



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 25, 2019

Mr. Barry Mahler
Chairman
Texas State Soil and Water Conservation Board
1497 Country View Lane
Temple, Texas 76504-8806

Opinion No. KP-0259

Re: Whether subsection 2261.252(e) of the Government Code allows a member of the State Soil and Water Conservation Board to receive funding through an agency program for land improvement measures (RQ-0264-KP)

Dear Mr. Mahler:

Your predecessor asked whether Government Code subsection 2261.252(e) abrogates the common-law conflict-of-interest doctrine for state agency purchase orders of \$25,000 or less.¹ *See* TEX. GOV'T CODE § 2261.252(e) (providing that section 2261.252, which addresses conflicts of interest for state agency contracts, applies only to purchase orders exceeding \$25,000). Specifically, he asked whether subsection 2261.252(e) alters the common law to allow the Texas State Soil and Water Conservation Board (“State Board”) to issue a purchase order granting a member of its governing board \$15,000 in financial assistance through a conservation program administered by the agency (“Program”). Request Letter at 1–3; *see* TEX. AGRIC. CODE §§ 201.301–311.

For at least the past century, Texas common law has prohibited a governmental body from entering into a contract if an officer of the governmental body had a direct or indirect interest in that contract:

If a public official directly or indirectly has a pecuniary interest in a contract, no matter how honest he may be, and although he may not be influenced by the interest, such a contract so made is violative of the spirit and letter of our law, and is against public policy.

Meyers v. Walker, 276 S.W. 305, 307 (Tex. App.—Eastland 1925, no writ); *see Knippa v. Stewart Iron Works*, 66 S.W. 322, 324 (Tex. App.—San Antonio 1902, no writ). The doctrine applies when an official with authority to make or influence the making of a contract is also a beneficiary of that contract. Tex. Att’y Gen. Op. No. JM-310 (1985) at 2. A contract that violates the common-law rule is void even if the interested official recuses himself or herself. Tex. Att’y Gen. Op. No.

¹*See* Letter from José O. Dodier, Jr., Chair, Tex. State Soil and Water Conservation Bd., to Honorable Ken Paxton, Tex. Att’y Gen. at 3 (Jan. 15, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

JC-0484 (2002) at 5, 6. Opinions from this office consistently apply this doctrine when addressing conflict-of-interest questions for public officials. *See, e.g.*, Tex. Att’y Gen. Op. Nos. GA-0351 (2005) at 2 (“Texas courts have held that a member of a governmental body may not have a personal financial interest in a contract entered into by the governmental body. This office has relied on these authorities in addressing questions about contractual conflicts of interest.” (citations omitted)), JM-671 (1987) at 2–3 (“The rule announced in *Meyers v. Walker* has been relied upon in numerous cases to invalidate contracts made by public officials who were pecuniarily interested therein.”). Moreover, this office previously concluded that grants awarded by state agencies are subject to the common-law doctrine.² Tex. Att’y Gen. Op. No. JC-0484 (2002) at 1, 5.

The Legislature may, however, codify or alter common-law principles, and in 2015, it passed sweeping reforms to state contracting procedures.³ Among many reforms, the Legislature added section 2261.252 to the Government Code. Section 2261.252 generally requires state agency employees or officials to disclose potential conflicts of interest and prohibits certain agency contracts, including a contract for the purchase of goods or services with a private vendor with whom a member of the agency’s governing board has a financial interest. TEX. GOV’T CODE § 2261.252(a)–(b). This prohibition against an agency entering into a contract in which a member of its governing board has a financial interest generally codifies common-law conflict-of-interest principles. But section 2261.252 also modifies those principles. For example, subsection (b)(3) expands upon the common law by imputing to the agency’s governing board the pecuniary interests of relatives. *Compare id.* § 2261.252(b)(1), (3) (prohibiting agency from entering contract in which a family member of the agency’s governing board has an interest), *with* Tex. Att’y Gen. Op. No. JM-424 (1986) at 4 (“The common-law doctrine [does] not extend to pecuniary interests of the officer’s relatives.”).

Your predecessor specifically asked about the effect of subsection 2261.252(e) on the common law. Request Letter at 1, 3. In 2017, the Legislature amended section 2261.252 to add both subsections (a–1) and (e).⁴ Subsection (a–1) requires state agency employees and officials to disclose conflicts of interest during both the procurement process and the term of a contract. *See* TEX. GOV’T CODE § 2261.252(a–1). In contrast, common-law conflict-of-interest principles apply only at the time a state agency enters a contract. Tex. Att’y Gen. Op. No. GA-0351 (2005) at 2 (“Common-law conflict-of-interest rules have their effect at the time a contract is entered into.”). Subsection (e) provides that section 2261.252 applies only to purchase orders of goods and services exceeding \$25,000:

²Under the Program, landowners receive grants in exchange for performing certain conservation measures. Request Letter at 2. Although local soil and water conservation districts initially determine a landowner’s eligibility for the Program, the State Board establishes the criteria for awarding a grant, determines appeals, and directly funds the grant to the landowner in exchange for the performance of specified conservation measures. TEX. AGRIC. CODE §§ 201.307, .310; 31 TEX. ADMIN. CODE § 523.6(g)(10).

³Act of May 31, 2015, 84th Leg., R.S., ch. 326, 2015 Tex. Gen. Laws 1477, 1477-89 (Senate Bill 20).

⁴Act of May 28, 2017, 85th Leg., R.S., ch. 556, § 9, 2017 Tex. Gen. Laws 1532, 1535 (Senate Bill 533).

This section applies only to a contract⁵ for the purchase of goods or services solicited through a purchase order if the amount of the purchase order exceeds \$25,000.

TEX. GOV'T CODE § 2261.252(e).

With the addition of subsection (e), your predecessor asked whether—for purchase orders of less than \$25,000—the Legislature intended to abrogate the longstanding common-law doctrine. Request Letter at 3. “Abrogation by implication is disfavored.” *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 461 (Tex. 2012). As such, courts will construe subsection 2261.252(e) as abrogating the common law “only if there exists a clear repugnance between the two.” *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 437 (Tex. 2016) (quotation marks omitted). Thus, while “statutes can modify common law rules, . . . before we construe one to do so, we must look carefully to be sure that was what the Legislature intended.” *Energy Serv. Co. of Bowie, Inc. v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190, 194 (Tex. 2007). We ascertain the Legislature’s intent from the plain text of its enactments. *Colo. Cty. v. Staff*, 510 S.W.3d 435, 444 (Tex. 2017) (“We seek that intent ‘first and foremost’ in the statutory text, and where text is clear, text is determinative of intent.” (footnotes and citations omitted)).

The text of section 2261.252 itself neither expressly nor impliedly purports to supplant or alter the common law for purchase orders of \$25,000 or less. *See* TEX. GOV'T CODE § 2261.252 (containing no reference to the common law). In contrast, in enacting similar legislation for local public officials under chapter 171 of the Local Government Code, the Legislature expressly stated its intent to abrogate common-law conflict-of-interest rules: “This chapter preempts the common law conflict of interests as applied to local public officials.” TEX. LOC. GOV'T CODE § 171.007(a). Chapter 171 demonstrates that when the Legislature intends to preempt common-law conflict-of-interest rules, it knows how to do so. *See PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd.*, 146 S.W.3d 79, 84 (Tex. 2004) (noting that “[a] statute’s silence can be significant” and that an analysis begins with the presumption that the Legislature knows how to enact what it intends); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 885 (Tex. 2000) (relying on principle of statutory construction that the Legislature knows how to enact laws effectuating its intent).

Moreover, the public policy of the State—consistent with the common-law doctrine—opposes state officers having financial interests in substantial conflict with the proper discharge of their duties:

It is the policy of this state that a state officer or state employee may not have a direct or indirect interest, including financial and other interests, or engage in a business transaction or professional activity, or incur any obligation of any nature that is in substantial conflict with the proper discharge of the officer’s or employee’s duties in the public interest.

⁵Chapter 2261 broadly defines “contract” to include a nonacademic grant “under which the recipient of the grant is required to perform a specific act or service.” TEX. GOV'T CODE § 2261.002(1).

TEX. GOV'T CODE § 572.001(a); *see also id.* § 572.051(a), (c) (requiring state agencies to adopt written ethics policy prohibiting state officer from accepting compensation that could reasonably be expected to impair independence of judgment in the performance of official duties). Construing subsection 2261.252(e) to permit state officers to engage in transactions with the institutions they serve contradicts this longstanding public policy. *See* Tex. Att'y Gen. Op. No. JM-671 (1987) at 8 (concluding disclosure and recusal requirements in Government Code section 572.058 did not change common-law rule prohibiting a state board from entering into contract in which board member has pecuniary interest, in part, because such a construction is contrary to public policy).

Thus, for purchase orders of \$25,000 or less, no repugnance exists between subsection 2261.252(e) and the common law. *See Wasson Interests, Ltd.*, 489 S.W.3d at 437–38. Rather, section 2261.252 applies to purchase orders of more than \$25,000, and for lesser amounts, a court would likely conclude that the common-law conflict-of-interest doctrine remains intact. *See Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42, 51 (Tex. 2015) (“We have explained that statutes can modify or abrogate common law rules, but only when that was what the Legislature clearly intended.”). Therefore, subsection 2261.252(e) does not abrogate common-law conflict-of-interest rules, which would prohibit a member of the State Soil and Water Conservation Board from receiving \$15,000 in financial assistance through a program administered by the agency.

S U M M A R Y

Government Code subsection 2261.252(e) does not abrogate common-law conflict-of-interest rules, which would prohibit a member of the State Soil and Water Conservation Board from receiving \$15,000 in financial assistance through a program administered by the agency.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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