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OPINION COMMITTEE



DALLAS COUNTY  
CRAIG WATKINS  
DISTRICT ATTORNEY  
CIVIL DIVISION

FILE # ML-47583-14  
I.D. # 47583

**RQ-1203-GA**

June 3, 2014

Honorable Greg Abbott  
Office of the Attorney General  
Attention Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

*Via registered mail, RRR and email: [Opinion\\_committee@texasattorneygeneral.gov](mailto:Opinion_committee@texasattorneygeneral.gov)*

Re: Request for an opinion regarding a county's contracting authority

Dear Attorney General Abbott,

I respectfully request your opinion on behalf of Dallas County Judge Clay Jenkins and myself.

### Questions Presented

In 2003, the Texas Legislature enacted legislation providing that a private entity may be held to its agreement to comply with a governmental entity's minimum wage requirement. Dallas County seeks to consider making the payment of a living wage (a wage higher than the state-mandated minimum wage) a condition contractors must meet for certain contracts entered into under the County Purchasing Act. Is Dallas County expressly authorized to require a living wage be paid on contracts awarded pursuant to the County Purchasing Act? In the alternative, does Dallas County have the implied authority under the County Purchasing Act to include payment of living wages as a factor in a request for competitive proposals?

### Discussion

1. *Does Texas Labor Code section 62.0515 authorize Dallas County to set a living wage (a wage higher than the state-mandated minimum wage) for a contractor's employees?*

The County Purchasing Act provides a procedure for competitive bidding for certain items. Tex. Loc. Gov't Code Ann. § 262.030 (Matthew Bender & Co., Inc., LEXIS through 2013 Sess.) Specifically, section 262.030(d) (which applies to Dallas County because the county has appointed a purchasing agent) provides for competitive proposal procedures for the purchase of insurance or high technology items. Additionally, other items may be purchased in this way when the purchasing agent determines, with the consent of the commissioners court, that it is in the best interest of the county to make a request for proposals. *Id.* at § 262.030(d). Section 262.030 specifically addresses the awarding of contracts: "[t]he award of the contract shall be made to the responsible offeror whose proposal is determined to be the lowest and best evaluated

offer resulting from negotiation, taking into consideration the relative importance of price and other evaluation factors set forth in the request for proposals.” *Id.* at § 262.030(b). Dallas County, therefore, has a statutory duty to award a contract to the responsible bidder whose proposal is determined to be the lowest evaluated offer resulting from negotiation. Likewise, the county has a statutory duty to specify in the request for proposals the relative importance of price and other evaluation factors. Your office has determined that “a governmental body may not adopt policies or issue bid solicitations or specifications that restrict competition unless such policies, solicitations, or specifications have a definite and objective relationship to matters of quality and competence or are adopted pursuant to clear legislative authority.” Tex. Att’y Gen. Op. No. JC-0521 (2002).

The county judge seeks to brief for consideration by the commissioners court the inclusion of a minimum wage of \$10.25 as a factor in requests for proposals; contractors would pay employees who work on county projects awarded under Texas Local Government Code section 262.30 at least \$10.25 per hour. Judge Jenkins and I believe this requirement could be adopted pursuant to clear legislative authority set out in the Texas Labor Code.

Texas Labor Code section 62.0515 provides that the state-mandated minimum wage supersedes any wage established by a governmental entity—except in a contract between a governmental entity and a private entity:

(a) Except as otherwise provided by this section, the minimum wage provided by this chapter supersedes a wage established in an ordinance, order, or charter provision governing wages in private employment, other than wages under a public contract.

(b) This section does not apply to any state or federal job training or workforce development program.

**(c) This section does not apply to a minimum wage established by a governmental entity that applies to a contract or agreement, including a non-annexation agreement, entered into by a governmental entity and a private entity.** A private entity that enters into a contract or agreement, including a non-annexation agreement, with a governmental entity, under the terms of which the private entity agrees to comply with a minimum wage established by the governmental entity, is subject to the terms of that contract or agreement, and those terms apply to and may be enforced against a general contractor, subcontractor, developer, and other person with which the private entity contracts in order to comply with the provisions of the original contract or agreement.

Tex. Labor Code Ann. § 62.0515 (Matthew Bender & Co., Inc., LEXIS through 2013 Sess.) (emphasis added). In essence, the statute provides that a private entity that contractually agrees to comply with an alternative minimum wage established by a governmental entity is subject to the terms of that contract and that those terms may be enforced against it. *Id.*

Your office has not specifically addressed whether a county can require its contractors to pay a set wage that is higher than the state-mandated minimum wage. Over two decades ago, however, your office determined that a county could not require companies that did business with the county to pay their workers prevailing wages (the wages paid to the majority of workers,

laborers, and mechanics within a particular area). Tex. Att'y Gen. Op. No. JM-1215 (1990). Your office made this determination because chapter 262 of the Local Government Code did not require the payment of prevailing wages generally and because no other statute expressly required or necessarily implied that a commissioners court could establish prevailing wage rates for contracts other than public works contracts. *Id.*

Here, the county does not seek to require a prevailing wage; it seeks to require a set wage that is higher than the state-mandated minimum wage. The authority relied upon, Texas Labor Code section 62.0515, was enacted in 2003, years after your office's 1990 opinion on prevailing wages. Judge Jenkins and I believe this legislation expressly authorizes Dallas County to solicit proposals that include payment of a higher minimum wage as an evaluation factor. By providing that a private entity can be held to contractual terms that require it to pay a wage higher than the state-mandated minimum wage, it seems that the Texas Legislature expressly authorizes a county to solicit and evaluate competitive proposals based upon a private entity's agreement to pay its workers more than the state-mandated minimum wage.

2. *In the alternative, does Dallas County have implied authority to include a living wage as a factor in a competitive proposal?*

If Dallas County does not have express authority to include a living wage as a factor in competitive proposals, please opine on whether including such a factor is consistent with the County Purchasing Act (Texas Local Government Code section 262.021 *et. seq.*) and whether authority to include such a factor may be necessarily implied from this statutory authority.

As noted above, a governmental body may adopt policies or issue bid solicitations and specifications that restrict competition if such policies, solicitations, or specifications have a definite and objective relationship to matters of quality and competence. Tex. Att'y Gen. Op. JC-0521. Judge Jenkins and I believe that including a living wage as an evaluation factor in competitive proposals would result in workers who are more highly qualified and thus more competent, and that this will improve the quality of the work provided (an outcome consistent with the County Purchasing Act). Workers who are paid a living wage are also likely to be more motivated and thus do better work, which would improve the overall quality of a project.<sup>1</sup> A living wage may also decrease turnover with contractors' employees (due to increased worker satisfaction) which in turn may result in employees' increased familiarity with the county's business, boosting both worker competence and quality. Further, Judge Jenkins and I believe that strong societal benefits result from the payment of living wages and that local governmental entities should be allowed to consider the promoting of economic opportunity for low wage earners as a factor in the purchasing process.

A contractor's payment of a living wage to its employees, if included in a request for proposals, would be one of several evaluation factors under Texas Local Government Code section 262.030, and the county would specify each factor's relative importance. It is my opinion and that of Judge Jenkins that the authority to include a living wage as an evaluation factor is implied under Texas Local Government Code section 262.030.

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<sup>1</sup> See, e.g., Wayne F. Cascio, *Decency Means More than "Always Low Prices": A Comparison of Costco to Wal-Mart's Sam's Club*, Acad. of Mgmt. Perspectives, Aug. 2006, at 26-37, <http://www.ou.edu/russell/UGcomp/Cascio.pdf>.

## Conclusion

Texas Labor Code section 62.0515 expressly authorizes Dallas County to require a living wage (a minimum wage higher than the state-mandated minimum wage) as a factor in requests for proposals under Texas Local Government Code section 262.030. In the alternative, the county's authority to include a living wage of \$10.25 as a factor in a request for proposals may be implied under Texas Local Government Code section 262.030. This office respectfully requests that you review the matter and issue an opinion at your earliest convenience.

Sincerely,



Craig Watkins  
Dallas County District Attorney

Enclosures