

MICHAEL A. STAFFORD
First Assistant County Attorney



1019 Congress, 15th Floor
Houston, TX 77002-1700
Phone: (713) 755-5101
Fax: (713) 755-8924

FEB 28 2001

OPINION COMMITTEE

FILE # _____
I.D. # 041902

MICHAEL P. FLEMING

County Attorney
Harris County, Texas

February 23, 2001

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**OFFICE OF THE ATTORNEY GENERAL
EXECUTIVE ADMINISTRATION**

✓ SG

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

RQ-0357-JC

FILE # 11L-41902-01
I.D. # 041902

Re: Authority of Harris County to enter a lease-purchase agreement for acquisition of the use of real property.

Dear General Cornyn:

This letter is to request your opinion relating to the authority of Harris County (the "County") to enter a lease-purchase agreement for acquisition of the use of real property. We ask the following questions:

1. Is the County authorized to enter a lease-purchase agreement for acquisition of the use of real property?
2. May a lease-purchase agreement have provisions for construction of new improvements and/or renovation of existing improvements without compliance with the County Purchasing Act or the Professional Services Procurement Act?
3. If the answer to question 2 is "No," does compliance with the request for proposal procedures of the County Purchasing Act in selection of the lessor/landlord change the answer?

Our memorandum is attached. If you need any additional information, please contact the undersigned at 713-755-7880.

Thank you for your courtesy and cooperation.

Sincerely,

MICHAEL P. FLEMING
County Attorney

John R. Barnhill
By **JOHN R. BARNHILL**
Assistant County Attorney

Approved:

A handwritten signature in black ink, appearing to read 'MAS', written over a horizontal line.

MICHAEL A. STAFFORD
First Assistant County Attorney

Attachment: Memorandum

MEMORANDUM

We ask the following questions relating to the authority of Harris County to enter a lease-purchase agreement for acquisition of the use of real property:

1. Is the County authorized to enter a lease-purchase agreement for acquisition of the use of real property?
2. May a lease-purchase agreement have provisions for construction of new improvements and/or renovation of existing improvements without compliance with the County Purchasing Act or the Professional Services Procurement Act?
3. If the answer to question 2 is "No," does compliance with the request for proposal procedures of the County Purchasing Act in selection of the lessor/landlord change the answer?

We begin by describing a lease-purchase agreement generally as a multi-year agreement under which the County as lessee acquires possession and use of certain property in return for periodic lease payments over the term of the agreement. The agreement typically contains an option for the County to purchase the property upon payment of a stated amount. If the option is exercised, all, or some stated portion, of the lease payments are credited toward the purchase price ("Lease-Purchase Agreement").

The Texas Local Government Code provides that:

The commissioners court of a county may purchase, construct, or *provide by other means*, or may reconstruct, improve, or equip a building or rooms, other than the courthouse, for the housing of county or district offices, ...or for the conducting of other public business, if the commissioners court determines that the additional building or rooms are necessary. The commissioners court may purchase and improve the necessary site for the building or rooms. (Emphasis added.)

TEX. LOC. GOV'T CODE ANN. § 292.001(a) (Vernon 1999). Thus, a County may provide by other means, *e.g.*, a Lease-Purchase Agreement, a building for the housing of county offices or the conducting of other public business, provided the commissioners court determines that the building is necessary. *See* Op. Tex. Att'y Gen. No. MW-357 (1981) (construing the predecessor statute to § 292.001 and opining that "purchase" as used in the statute includes "all lawful acquisitions of real estate by any means whatever, except by descent").

One might question whether provisions in a typical Lease-Purchase Agreement, including those for build-out of the property or construction of new improvements, implicate the competitive bidding requirements generally applicable to public construction projects. While we have found no cases or opinions of the Attorney General

that directly address this issue, we believe that they do not. The competitive bidding requirements applicable to counties require, among other matters, that:

Before a county may purchase one or more items under a contract that will require an expenditure exceeding \$25,000, the commissioners court of the county must comply with the competitive bidding or competitive proposal procedures prescribed by this subchapter. (Emphasis added.)

County Purchasing Act, TEX. LOC. GOV'T CODE ANN. § 262.023(a) (Vernon Supp. 2000).

A governmental entity may not select a provider of professional services or a group or association of providers or award a contract for the services on the basis of competitive bids submitted for the contract or for the services, but shall make the selection and award:

(1) on the basis of demonstrated competence and qualifications to perform the services;....(Emphasis added.)

Professional Services Procurement Act, TEX. GOV'T CODE ANN. § 2254.003(a) (Vernon 2000).

A purchase of land, however, is not subject to the competitive bidding requirements that apply to county purchases in general if the Commissioners Court grants an exemption. TEX. LOC. GOV'T CODE ANN. § 262.024(a)(6) (Vernon 1999). The County Purchasing Act further provides that:

“Purchase” means any kind of acquisition, including a lease, of an item. (Emphasis added.)

Id. § 262.022(6). The Code Construction Act provides that:

“Includes” and “including” are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded.

TEX. GOV'T CODE ANN. § 311.005(13) (Vernon 1998). Since a purchase includes “any kind of acquisition,” we conclude that this includes an acquisition through a Lease-Purchase Agreement. Thus, a county may negotiate a lease, and a Lease-Purchase Agreement, of real property with a prospective landlord without complying with the County Purchasing Act, if the Commissioners Court grants the exemption.

Do provisions in a Lease Purchase Agreement for build-out or construction of new improvements implicate the Professional Services Procurement Act? The Attorney General has considered the authority of a county to enter a "design/build" contract for construction of public buildings. Under the design/build concept, the owner contracts with a single party for both the design and construction of the entire project. The single party may be either the architect/engineer, the contractor or both acting in tandem as a joint venture. The Attorney General concluded that because the Professional Services Procurement Act prohibits the procurement of architectural or engineering services through competitive bidding, that a commissioners court does not possess the authority to award a design/build contract for the construction of a public work on the basis of competitive bids where architectural or engineering services comprise a component of the contract. Op. Tex. Att'y Gen. No. JM-1189 (1990).

However, a typical provision in a Lease-Purchase Agreement providing for build-out or construction does not contemplate that the *county* would either select the provider of, or make expenditures for, any professional services or construction services. The Lease-Purchase Agreement contemplates that the *landlord*, the lessor, may enter one or more contracts providing for design and construction of the build-out. The county would not make any payment to the architect/engineer or to the contractor for the build-out. Indeed, typically the county's only financial obligation is to make monthly or annual lease payments, provided that the Commissioners Court appropriates funds for the expenditure. If the county does not appropriate funds for any lease payment, the landlord's sole remedy is to terminate the lease (see discussion of "debt," *infra*). Unlike projects financed with bonds or certificates of obligation, the risk of financing under a Lease-Purchase Agreement remains with the landlord. Thus, the Professional Services Procurement Act is not applicable to a Lease-Purchase Agreement containing build-out provisions. To hold to the contrary would result in the anomaly of the County being authorized to lease-purchase an identical *existing* building without renovation, but not one which requires build-out. This would not be a "just and reasonable result" intended in the enactment of statutes. See Code Construction Act, TEX. GOV'T CODE ANN. § 311.021(3) (Vernon 1998).

Multi-year financial obligations may conflict with the constitutional limitation on a county's authority to incur debt. The Texas Constitution provides that:

... no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent (2%) as a sinking fund...

TEX. CONST. art. XI, § 7. The Texas Supreme Court has interpreted this provision as follows:

We conclude that the word "debt," as used in the constitutional provisions [art. XI, § 7], means any

pecuniary obligation imposed by contract, except such as were, at the date of the contract, within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year, or out of some fund then within the immediate control of the corporation.

McNeill v. City of Waco, 33 S.W. 322, 324 (Tex. 1895); *City of Bonham v. Southwest Sanitation, Inc.* 871 S.W.2d 765 (Tex. App. – Texarkana 1994, writ denied). Thus, any financial obligation imposed on a county by contract is within the meaning of “debt,” unless at the time of making the contract it reasonably could be paid out of current revenues, that is, the current budget, or out of some fund within the immediate control of the county. If the obligation is a “debt,” then the county must make provision for levying and collecting a tax sufficient to pay the interest thereon and establish a 2% sinking fund. Furthermore,

A party seeking to establish that its contract is not within the constitution’s prohibition must both allege and prove that, at the date of making the contract, the entire obligation could reasonably be paid from the current year’s revenues, or that there was at that time a fund on hand or in the immediate control of the city [or county] for the specific purpose of paying the obligation plus interest. *Otherwise, the contract is void* and no recovery can be had on it. (Emphasis added.)

City of Bonham at 769.

In order to avoid the creation of a debt within the meaning of the Constitution, and thus have a valid agreement, a Lease-Purchase Agreement should contain a clause that allows termination of the agreement without penalty in the event that the Commissioners Court fails to appropriate funds in any budget year to provide for the payment of the obligation due under the lease. *See City-County Solid Waste Control Board v. Capital City Leasing, Inc.* 813 S.W.2d 705 (Tex. App. – Austin 1991, writ denied) (holding that a contract which runs for more than one year is a commitment only of current revenues, and so is not a “debt,” if it reserves to the governing body the unequivocal right to terminate at the end of each budget period). Thus, a Lease-Purchase Agreement containing such a clause is a commitment of current funds only and is not an unconstitutional debt. *See also* TEX. LOC. GOV’T CODE ANN. § 271.903 which provides that:

If a contract for the acquisition, including lease, of real or personal property retains to the governing body of a local government the continuing right to terminate at the expiration of each budget period of the local government during the term of the contract, is conditioned on a best efforts attempt by the governing body to obtain and

appropriate funds for payment of the contract, or contains both the continuing right to terminate and the best efforts conditions, the contract is a commitment of the local government's current revenues only.

TEX. LOC. GOV'T CODE ANN. § 271.903(a) (Vernon 1999).

In summary, we conclude that a county may enter a Lease-Purchase Agreement for acquisition of the use of real property provided the agreement contains a "non-appropriation" clause described in the preceding paragraph, and that the agreement may have provisions for construction of new improvements and/or renovation of existing improvements without compliance with the County Purchasing Act or the Professional Services Procurement Act. If you disagree with our conclusion as to our second question, we pose the third question.