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OPINION COMMITTEE

ECTOR COUNTY, TEXAS  
1010 East 8th Street, Room 520  
Odessa, Texas 79761

FILE # ML-43577-G  
I.D. # 43577

March 12, 2004

The Honorable Greg Abbott  
Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

RQ-0195-GA

Re: Request for Opinion regarding the Ector County Auditor's authority to audit and pay a claim under Local Government Code, Section 113.065 and related questions.

To the Honorable Attorney General Abbott:

This is to request an opinion concerning the authority of the Ector County Auditor to audit and pay a claim for services performed under a contract that, per the Ector County Attorney, was awarded in violation of Local Government Code, Chapter 262 and related questions.

FACTS

In 1983, Ector County (County) became a Self-Insured Benefit Plan (Plan) for medical benefits for its employees, retirees and their dependents as provided by Local Government Code Section 157.002, Medical Care, Hospitalization, and Insurance in Counties. To assist the County in the administration of the Plan, the County has historically procured, under the provisions of Local Government Code, Chapter 262 the services of an independent third-party administrator (TPA) whose responsibilities include, but are not limited to, plan and claims administration.

On September 30, 2003, the Ector County Commissioners Court (Court) rescinded a previous Court action of renewing in accordance with the contract, for a one-year term, the existing TPA contract with ICON Benefits, Inc. and awarded the TPA services to another TPA, GRI, Inc. to be effective October 01, 2003. Both ICON Benefits, Inc. and GRI, Inc. are licensed vendors for TPA services.

In review of the Court's action, the County Auditor determined that the Court did not comply with the competitive bid process for the procurement of the TPA services and subsequent award of a contract to GRI, Inc. as provided by Local Government Code,

Chapter 262 and submitted a request with Court records to the County Attorney for an opinion.

While waiting for the opinion from the County Attorney on the enforceability of the contract, payments were being made to GRI, Inc. for services provided under the contract.

The enclosed documentation represents the information presented to the County Attorney by the County Auditor and the County Attorney's opinion, which includes the statement "The County failed to comply with the public notice requirements of the purchasing act in regard to TPA services. However, the contract with GRI is in effect and the County is under obligation to perform under the contract".

Local Government Code, Section 157.003, Hospital and Insurance Fund, (d) states "Claims shall be paid from the fund in the same manner as provided by law for the payment of other claims of the county or flood control district". Local Government Code, Section 113.065, Requirement for Approval of Claims states, "The county auditor may not audit or approve a claim unless the claim was incurred as provided by law". Local Government Code, Section 113.064, Approval of Claims by County Auditor states, "A claim, bill or account may not be allowed or paid until it has been examined and approved by the auditor". A plain reading of these statutes suggests that if the county auditor cannot approve the claim, then the claim cannot be paid.

Several statutes provide internal controls over the payment of funds in transactions that do not follow the law. For example, Local Government Code, Section 271.028, Effect of Noncompliance renders public works contracts entered into in violation of purchasing statutes void. For counties over 225,000 in population, Local Government Code, Section 111.093, Appropriations For Purchases, Contracts, Salaries, or Labor Expenses in County With Population of More Than 225,000 provides that a contract is not enforceable unless incurred by law and certified by the county auditor as having available funding. The application of law to the county contract process is so strongly valued that Local Government Code, Section 262.033, Injunction allows citizens to enjoin performance of a contract that violates the requirements of the Purchasing Act.

Case law suggests that payment cannot be made if the underlying contract is contrary to statutory requirements. The legality of a claim refused can then be resolved through the court system. See *Wyatt Metal & Boiler Works v. Lipscomb, County Auditor*, copy attached. Because the performance of the contract will occur over the next year, Ector County is in the position of trying to resolve claims for services already rendered as well as the legality of ongoing services yet to be rendered. While the County Attorney's opinion is fair in its treatment of the contract, it seems counter productive to the legislative scheme to reward non-compliance by validating the contract with payment.

These circumstances are not unique to Ector County. The application of various financial and procurement laws to the wide variety of circumstances that arise in daily county operations can be confusing. In asking for this opinion, there is no blame being placed on

any of the participants regarding this issue. However, if a mistake has been made, the County needs to correct the mistake, not compound it.

The County Attorney is considering issues of contract law in making the determination that payment must be made. However, the statutes cited above suggest that contract law may be a second tier analysis only reached if the contract was procured according to the law. As there appears to be a conflict between the Local Government Code and contract law, I am respectively asking for an opinion on the relationship between county financial law, purchasing law and contract law.

### QUESTIONS

Based on the information provided to the County Attorney, the County Attorney's opinion, LGC 157.003(d), LGC 113.065 and other documentation, I have the following questions:

1. Assuming the contract awarded to GRI, Inc. was not competitively procured within the requirements of Local Government Code, Chapter 262, can the County Auditor, under Local Government Code, Section 113.065, legally approve a claim for payment to GRI, Inc. for TPA services rendered under the October 01, 2003 contract?
2. If the answer to #1 is "yes", are there judicial rulings or statutory authority other than Local Government Code, Section 113.065 providing for County Auditor approval for either the past or the future payment of services?
3. If the answer to #1 is "no", what action, if any, could be taken by the County, in order for the County Auditor to audit and lawfully approve a claim for payment to GRI, Inc. for services already rendered? For example, could the Court approve payment in quantum meruit?
4. If the answer to #1 is "no", what action, if any, could be taken by the County in order for the County Auditor to lawfully approve a claim for payment to GRI, Inc. for future services under the contract? For example, could the Court in some way ratify a contract that did not comply with competitive bidding statutes?
5. Is a contract that does not comply with the Purchasing Act void or voidable, and does the determination make a difference in whether or not a contract can be ratified?
6. If the contract is void, should the County take action to bid the services as provided under Local Government Code, Chapter 262 and would this limit or increase potential liability to the County?
7. If the contract is void, can the County enter into a month-to-month contract with GRI, Inc. for TPA services until such time as a vendor can be awarded the TPA

services under Local Government Code, Chapter 262 or would a month-to-month contract create a continuing violation?

8. If the contract is void, ratification is not an option and the Purchasing Act does not provide for a month-to-month contract, are there other legal avenues available to the County in order to continue the activities of the Plan as it pertains to plan and claims administration?
9. If the only legal vehicle for payment is a claim in quantum meruit, could the court suffer the continuing provision of services while making periodic "quantum meruit" settlement payments?

#### SUMMARY

Without the services of a third-party administrator, the County's Self-Insured Benefit Plan will not function or at least not function effectively for the benefit of the employees, retirees and dependents thereof, nor the medical providers. The County Attorney's opinion is that the contract, although not legally procured under the statutes, is a valid and enforceable contract that the County is obligated to perform. The County Auditor is questioning the legal authority to audit and pay for services being performed under the contract knowing the contract was not properly procured under the statutes and a resolution thereof.

Sincerely,



David R. Austin  
Ector County Auditor

Enclosures