



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 10, 2019

The Honorable Rod Ponton
Presidio County Attorney
Post Office Drawer M
Marfa, Texas 79843

Opinion No. KP-0246

Re: Competitive bidding requirements applied
to municipal airport operation (RQ-0253-KP)

Dear Mr. Ponton:

You tell us Presidio County (the “County”) received a contract offer for the operation of the county’s two municipal airports that “requires the payment of \$108,000 by Presidio County to [the company] in three equal installments of \$36,000.”¹ You explain your concern that if the County accepts the offer without first receiving other bids, it could run afoul of the competitive bidding requirement in the County Purchasing Act, specifically section 262.023 of the Local Government Code.² Request Letter at 1–2. You provide a copy of the proposed contract and ask whether its acceptance without the receipt of other bids would violate the law. *Id.* Because this office does not construe contracts in the opinion process, we cannot advise you regarding a particular contract’s adherence with competitive bidding or any other legal requirement. *See* Tex. Att’y Gen. Op. No. KP-0178 (2018) at 2. However, we can advise you generally on the issues you raise.

Because the context of your question involves the operation of municipal airports, we first consider chapter 22 of the Transportation Code. *See generally* TEX. TRANSP. CODE §§ 22.001–.901 (County and Municipal Airports). Subsection 22.020 of that chapter provides that a local government, “by contract, lease, or other arrangement, on a consideration fixed by the local government and for a term not to exceed 40 years, may authorize a qualified person to operate, as the agent of the local government or otherwise, an airport owned or controlled by the local government.” *Id.* § 22.020(a); *see also id.* § 22.021 (authorizing a similar arrangement for the use of the airport by another). In an opinion concerning the lease of county airport land, this office addressed the relationship between sections 22.020 and 22.021 of the Transportation Code and the competitive bidding requirement applicable to the sale or lease of county real property in chapter 263 of the Local Government Code. *See* Tex. Att’y Gen. Op. No. GA-0190 (2004); TEX. LOC. GOV’T CODE §§ 263.001(a) (requiring such a sale or lease to be made by public auction unless otherwise authorized by chapter 263), .007 (authorizing sale and lease of county real property through sealed bids or sealed proposals). At issue was whether Kerr County could lease airport hangar space to a company conducting an aviation business without competitive bidding. *See* Tex.

¹*See* Letter from Honorable Rod Ponton, Presidio Cty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Oct. 12, 2018), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

²Section 262.023(a) prohibits a county from purchasing “one or more items under a contract that will require an expenditure exceeding \$50,000” without using a competitive procedure as described therein. TEX. LOC. GOV’T CODE § 262.023(a).

Att’y Gen. Op. No. GA-0190 (2004) at 1. Noting that the county’s express leasing authority regarding airports is more specific than the county’s general leasing authority under the Local Government Code and finding “no indication that the Legislature intended Local Government Code chapter 263 to prevail over Transportation Code chapter 22,” the opinion concluded that a “lease of county airport land under section 22.020 or 22.021 does not have to be made at an auction.” *Id.* at 6. This conclusion was bolstered by the fact that subsection 22.024(a), governing the disposal of airport property, expressly incorporates certain requirements of chapter 263 of the Local Government Code, suggesting that the Legislature intended chapter 22 to prevail otherwise. *Id.*

A Texas appellate court recently agreed with the reasoning and conclusion of GA-0190 on this point and applied its analysis to the County Purchasing Act. *See Skypark Aviation, LLC v. Lind*, 523 S.W.3d 869, 875 (Tex. App.—Eastland 2017, no pet.). In *Skypark*, Ector County sought a new fixed base operator for one of its airport facilities and issued a request for proposals. *Id.* at 872. An unsuccessful bidder brought suit, arguing in part that the county was subject to the competitive bidding requirement of the County Purchasing Act in chapter 262 of the Local Government Code, which would have triggered a waiver of immunity from suit for his claim. *See id.* at 873–74. The court disagreed, pointing to GA-0190 and concluding that “the County Purchasing Act is not applicable to Ector County’s request for proposal” despite the fact that the county had chosen to utilize a procedure similar to what the County Purchasing Act required. *Id.* at 875. The court noted that Ector County sought “an entity to serve as the fixed base operator of the airport based upon an acceptable sum paid by the operator to the county,” likening the arrangement to an airport lease. *Id.* The court thus determined that the arrangement was governed by sections 22.020 and 22.021 of the Transportation Code, referring again to GA-0190 and concluding that the County Purchasing Act does not apply to “the leasing of a county airport for operational purposes.” *Id.*

The situation you describe is a contract, not a lease as in *Skypark*, and it involves an airport manager position rather than a fixed base operator position. However, because Transportation Code subsection 22.020(a) authorizes a “contract, lease, or other arrangement” for a qualified person to operate a local government airport, the distinction is insignificant here. TEX. TRANSP. CODE § 22.020(a). In addition, the contract calls for the County to pay consideration to the potential airport operator. While this may be factually different from *Skypark*, section 22.020 requires simply that the consideration for a qualified person to operate the airport be “fixed by the local government” and does not rule out the possibility that monetary consideration could come from the local government if so chosen by that entity.³ *Id.* Depending on the facts, a court could conclude based on this broad language that the airport operations contract meets the requirements of Transportation Code section 22.020 and is therefore—consistent with *Skypark*—not subject to the competitive bidding requirement of Local Government Code section 262.023(a).⁴

³*See also* Tex. Dep’t of Transp., Aviation Div., Model Airport Manager’s Contract Agreement, <https://www.txdot.gov/inside-txdot/division/aviation/airport-rules.html> (providing for compensation paid by a city or county to an airport manager).

⁴Subsection 22.020(a) requires that the arrangement “authorize a qualified person to operate, as the agent of the local government or otherwise, an airport owned or controlled by the local government” and that the term not

Should the contract in question not fall within the purview of Transportation Code section 22.020, we consider the competitive bidding requirements of section 262.023 of the Local Government Code. That provision prohibits a county from purchasing “one or more items under a contract that will require an expenditure exceeding \$50,000” without using a competitive procedure as described therein. TEX. LOC. GOV’T CODE § 262.023(a). The provision specifies that “all separate, sequential, or component purchases of items ordered or purchased, with the intent of avoiding the requirements of this subchapter, from the same supplier by the same county officer, department, or institution are treated as if they are part of a single purchase and of a single contract.”⁵ *Id.* § 262.023(c). Section 262.022 defines “separate,” “sequential,” and “component” purchases respectively as purchases “made separately,” “made over a period,” or “of the component parts” of an item or items “that in normal purchasing practices would be purchased in one purchase.” *Id.* § 262.022(2), (7), (8); Tex. Att’y Gen. LO-94-087, at 2. The term “item” includes services other than professional services as defined by the Professional Services Act and thus would likely encompass airport operations services.⁶ TEX. LOC. GOV’T CODE § 262.022(5). Based on subsection 262.023(c), a contract for airport operation services that does not fall under Transportation Code chapter 22 and that is based on installment payments exceeding \$50,000 in the aggregate would generally be subject to competitive bidding.

However, a county may exempt a contract for the purchase of certain items, including “a personal or professional service,” from the competitive bidding requirement of section 262.023 “if the commissioners court by order grants the exemption.” *Id.* § 262.024(a)(4). This office has interpreted the phrase “personal services” in subsection 262.024(a)(4) to refer to services “rendered by a person or persons chosen specifically by the commissioners court,” as opposed to those performed generally by personnel unknown to the commissioners. *See* Tex. Att’y Gen. Op. No. JM-890 (1988) at 5; *see also* Tex. Att’y Gen. LO-98-023, at 2 (“A personal services contract is a contract for the services of a particular individual. Unless the service to be provided is to be done by a unique, particular, named individual, rather than by anonymous and fungible workers, the contract is not for personal services.”). Thus, depending on the facts, an airport operations contract could be eligible for exemption from competitive bidding by the commissioners court if the contract requires a particular, named individual to perform the services. Such a factual determination cannot be made in an attorney general opinion. Tex. Att’y Gen. Op. No. KP-220 (2018) at 4.

exceed 40 years. TEX. TRANSP. CODE § 22.020(a). Additionally, an arrangement made under section 22.020 must be made subject to the terms of any state or federal aid grant or loan. *See id.* § 22.020(c).

⁵*See also* TEX. LOC. GOV’T CODE § 262.034(a) (providing that a county officer or employee who “intentionally or knowingly makes or authorizes separate, sequential, or component purchases to avoid the competitive bidding requirements of Section 262.023” commits an offense).

⁶*See* TEX. GOV’T CODE § 2254.002(2)(A)–(B) (defining “professional services” as services within the scope of the practice of accounting, architecture, landscape architecture, land surveying, medicine, optometry, professional engineering, real estate appraising, or professional nursing; or services provided in connection with a person licensed or registered in one of those fields).

S U M M A R Y

Depending on the facts, a court could conclude that an airport operations contract meets the requirements of Transportation Code section 22.020 and is therefore not subject to the competitive bidding requirement of Local Government Code section 262.023(a). Even if an airport operations contract does not fall within Transportation Code section 22.020, it could be eligible for exemption by the commissioners court from competitive bidding pursuant to section 262.024(a)(4) as a purchase for a personal service if the contract requires a particular, named individual to perform the services.

Very truly yours,



KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy Attorney General for Legal Counsel

VIRGINIA K. HOELSCHER
Chair, Opinion Committee

BECKY P. CASARES
Assistant Attorney General, Opinion Committee