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OPINION COMMITTEE

The State of Texas
House of Representatives



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The Honorable Ken Paxton
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October 29, 2015

Dear General Paxton:

As chair of the House Committee on Transportation, I respectfully request a formal opinion to clarify the authority of the Texas Department of Transportation ("department") to enter into design-build contracts during the 2016-2017 fiscal biennium using funds appropriated to the department for that biennium.

This request arises from a potential conflict between the limitations on design-build contracts contained in an appropriations rider, Rider 47, that follows the appropriations to the department in House Bill 1, Acts of the 84th Legislature, Regular Session, 2015 (the General Appropriations Act), and the limitations contained in Sections 223.242(d) and (d-1) of the Transportation Code.

Rider 47, headed Limitation on Expenditures for Design-Build Contracts, found on page VII-31 of House Bill 1, states:

Limitation on Expenditures for Design-Build Contracts. The Department of Transportation is authorized to expend funds appropriated by this Act to enter into no more than ten design-build contracts in the 2016-17 biennium for highway projects that have an estimated construction cost to the department of \$250,000,000 or more per highway project. If provisions in Transportation Code §223.242, or similar general law, establish a limit on the number of design-build contracts that the Department of Transportation may enter into in each fiscal year or biennium that is less than the amount authorized by this section, then the limitation established by general law prevails.¹

Thus, Rider 47 establishes two limitations on the department's authority to use funds appropriated to the department by House Bill 1 to enter into design-build contracts during the

¹ Rider 47, page VII-31, Chapter 1281 (H.B. 1), Acts of the 84th Legislature, Regular Session, 2015 (the General Appropriations Act).

2016-2017 fiscal biennium. Specifically, the rider establishes a minimum project construction cost estimate of \$250 million and also establishes a limit of 10 design-build contracts that the department may enter into during the 2016-2017 fiscal biennium. However, the rider also includes a conflicts clause that provides that if general law establishes a limitation on the number of design-build contracts that the department may enter into that is less than the amount authorized by the rider, then the limitation established by general law prevails.

Section 223.242, Transportation Code, sets forth the general law governing the scope of and limitations on design-build contracts entered into by the department and contains two limitations on design-build contracts that potentially conflict with the limitations established in Rider 47. Specifically, Subsection (d) establishes a minimum project construction cost estimate of \$150 million, and Subsection (d-1) limits the department to a maximum of three design-build contracts per fiscal year. Sections 223.242(d) and (d-1) state:

(d) The department may enter into a design-build contract for a highway project with a construction cost estimate of \$150 million or more to the department.

(d-1) The department may not enter into more than three contracts under this section in each fiscal year.²

Under Texas law, general law cannot be adopted, repealed, or amended by a rider in a general appropriations act. A rider that would have that effect is invalid because its inclusion in the act violates the one-subject requirement of Section 35(a), Article III, Texas Constitution. See *Strake v. Court of Appeals*, 704 S.W.2d 746, 748 (Tex. 1986); *Moore v. Sheppard*, 192 S.W.2d 559, 561-562 (Tex. 1946); *Linden v. Finley*, 49 S.W. 578, 579 (Tex. 1899); Tex. Att'y Gen. Op. Nos. MW-585 (1982), MW-51 (1979), V-1254 (1951). In Attorney General Opinion No. JC-0178 (2000), the attorney general explained:

The law with regard to riders has long been settled in Texas, as summarized in Attorney General Opinion JM-1151:

A valid rider may detail, limit, or restrict the use of appropriated funds. Attorney General Opinion V-1254 (1951). A rider that

² House Bill 20 (Chapter 314, Acts of the 84th Legislature, Regular Session, 2015) amended Section 223.242(d), Transportation Code, by increasing the minimum project construction cost estimate for a design-build contract from \$50 million to \$150 million and amended Section 223.242(d-1), Transportation Code, by making permanent the temporary limit of three design-build contracts per fiscal year. Specifically, House Bill 20 made the following changes to Sections 223.242(d) and (d-1):

(d) The department may enter into a design-build contract for a highway project with a construction cost estimate of \$150 [~~\$50~~] million or more to the department.

(d-1) The department may not enter into more than three contracts under this section in each fiscal year [~~This subsection expires August 31, 2015~~].

qualifies or directs the use of appropriated funds or that is merely incidental to an appropriation is valid. *Jessen Assoc., Inc., supra*, at 599. So, too, is a rider that merely implements or is declarative of existing general law. See Attorney General Opinions JM-786 (1987); JM-343 (1985).

A rider may not, however, embody matters of general legislation. *Moore v. Sheppard*, 192 S.W.2d 559 (Tex. 1946); see also Attorney General Opinions MW-585 (1982); MW-51 (1979). A rider that attempts to alter existing substantive law is a matter of general legislation that may not be included in a general appropriations act. *Strake v. Court of Appeals*, 704 S.W.2d 746 (Tex. 1986). Thus, a rider that amends, modifies, repeals, or conflicts with existing general law or that attempts to nullify a constitutional provision other than article III, section 35, is invalid. See *id.*; *Linden v. Finley*, 49 S.W. 578 (Tex. 1899); see also Attorney General Opinions JM-885 (1988); H-1158 (1978); M-1199 (1972); V-1254 (1951).

Tex. Att'y Gen. Op. No. JC-0178 (2000) (quoting Tex. Att'y Gen. Op. No. JM-1151 (1990) at 5-6).

Certain interested parties contend that Rider 47 violates Section 35(a), Article III, Texas Constitution, because the rider attempts to alter and conflicts with existing substantive law. Specifically, these parties contend that the department is not required to follow the \$250 million minimum project construction cost estimate limitation established by Rider 47 because that limitation is inconsistent with the \$150 million minimum project construction cost estimate limitation established by Section 223.242(d), Transportation Code, and, therefore, that provision of the rider is invalid under Section 35(a), Article III, Texas Constitution. Consequently, in the view of these interested parties, for each year of the 2016-2017 fiscal biennium, the department may use money appropriated to the department in House Bill 1 for the 2016-2017 fiscal biennium to enter into no more than three design-build contracts that have an estimated construction cost to the department of \$150 million or more.

Others contend that the department is required to follow the express terms of Rider 47 because the rider does not violate Section 35(a), Article III, Texas Constitution, since the rider only restricts the use of appropriated funds to certain projects that are permissible under Section 223.242(d), Transportation Code. Specifically, these parties contend that the \$250 million minimum project construction cost estimate limitation established by Rider 47 is only a restriction on the use of appropriated funds and does not alter, amend, or conflict with existing substantive law because projects with an estimated construction cost to the department of \$250 million or more are authorized under Section 223.242(d), Transportation Code, since the

The Honorable Ken Paxton
October 29, 2015
Page 4

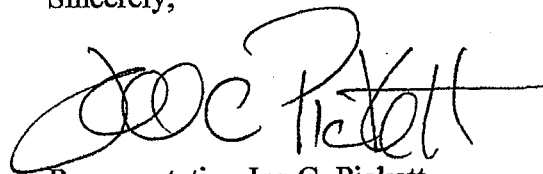
estimated costs of these projects are greater than the minimum amount required by that section. Further, the legislature may validly restrict the use of appropriated funds to only certain projects (here, projects with a construction cost estimate of \$250 million or more) so long as those projects are authorized by the statute.³ Therefore, in the view of these parties, for each year of the 2016-2017 fiscal biennium, the department may use money appropriated to the department in House Bill 1 for the 2016-2017 fiscal biennium to enter into no more than three design-build contracts that have an estimated construction cost to the department of \$250 million or more.

Given these conflicting interpretations of the department's authority to enter into design-build contracts during the 2016-2017 fiscal biennium, I am respectfully requesting a formal opinion on the following questions:

- (1) Does Rider 47 violate Section 35(a), Article III, Texas Constitution?
- (2) If Rider 47 is valid, what is the scope of the department's authority to enter into design-build contracts during the 2016-2017 fiscal biennium?
- (3) If Rider 47 is invalid, what is the scope of the department's authority to enter into design-build contracts during the 2016-2017 fiscal biennium?

Thank you in advance for your consideration of this matter. Please do not hesitate to contact me if you need any additional information regarding this request.

Sincerely,



Representative Joe C. Pickett

Chair, House Committee on Transportation

³ Although Rider 47 does authorize the department to enter into more projects than the amount authorized by Section 223.242(d-1), the rider's conflicts clause remedies this conflict by providing that the limitation established by general law prevails.