



**RUSSELL W. MALM  
MIDLAND COUNTY ATTORNEY**

200 W. Wall St., Suite 104

Midland, Texas 79701

(915) 688-1086

FAX (915) 688-1092

December 21, 2001

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OPINION COMMITTEE

RQ-0486-JC

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The Honorable John Cornyn  
Attorney General  
209 W. 14<sup>th</sup> St.  
Austin, TX 78701

FILE # ML-42350-02

I.D. # 42350

Dear Attorney General Cornyn:

In my capacity as Midland County Attorney, and under the authority of *Tex. Gov't. Code §402.043*, I ask your opinion in regards to the following legal questions.

1. May a County enter into a multi-year lease of real property that does not require the lessee to make payments and that requires the County to spend county funds in each year of the lease?

On July 9, 1968, real estate was deeded to the Museum of the Southwest, to be used for public museum purposes and to be known as the "Fred and Juliette Turner Memorial Museum." The deed further provided that if at any time prior to January 1, 1979 the premises are not used for public museum purposes the land would revert to the grantors. On July 10, 1968 the Museum of the Southwest conveyed this real estate to Midland County by a deed, subject to the terms, provisions, covenants and conditions set forth in the Deed to the Museum of the Southwest. On October 18, 1968, a Confirmation Deed was signed which corrected the name of the grantor from the Museum of the Southwest to The Midland Museum Corporation

On September 5, 1968 Midland County entered into a lease agreement with the Museum of the Southwest by which it leased the real estate conveyed in the July 10th deed. On October 18, 1968, the parties executed an Amendment and Confirmation of Lease Agreement, which corrected the Lessee's name to The Midland Museum Corporation. The lease had a term of ten (10) years and provided that as consideration Lessee paid to Lessor "the sum of \$1.00 and other good and valuable consideration." The lease provides that Midland County shall have several responsibilities, including the following:

"5. Lessor shall maintain the grounds at the leased premises (and the sprinkler equipment) and the exterior of the buildings thereon (including without limitation roofs, walls, foundations, doors) in a condition and state of repair consistent with the present dignity and appearance of the premises.

6. During Lessee's occupancy of the premises, Lessor agrees to furnish, or bear the cost of, all utilities (except telephone), including water, electricity, gas, heating and refrigerated air conditioning in season; the cost of telephone service shall be borne by Lessee; Heating and air conditioning equipment and plumbing shall be serviced and maintained by Lessor."

On September 25, 1978, the parties executed a Renewal of Lease Agreement. The renewal provided that the lease term would continue until August 31, 1988. On March 25, 1985 the parties again renewed the lease agreement and provided that the lease would run until August 31, 1988.

On May 8, 1989 the parties executed an Amended and Restated Lease Agreement which provided that the lease "would be for a term of fifty (50) years commencing on the first day of September, 1968." The Amended and Restated Lease Agreement contains the following provisions regarding the duties of the Lessor, Midland County:

"3. Lessor shall insure against fire and damage to the buildings and structures located on the leased premises.

5. Lessor shall maintain:

(a) the exterior structural condition of the buildings on the premises including foundations, walls, roofs and doors; and

(b) the grounds and landscaping at the leased premises in accordance with the standards and dignity befitting a museum and local ordinances as they may apply."

In each year of the lease, Midland County has spent substantial sums of money complying with its obligations under the lease. For example, in Fiscal Year 2000 Midland County's costs in meeting its obligations were \$64,176.31, which included \$42,886.66 for water, gas and electricity, \$14,089.65 for equipment maintenance and \$7,200.00 for landscaping. The lease does not require any payments by the lessee and, in fact, Midland County has not received any payments from the Lessee. Therefore, the lease requires Midland County to spend funds and does not require the Lessee to make any lease payments.

The original lease was for a period of twenty (20) years and the Amended and Restated lease is for a period of fifty (50) years. Neither the original nor amended lease contain any provision allowing the county to terminate the lease prior to the end of the stated term, except upon breach by the lessee. The contract provides that compensation for the lease is the total sum of One Dollar (\$1.00). The lease does not provide for rental payments beyond that date. Under the terms of the lease, Midland County will be obligated to expend funds during every year of the lease.

It is Midland County's belief that the lease agreement violates Art. 11, §7 of the Texas Constitution. Art. 11 §7 prohibits a county from incurring a debt without establishing a tax to cover interest on the obligation and creating a sinking fund to reduce the principal. *City-County*

*Solid Waste Control Bd. v. Capital City Leasing, Inc.*, 813 S.W.2d 705 (Tex. App.-Austin 1991) A contract that violates these constitutional provisions is void and the governmental unit involved need not pay any related obligation. *Id.*; *Texas & New Orleans R.R. Co. v. Galveston County*, 169 S.W.2d 713 (Tex. 1943). Midland County did not establish a tax to cover interest on the lease obligation nor did it create a sinking fund.

A contract creates a debt unless the counties obligations under the contract will be satisfied out of current revenues or out of some fund then within the immediate control of the governing body. *City of Bonham v. Southwest Sanitation, Inc.*, 871 S.W.2d 765, 768 (Tex. App.-Texarkana 1994, writ denied); *Tex. Atty. Gen. Op. JC-0139* (1999). If a contract runs for more than one (1) year and it does not reserve to the governing body the right to terminate at the end of each budget period, then it is a commitment of more than current revenues and is a debt. *Bonham*, 871 S.W.2d at 768. In other words, if a contract that requires a county to expend money is for a term greater than one (1) year and it does not give the county the right to terminate at the end of each year, the contract is void. The lease agreement with the Museum of the Southwest violates this constitutional principal. Nothing in the contract contemplates that Midland County would satisfy its obligations out of current revenues and the County is not given the right to terminate the lease at the end of each budget period. Therefore, it appears that the lease creates a debt and is, therefore, void.

The Attorney General recently addressed a similar situation in *Tex. Atty. Gen. Op. JC-0395* (2001). In that situation, the District Attorney's predecessor leased a postal-meter system for fifty-one (51) months, and the lease payments were to be made from county funds. Your office ruled that because the multiyear contract neither provided for levying and collecting a tax to pay the interest and to create a sinking fund nor permitted the county to terminate the contract at the end of each year, it creates an unconstitutional debt. *See* TEX. CONST. art. XI, § 7. In *JC-0395* you state as follows:

“Under Article XI, section 7 of the Texas Constitution, a multiyear contract requiring expenditures of county funds that is not accompanied by the levy and collection of designated taxes must allow the county to terminate the contract at the end of each year. *See* TEX. CONST. art. XI, § 7 (prohibiting county generally from incurring debt); *City of Bonham v. S.W. Sanitation, Inc.*, 871 S.W.2d 765, 768 (Tex. App.-Texarkana 1994, writ denied) (defining “debt” and indicating that multiyear contract that provides right to terminate at the end of each year does not create debt).”

2. Would a lease such as the one described above violate Article III, section 52 of the Texas Constitution which prohibits an impermissible gift or grant of public moneys?

The Museum of the Southwest is a private non-profit corporation. Article III, section 52 of the Texas Constitution precludes counties from making unconditional gifts or donations to private entities, “expenditures which, by definition, lack sufficient controls to ensure that an authorized public purpose is achieved.” *Tex. Atty. Gen. Op. JC-0113* (1999); *Kordus v. City of Garland*, 561 S.W.2d 260, 261 (Tex. App.--Tyler, 1978, writ. ref'd n.r.e.).

A lease of public property to a private entity does not violate Art. III, §51, however, if the transaction serves a public purpose and an adequate rental is paid. *Tex. Atty. Gen. Op. H-1217* (1978). An agreement providing for rental or lease payments at less than fair market value, however, would amount to an unconstitutional gift or grant of public money. *LO-97-030* (1997).

In considering any lease of public property, a political subdivision is free to negotiate terms very much like private parties unless public auctions or bids are required. The significant limitation is that public property may not be leased at less than its fair market value. *35 DAVID B. BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 9.23* (Texas Practice 1989).

It has also been held that a county may transfer public funds to a private corporation if it serves a public purpose and the county retains some degree of control over the performance of the contract in order to insure that the county receives its consideration, viz., accomplishments of the public purpose. *Key v. Commissioners Court*, 727 S.W.2d 667, 669 (Tex. App.--Texarkana, 1987, no writ); *LO-96-035* (1996).

A county's authority to enter into a contract with a private organization is limited to powers that are either expressly or by reasonable implication conferred on the county by the constitution and statutes. See *Tex. Const. Art. V, § 18*; *Galveston, H.& S.A. Railway Co. v. Uvalde County*, 167 S.W.2d 305, 306 (Tex. Civ. App. - San Antonio 1942, writ ref'd w.o.m.); *Attorney General Opinions JM-103, JM-65* (1983); *MW-329* (1981). Therefore, your office held that "the authority of the commissioners court to contract with a non-profit organization to promote voter registration is dependent on the county's authority to perform the service that will be furnished under the contract." *Tex. Atty. Gen. Op. JM-157* (1984). When the commissioners court is granted a power or charged with a duty, it has implied authority to exercise broad discretion to accomplish the intended purpose. *Anderson v. Wood*, 152 S.W.2d 1084, 1085 (Tex. 1941).

3. Would the lease described above be void or voidable if it was entered into without complying with the requirements of Chapter 263 of the Local Government Code? §263.001 of the Local Government Code requires that a lease must be made at a public auction held in accordance with that section. §263.007 provides that a Commissioners' Court may adopt a procedure by which the county may sell or lease real property through a sealed-bid procedure after publishing notice in the newspaper. Before following the sealed-bid procedure, the County must also first obtain an appraisal of the property's fair market value and determine a minimum bid based upon the appraisal. Another procedure a County may follow is to contract with a real estate broker to sell the real property. *Tex. Loc. Gov't Code §263.068*. Under that procedure, the real property must be sold to the person who submits the highest cash offer.

We do not believe that the lease in question was entered into following a public auction, sealed-bid procedure or contract with a real estate broker. In *Tex. Atty. Gen. Op. JM-1043*(1989) your office stated as follows:

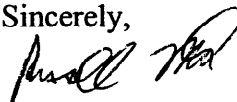
We find ample authority for the rule that a disposition of county property not made in compliance with the public auction requirements of what is now section 263.001, and not falling within an exception to these requirements under chapter

263, is void. See, e.g., *Hardin County v. Nona Mills Co.*, 112 S.W. 822 (Tex. Civ. App. 1908, no writ); *Jack v. State*, 694 S.W.2d 391 (Tex. App.-San Antonio 1985, writ ref'd n.r.e.).

It is our opinion that the lease is void if none of the statutory procedures were followed.

Thank you for your assistance and attention to this matter. Please do not hesitate to contact me at any time if you have any questions or require any additional information or briefing on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Russell W. Malm". The signature is fluid and cursive, with the first name "Russell" being more prominent than the last name "Malm".

Russell W. Malm

cc: Bill Morrow  
Jimmy Smith  
Mike Bradford  
Josie Ramirez  
Randy Prude  
Ginny Bailey