The Honorable Stephen D. Holmes, Galveston County Commissioner, Precinct 3
 The Honorable Ken Clark, Galveston County Commissioner, Precinct 4
 Mr. Bruce Hughes, Galveston County Purchasing Agent
 Mr. O.C. Unbehagen, Galveston County Construction Manager
 Mr. Harvey Bazaman, Director, Galveston County Legal
 Mr. Tom Paxon, President, Air Conditioning and Refrigeration Contractors Of Texas
 Mr. Jim Sewell, Executive Vice President, Associated General Contractors of America,
 Texas Building Branch
 Mr. Donald Lee, Executive Director, Conference of Urban Counties
 Mr. James Allison, General Counsel, County Judges and Commissioners Association
 Mr. Robert Kepple, Executive Director, Texas District and County Attorneys Association



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Chief Investigator

JANICE K. ROACH
Chief Administrator

RQ-0630-JC

November 15, 2002

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OPINION COMMITTEE

Honorable John Cornyn
Attorney General of the State of Texas
209 West 14th Street
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-42891-02
I.D. # 42891

Re: Request for an Attorney General's Opinion regarding county design-build projects and other matters

Dear General Cornyn:

Pursuant to Texas Government Code §402.043 we submit this request for an Attorney General's Opinion.

Facts:

Galveston County is considering construction of two thermal energy plants to produce chilled and hot water. One plant will be located at its current courthouse and jail complex. This project will also include the renovation of the heating and air conditioning systems in the existing buildings. This plant would provide heating and cooling capacity for only the existing buildings.

The second plant would be located at the site of a proposed Justice Administration Building and Jail Complex. This Complex is in the planning stage. These new buildings will of course contain heating and cooling equipment, and the second thermal plant would provide chilled or hot water only for the buildings in the new complex.

Galveston County currently owns fee simple title to the land on which both of the proposed thermal plants would be constructed.

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The County is considering construction of both plants using the design-build method of construction. In addition, the County contemplates either selling or leasing to the Contractor the portion of the county owned land on which each thermal plant is constructed; the County would then enter into either a lease/purchase (in the event of a sale of the county land) or a lease/lease-back/purchase arrangement (in the event of a lease of the county land).

In either situation, the Contractor would design, build and own the thermal plants and lease them to the County for a set term with \$1 residual at the end of a 20 year term. During the lease period, the owner of the thermal plants would provide their services under a payment arrangement yet to be determined.

Galveston County is in the process of issuing a Request for Qualifications for a contractor. Before we begin negotiations with the contractor who we feel might be the successful responder, we have three concerns for which we request this opinion.

Question No. 1: Is a thermal energy plant a facility?

As mentioned above, the County is considering using the design-build method of construction. *Tx. Loc. Gov't. Code Ch. 271, Subchapter H* permits this method of construction if, *inter alia*, the project being constructed is a "facility" as defined under the Act.

We are unable to determine whether each thermal plant would constitute a "facility" as described under *Tx. Loc. Gov't. Code Ch. 271, Subchapter H*. The definition of facility is unclear due to the statute's ambiguity and numerous exceptions, and we are uncertain whether the thermal plants being considered fall within definition.

Discussion on Question No. 1

The definition of "facility" is set forth in *Tx. Loc. Gov't. Code §271.111(7)*, as follows:

(7) "Facility" means buildings the design and construction of which are governed by accepted building codes. The term does not include:

(A) highways, roads, streets, bridges, utilities, water supply projects, water plants, wastewater plants, water and wastewater distribution or conveyance facilities, wharves, docks, airport runways and taxiways, drainage projects, or related types of projects associated with civil engineering construction; or

(B) buildings or structures that are incidental to projects that are primarily civil engineering construction projects.

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The definition of "facility" does not specify the characteristics of projects; guidance is more given by the exceptions to the definition.

In this case, both thermal plants consist of buildings that will be subject to local and state building codes. Neither appear to be a type of project specifically excluded from the definition of "facility" by *Tx. Loc. Gov't. Code §271.111(7)*.

But no case or Attorney General Opinion has addressed this issue. Nor does a review of the legislative history offer any guidance. Therefore we ask your opinion on whether the thermal plants under consideration are "facilities" within the meaning of *Tx. Loc. Gov't. Code §271.111(7)* such that the design/build method of construction may be utilized by Galveston County.

Question No. 2: May the County utilize a lease purchase agreement for these projects?

The County contemplates either selling or leasing that portion of the county owned land required for the construction of the plants to the Contractor. The County would then enter into a lease/purchase or a lease/lease-back/purchase financing arrangement. Under either scenario, the Contractor would design, build and own the thermal plants and lease them to the County for a set amount with \$1 residual at the end of a 20 year term.

The issue is whether the County has the authority to enter into lease-purchase agreements in this instance.

Discussion on Question No. 2

Attorney General Opinion JM-697 (1987) states that counties have the implied authority to enter into a lease-purchase agreement for the purpose of constructing or purchasing a county jail. The opinion noted there was no express authority for such an agreement.

In JM-800 (1987) the Attorney General held that a county could not use a lease-purchase for the construction of a county jail under the predecessor statute of *Tx. Loc. Gov't. Code Ch. 271*. Although the involved agreements described the building as "personal property", the Attorney General opined the County could not avail itself of the lease-purchase option merely by branding real property as personal property, noting that a jail is an appurtenance of the land and was thus real property. Lease-purchase agreements are permitted for personal property purchases. See *Tx. Loc. Gov't. Code §271.005(2)*.

In *Zimmelman v. Harris County*, 819 SW 2d 178 (Tex. App.- Houston (1st Dist.) 1991 no writ.) the Court upheld a financing arrangement wherein Harris County established the Harris County Public Facilities Corporation and authorized it to raise funds for the construction of a jail through bonds. The Corporation then contracted with City Partnership, Ltd., a private developer, to build the new jail on a "turn-key" basis. The

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County then leased the jail back from the Corporation with a purchase right at the end of the lease. The Court, in rendering its opinion, cited JM-697, but upheld the validity of the lease-purchase arrangement because the Corporation had its bonds approved by the Attorney General. The Court noted:

upon the approval by the attorney general of such bonds and any contracts securing the bonds (in this case, the lease), such bonds and any contracts, proceeds from which are pledged to the payment thereof, shall be incontestable in any court or other forum for any reason and shall be binding obligations in accordance with their terms for all purposes.

Infra at 183, 184.

The only authority that gives counties the express authority to enter into lease-purchase agreements on real property is set forth in *Tx. Loc. Gov't. Code §263.053* which applies to counties with a population of 500,000 or more. Galveston County does not meet this population threshold, thus if Galveston County has authority to undertake this financing arrangement, it must be through an implied authority. Since the Legislature has addressed lease-purchase agreements in Chapter 263 we are concerned that *Inclusio unius est exclusio alterius* (The inclusion of one is the exclusion of all others).

Because of the limitations contained in Chapter 271 and the fact that the legislature has previously addressed this method of financing we are concerned about the applicability of JM-697 to this project

Question No. 3: How may the County sell or lease the land to the Contractor in light of Chapter 263 of the Local Government Code requirements?

The third question concerns the fact that the projects will be constructed on County-owned land that will either be sold or leased to the contractor. Generally, when a county sells or leases its property, it must comply with the provisions of *Tx. Loc. Gov't. Code Ch. 263*.

Discussion on Question No. 3

We have found no opinions or cases that discuss the interaction of *Tx. Loc. Gov't. Code Ch. 263* with the County's implied authority to enter into lease-purchase agreements.

It is arguable that the County could take advantage of *Tx. Loc. Gov't. Code §263.001* and advertise its land for a sale or lease to a third party. Likewise the County could engage the services of a real estate broker to assist the County in selling or leasing the land to the successful contractor under *Tx. Loc. Gov't. Code §263.008*. Both of these are express methods by which counties may engage in the sale or lease of land. How they interact with the implied authority of entering into a lease purchase is uncertain.

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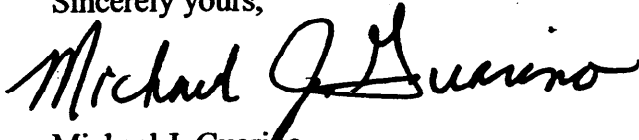
Hon. John Cornyn
November 8, 2002
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Conclusion

In light of the uncertainty of what constitutes a "facility", the utilization of the lease-purchase method of financing and the interaction of the express powers granted under *Tx. Loc. Gov't. Code Ch. 263* with the implied powers of lease-purchase we respectfully request your opinion on the matters briefed herein. We also request that you give this an expedited consideration because Galveston County has begun the process of advertising.

Should you have any questions, please contact me. Thank you for considering our request.

Sincerely yours,



Michael J. Guarino
Criminal District Attorney
Galveston County

Cc: Hon. James D. Yarbrough
County Judge

Hon. County Commissioners

Hon. Bruce Hughes
Purchasing Agent

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