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OPINION COMMITTEE

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February 4, 2004

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

**RQ-0181-GA**

Re: Request for Opinion regarding the following questions:

1. Does the Sheriff, or any elected official, have authority to enter into a binding contract with the United States Marshal's Service to house federal prisoners in the county jail?;
2. Does the sheriff, or any elected official, have the authority to accept surplus items provided under an agreement with the federal government?; and
3. Who may dispose of surplus items provided to a county agency by the federal government and must they be included in county inventory?

To the Honorable Attorney General Abbott:

This is to request an opinion regarding the Authority of a county sheriff to enter into an agreement with the United States Marshall's Service for housing federal prisoners. Recently, an issue has arisen in Smith County concerning a Intergovernmental Services Agreement signed by the county sheriff as an addendum to a Cooperative Program Agreement between Smith County and the U.S. Marshall's Service. Under the original agreement, the federal government agreed to provide moneys for the completion of a low risk jail facility in Smith County. In exchange for the money, the United States Marshall's Service received a contractual agreement for Smith County to reserve a minimum of 50 bed spaces for use by the U.S. Marshall to house federal prisoners. This agreement was entered into and signed by the Smith County Sheriff and the Smith County Judge in 1988 and had an original term of fifteen years with an automatic renewal unless otherwise terminated. In 2002, the Smith County Sheriff entered into an Interlocal Cooperative Agreement with the U.S. Marshall's Service as a supplement to the original agreement which is incorporated therein, which expanded the service provided to the U. S. Marshall's Service by including certain transportation services to

be performed by the sheriff. This agreement was signed by the Smith County Sheriff alone.

## ANALYSIS

### **I. Contract authority of the county sheriff regarding federal prisoners**

The first question asked concerns the authority of a county sheriff to enter into a contract which might encumber county resources, specifically an agreement with the United States Marshal's Service to house federal prisoners in the county jail. In researching the issue, I have reviewed Attorney General Letter Opinion 90-95 which seems to be directly on point with this issue. In that opinion, the Attorney General concluded that the Lubbock County Sheriff was not authorized to enter into a contract to house 120 federal inmates from Washington D.C. without commissioners court approval. In reaching this conclusion, the Attorney General construed Local Government Code § 351.043, and more specifically the amended language providing discretionary authority to accept federal prisoners, in a manner which did not confer authority to exercise that discretion through contracting. For several reasons, I respectfully disagree with this conclusion and would suggest that the plain language of the statute specifically places the authority to contract squarely upon the county sheriff and not the commissioners court. Because the discretionary authority to act, or refuse to act, belongs solely to the county sheriff, the sheriff alone must have contracting authority to carry out that statutory discretion. In support of this conclusion, I point to several logical inconsistencies in the two points of construction set forth in LO-90-95.

#### **A. The 1981 amendment of Local Government Code § 351.043 created a need to contract for the discretionary act of housing federal prisoners.**

The first inconsistency of the opinion concerns the change in language of Local Government Code §351.043 from a mandatory duty to house federal inmates to a discretionary act. The Attorney General opines that this change "was not intended by the legislature to effect anything more than to no longer impose on the county sheriff a mandatory duty to admit federal prisoners into the county jail." Letter Opinion No. 90-95, November 27, 1990 at 2. While the legislature may not have intended the amended language to affect the operation of the statute, the reality of the change had the effect of creating a need for contractual obligations to ensure bed-space for federal needs. Prior to this amendment, the county sheriff was required to accept federal prisoners, therefore no contract would have been needed to ensure that the federal government had space to house prisoners. However, once sheriffs were released of their duty to house federal prisoners, the only way for the U.S. Marshal's Service to ensure that their prisoners would be housed would be through contracting. The lack of

language addressing the issue, suggests that the legislature did not contemplate this eventuality. However, once the need for a contractual relationship arose, it became a question of whom was responsible for the contract.

**B. The Legislature did not intend that the commissioners court be granted the authority to usurp the discretionary authority of the sheriff to accept prisoners.**

This leads to the second inconsistency in the conclusion reached in Letter Opinion 90-95, which is that the legislature did not intend to empower the sheriff with the authority to contract for housing federal prisoners. However, the plain language of the statute vests the authority to make the decision as to whether to accept federal prisoners, or to not accept those prisoners, solely in the sheriff and not the commissioners court. If the Attorney General's construction of Local Government Code §351.043 (a) is correct, the commissioners court would have the authority to "veto" the sheriff's decision to accept federal prisoners, thereby usurping a specific grant of authority to the office of sheriff. The legislature does not mention the commissioners court as having any authority over the housing of federal prisoners. The Attorney General expressed the opinion that "if the legislature had intended that the county sheriff be empowered to enter into the sort of contract about which you inquire, it would have done so in an unequivocal manner... when the legislature has intended to confer on sheriffs the authority to enter into certain contracts, it has done so explicitly using the word 'contract'." To support this conclusion, the Attorney General cites Local Government Code §351.0415 which grants the county sheriff the sole authority to contract for operation of a jail commissary in all but very large counties. It is true that this statute is very specific in its grant of authority. However, the legislature has also been explicit in its separation of powers language when granting authority among the various elected officials. Specifically, Local Government Code §351.061 grants the commissioners court specific authority to contract with non-governmental associations for the provision of law enforcement services by the county. However, the contractual authority of the commissioners court is not binding upon the sheriff to provide these services. Local Government Code §351.063 clarifies the commissioners court authority in that they may request that the sheriff (or other county law enforcement official) provide the contracted services, presumably defeating the contractual authority of the commissioners court if no county law enforcement official chooses to provide the service. This type of language is not found in Local Government Code §351.043. Clearly, the legislature would have clarified its grant of authority to the commissioners court and right of refusal for the sheriff if they intended the commissioners court to have exclusive authority to contract for housing federal prisoners.

**C. Local Government Code § 351.043 specifically outlines a contractual obligation between the sheriff and the federal authority.**

Letter Opinion 90-95 seems to reach the conclusion that Local Government Code § 351.043 does not grant the county sheriff a specific authority to contract without applying basic contract principles within the context of the entire statute. First, basic contract law states that three elements are necessary to form a contract; offer, acceptance, and consideration. Additionally, there seems to be an assumption that this contract is required to be in a writing approved by the commissioners court before it is valid. This is an incorrect assumption. Under Local Government Code § 351.043(a), the federal authority offers to compensate the county sheriff in exchange for the housing of prisoners. The county sheriff then is given the discretion to accept that prisoner or refuse to accept the prisoner. If the prisoner is accepted, the federal authority becomes “personally liable to the *sheriff or jailer* for the jail fees and other costs incurred in keeping the prisoner.” Local Government Code §351.043(c), emphasis added. Further, the county sheriff obligates his office to “safely keep the prisoner until transferred or discharged by due course of law.” Local Government Code § 351.043 (b). This constitutes consideration by both parties, therefore, upon acceptance of the prisoner a contract is formed. This contract would be on an individual, case by case, basis. Clearly, if the legislature had intended that the sheriff be able to enter into a contractual obligation on an individual basis, they would not then have intended that the sheriff gain approval from the commissioners court prior to contracting for housing of multiple prisoners.

**D. Commissioners Court has no standing to enforce collection of fees and costs under Local Government Code § 351.043.**

Another obvious point which distinguishes Local Government Code § 351.043's language from the language of other statutes is the clear assignment of liability. The officer is not liable to the county or commissioners court for payment of fees or costs incurred as a result of housing a prisoner, that liability is assigned solely to the sheriff. This is a clear indication that the sheriff is the principle to the contractual relationship involving federal prisoners. As such, it follows that the contractual authority rests with the sheriff. In fact, because liability accrues to the county sheriff in his official capacity, the commissioners court lacks standing even for enforcement of payment for services rendered under the contract. It should be noted that the legislature contemplated collection of costs and fees as they relate to out of county prisoners. Under Local Government Code §351.044, the legislature specifically authorizes “a county” to collect the reasonable costs of housing an out of county prisoner from another county. Again, the legislature specifically designated “the county” as the recipient of liability for the costs of housing out of county inmates, but chose to assign the receipt

of liability for housing federal prisoners to the sheriff.

**E. Under statutory construction rules, even if Local Government Code § 351.043 is unambiguous, the legislative intent may be considered and should be construed to allow sheriff the right to contract.**

Local Government Code § 351.043 is not ambiguous in its grant of discretion to the sheriff to either accept a federal prisoner or not. Further, this is a wide grant of discretion so long as there is no violation of a law or Jail Commission rule. No other entity or official is included in the process and all aspects of the relationship between the federal government and the jail are exclusively given to the sheriff. However, even though Local Government Code §351.043 is not ambiguous, the legislature's intent may still be considered in its construction. Tex Gov't Code Ann. §311.023. Under the Statute Construction Aids, when determining the proper construction of a statute, several factors are suggested to be reviewed in order to determine legislative intent. These are:

- (1) object sought to be attained;
- (2) circumstances under which the statute was enacted;
- (3) legislative history;
- (4) common law or former statutory provisions, including laws on the same or similar subjects;
- (5) consequences of a particular construction;
- (6) administrative construction of the statute; and
- (7) title (caption), preamble, and emergency provision.

Id.

The Attorney General, in reaching its decision in LO 90-95, only addressed the legislative history of the amended language of Local Government Code §351.043 and did not apply the other factors. When those factors are used, it becomes clear that the legislative intent is much more significant than the amendment's history suggests.

First, we must look at the objective sought to be attained. This is clear from the history noted in LO 90-95, in that the legislature's focus was on removing the mandatory duty of housing federal prisoners from the county sheriff. This presumably was to allow greater control over jail operations and flexibility with inmate population. Therefore, it must be construed that the legislature intended that the *sheriff* be granted greater powers when it comes to jail operations.

Second, we look at the circumstances under which the statute was enacted. During the late 1970's and early 1980's, Texas jails and prisons faced enormous issues of overcrowding. The amendment to Local Government Code §351.043 was an attempt to assist local control over jail populations. Prior to the amendment, local jails were required to house federal inmates, therefore

sheriffs were forced to either let their jails become overpopulated or release local prisoners. The amended language of Local Government Code §351.043 made it possible, and in fact forced, local sheriffs to turn away federal prisoners when experiencing overcrowded conditions. However, again, the legislature granted the sheriff the authority to determine the jail's compliance with statutory requirements and administrative rules governing jail operations. The commissioners court was granted no oversight authority at all in these matters. Therefore, it must be construed that the legislature intended that the oversight of local jail operations and the ability to house federal prisoners be an issue reserved for the sheriff under the supervision of the Texas Commission on Jail Standards. See Tex Gov't Code §511.009.

Third, we look at the legislative history. As noted in LO 90-95, the legislative history simply points to an attempt to remove the requirement that sheriffs accept federal prisoners into county jails and replace it with a discretionary act of the sheriff. This amended language is ambivalent in relation to contractual authority. Therefore, since the need for contracting arose with the 1981 amendment and no express contracting authority was enacted, it follows that either contracting was not contemplated by the legislature or they simply intended that contracting authority adhere to the party granted discretion.

Fourth, we look at common law or other statutory provisions including prior version of the statute. In this case, the predecessor statutes to Local Government Code §351.043 required the sheriff to accept federal prisoners; therefore, no contract was necessary. Thus, it is of little help in determining standing to contract. However, there is another statute dealing with the operation of the jail in regard to housing prisoners which is helpful. Texas Government Code § 511.012(b) establishes the consequences for failure to meet the population requirements of the Texas Jail Standards Commission. Tex Gov't Code §511.012. Under this statute, upon an order from the commission, the sheriff must transfer the number of prisoners necessary to come into compliance to another entity willing to accept them. The statute specifically states that the agreement "must be in writing and signed by the sheriffs of the counties transferring and receiving the prisoners." *Id.* This specifically authorizes the sheriff to bind the county for payment of housing transferred prisoners. It should be noted that subsection (c) provides that payment of costs of housing prisoners is a liability from the transferring county to the receiving county, which are set by agreement between the two counties. However, the federal prisoner statute may be distinguished in that the liability for costs from the federal government falls to the sheriff and not the county. Therefore, the federal prisoner statute, if to be consistent with Texas Government Code § 511.012(b), must be construed as if the legislature intended to grant the sheriff authority to sign an agreement to house federal prisoners.

Fifth, and probably most important, is the consequences of a particular construction. LO 90-95 construes the statute to give the commissioners court the authority to contract for the housing of federal prisoners. If this is the proper construction, the discretion granted by the plain language of

Local Government Code §351.043 is rendered ineffective. In essence, this construction gives the commissioners court the authority to override the will of the sheriff as to whether or not to accept federal prisoners and, if so, the number of prisoners that will be accepted. This construction cannot have merit. If the legislature had intended the commissioners court to have approval authority, it would have expressly given that authority. There are many statutory examples in which discretionary acts of elected officials are conducted “with the approval of the commissioner court.” See Loc Gov’t Code §85.004 and 85.006, related to reserve deputies and county police force appointment by sheriff.

The sixth point, administrative construction, and the seventh, preamble, title, or emergency, are not addressed due to a lack of relevant authority.

### Conclusion

Local Government Code §351.043 provides very specific authority for the exercise of the sheriff’s discretion to house federal inmates. Since the sheriff is the sole decision maker in this process, it follows that he has wide discretion as to the manner in which the discretion will be utilized. This would naturally include the ability to contract with the U.S. Marshall’s Service to house federal prisoners. Further, since the legislature has amended the mandatory provision to house federal prisoners into a discretionary decision, a situation has been created in which a contractual relationship occurs each time a federal prisoner is accepted into the local jail. If the sheriff is statutorily granted the authority to contract on an individual basis, he must also have the authority to contract on a group, or pre-planned, basis. Further, since the statute assigns liability to the sheriff, he may also set the price to be charged under the contract and the terms of providing services to the federal government. To construe the federal prisoner statute otherwise would defeat the grant of discretionary authority provided to the sheriff.

Essentially, the proper construction of the statute comes down to what happens if the commissioners court declines to enter into a contract to house federal prisoners against the wishes of the county sheriff. The answer is simple, the sheriff may still accept federal prisoners in the same manner as would have been outlined under a contractual relationship. The only real difference would be that no written contract would exist designating bed space. Vice-versa, if the commissioners chose to enter into a contract to house federal prisoners, the sheriff has the discretionary authority to refuse to accept those prisoners. At that time, the commissioners would be required to look elsewhere to meet the county’s contractual obligations. Therefore, it is my opinion that the legislature intended that the sheriff have sole discretion and oversight of jail operations in regard to housing federal prisoners including the right to contract. The only authority the commissioners court would have in the process would be approval of any additional salaries or positions related to housing those inmates.

## **II. Authorization for acceptance and/or disposal of surplus items provided to a county agency by another governmental entity**

Related to the above issue, the Smith County Sheriff's Office has also received a large quantity of surplus goods over a period of several years from the federal government under the above mentioned contract for housing federal prisoners. The Smith County Commissioners Court has expressed concern that these surplus items have not been properly received into the county and that disposal of the surplus items have not been authorized by the commissioners court. The commissioners asked that the Attorney General provide an answer to two basic questions related to the receipt and disposal of surplus goods: (1) Is the county sheriff, or any elected official authorized to accept items donated by a non-county agency, and (2) after items have been properly accepted, must the commissioners court approve of the disposal of these items?

Consideration of these two basic questions involves a multitude of other questions, including whether the federal surplus items are donated to the county or provided to the sheriff as additional compensation under the above contract, whether the items become "county property" or become the property of the sheriff until transferred or disposed of, and whether property provided to a county agency under a federal program which restricts the resale of that property violates Local Government Code §263.152's requirement that the county first attempt to sell items by bid or auction? The answer to these questions form the basis for how the analysis of the two "real" questions is conducted. The outcome of the requested opinion is of importance throughout Texas due to the large number of county sheriffs who participate in the federal surplus program.

### **A. Authority to accept donations or surplus materials on behalf of the county or a county entity**

Prior to 1999, Texas counties were not statutorily authorized to accept donations or gifts for general purposes. The Legislature alleviated this problem by enacting Local Government Code § 81.032 which gives specific authority to the commissioners court to accept property "for the purpose of a function conferred by law on the county or a county officer." Clearly, this statute gives the commissioners court the sole authority to accept donations on behalf of the county even for items which are intended for the use of one or more elected county officials, including the sheriff. However, the legislature does not specifically give a definition of the term "donation". Therefore, we must look at the terms plain meaning in society to determine if certain property transactions can be classified as a donation. Webster's dictionary defines the term as "the act or instance of donating: as a: the act of making a gift especially to a charity or public institution; b: a free gift." *Merriam-Webster online dictionary, 2004*. To interpret this statutory authority, one simply reads it to say that a commissioners



court may accept a free gift of money or property for the benefit of the county's functions. This seems to be in line with the legislative intent which was to give counties the ability to accept moneys from estates and non profit organizations as a means of revenue.

**B. Federal surplus property transferred to a local sheriff's office is not a donation as intended in Local Government Code § 81.032.**

In order to answer the question as to whether the county sheriff has the authority to accept federal surplus property, the classification of that property must first be determined. In order to be a donation, the property must be a "free gift" to the sheriff or county. In this case, the property is handled under a federal program which provides surplus property to the county in relation to the amount of money paid to the county under the federal prisoner housing contract discussed above. Basically, the U.S. Marshall's service sets up a budget for each county which participates in the program which equals the amount paid to that county for housing prisoners. The county is then allowed to retrieve property from various military bases until the value of that property equals the amount budgeted. The U.S. Marshal's Service terms this program "a perk" of the housing contract and not a gift. Also, while much of the property has little or no remaining value as individual items, the county may combine items to create valuable pieces of property thereby increasing the "value" of the prisoner housing contract. This appears to be more of an added compensation for services rendered than a "free gift". Further, the fact that this surplus property is only available to those counties which perform some service for the federal government tends to support the theory that the property is intended as a reward for cooperation and assistance rather than an altruistic gesture by the federal government.

As stated above, §81.032 was not enacted until 1999, before which counties were not authorized to accept donations, gifts, or bequests. *See Local Government Code §81.032.* The contractual relationship made the subject of this request has been in place for many years in Smith County and certainly pre-dates the enactment of Local Government Code § 81.032. Further, both the federal and state governments have operated programs making surplus property available to counties for decades. These programs were not designed to provide "donations" to the counties, but rather an intergovernmental transfer of unneeded property. In fact, Smith County has adopted a donation policy which has been recommended by the State and modeled after Travis County's policy. Under this policy, property received from other governmental entities are specifically excluded from the definition of a donation. This state recommended policy seems to support the notion that surplus property transfers were not intended as donations to counties.

**C. Federal surplus property obtained by a sheriff's office does not immediately become "county" property.**

Property received by a law enforcement agency does not necessarily become property under the control and authority of the county. Law enforcement agencies such as sheriff, constable and district attorney's offices are constitutionally created entities which are separate and independent from the county commissioners court. These agencies have increasingly become more self funded with the statutory creation of accounts such as forfeiture accounts. Use of these funds is under the control of the agency which made the forfeiture subject only to statutory restrictions. Often these funds are used to purchase equipment and supplies which are intended to serve law enforcement needs. These items, purchased with discretionary funds, do not become county property simply because they were obtained by a county agency. The agency obtaining the items maintain complete control over their use and/or disposition. For example, electronic equipment and software purchased by a sheriff's office to process digital photographs of crime scenes would not be subject to commissioners court transfer to the county's information technologies department without the consent of the sheriff. The same can be said for property received by a sheriff's office under an agreement between an outside entity and that sheriff. This property is titled in the sheriff until such time as he/she disposes of the property either by transfer or destruction. It is also true that this property may be transferred to the county by the sheriff at which time the county commissioners court obtains exclusive control over the items. An example of this would be motor vehicles transferred to the sheriff's office under the federal agreement referenced above. These vehicles remain titled in the U.S. Marshal's Service, by and through the sheriff's office. These vehicle's may not be disposed of through sale or destruction without the permission of the U.S. Marshal's Service and the sheriff's office. This means that the commissioners court may not dispose of the vehicles over the objection of the sheriff, even if the U.S. Marshal's Service agrees with the court. Thus, since the commissioners court has exclusive authority over all "county" property, the vehicle cannot be classified as "county" property.

**D. Contractual obligation under Local Government Code is held exclusively by the sheriff, therefore payment either in currency or property is to the sheriff.**

Local Government Code §81.032 specific assigns the payment of compensation for the housing of federal prisoners directly to the sheriff who has accepted those prisoners. This payment may be made in any manner and by any means approved by the sheriff. Usually, payment for governmental services is in the form of cash. However, the sheriff could, and in this case did, determine that at least partial payments could be made in the form of surplus property. This property in turn could be used to offset deficiencies in the budgetary allotment of capital or operational

funding. For instance, acceptance of vehicles, bulletproof vests, gas masks, and clothing could rationally be just as important to a sheriff as cash. In this case, the sheriff has established a policy in which the cash payments received from the federal government are immediately turned over to the county's general fund to help offset the additional expense incurred by the county for things such as salaries for extra detention officers and provide general revenue from the excess. However, the sheriff has chosen to retain control over the surplus property portion of the federal payment.

**E. Property that is unfit for use or repair may be properly discarded or destroyed under the discretion of the sheriff.**

As stated above, the Smith County Sheriff has retained control over the federal surplus property received under the federal inmate contract. A part of this control is the sorting of the property to determine its usefulness to meet local needs. If it is determined by the sheriff's office that a need may be filled by using the property or parts from the property it is kept. Certain useful property may then be transferred to various departments within the county which are then placed into the county's inventory. Once the property is received by the county, the sheriff loses control over the use or disposition of the property. The same would also be true of property transferred to other governmental entities such as the Department of Public safety or local municipalities. However, until such transfer has been completed, the sheriff has retained control of the use of the property which is outside the control of the commissioners court. Unfortunately, not all surplus property received by the sheriff is usable. Oftentimes, the sheriff has been forced to accept large quantities of broken, damaged or mismatched property in order to obtain useful property to address a specific need. An example of this activity is gas masks. The sheriff's office needed to obtain several functional gas masks for its S.W.A.T. team. Unfortunately, in order to achieve this goal, the sheriff was required to accept hundreds of surplus gas masks for use as parts in order to assemble the required number of masks. The unused broken parts of the masks were then discarded. Another example would be an incident in which the sheriff's office obtained a barrel of gloves. When the barrel was opened, a vast percentage of the gloves turn out to be left handed, leaving only a few pairs of usable gloves. The excess left handed mismatches were then discarded as unusable. These examples show the types of decisions that the sheriff has retained authority to make regarding the surplus property. And while some may argue that other county offices, such as the commissioners court, may find treasures amongst the trash discarded by the sheriff, those offices may only exercise control over the property after it is discarded by the sheriff.

## Conclusion

The question regarding the authority of various county elected officials to accept items provided to that official under a contractual obligation is somewhat complicated by the fragmented nature of county government. Each elected official is given broad discretion over the duties and rights granted to that office. However, commissioners court, as the legislative body of the county, has been given equally broad discretion over the fiscal affairs of the county including its inventory of property. The question then becomes: when does property come under the ownership of the county and therefore under the control of the commissioners court? Under the circumstances made the subject of this request, the county sheriff has been provided certain property as a “perk” of a federal contract to house federal inmates. This perk is intended to provide an extra “value” to the local government by providing equipment that might not otherwise be available to the department. Usually, this means that the county government immediately obtains possession and control over the property. However, this property is somewhat different in that it is provided to the sheriff as the local law enforcement agency under a contract that is exclusively his own. Further, certain items of property are “titled” specifically under the sheriff’s office. This property, much like forfeited property under Chapter 59 of the Code of Criminal Procedure, is under the control of the sheriff’s office until disposition by the sheriff. One of these dispositions is to transfer the property to the county at which control of that property is also transferred. Until such time as the sheriff disposes of the property, the commissioners court is without authority to transfer, remove, sell or destroy it. This is not to say that the commissioners court is without authority to consider such property as it may relate to the allocation of county resources in its annual budgetary review.

### **III. Surplus property has been used in county operations for many years prior to the enactment of Local Government Code §81.032.**

Texas counties have been receiving federal surplus property under various programs for many years. Using Smith County as an example, the sheriff has received property under two different programs, the U.S. Marshal’s program and the Section 1208 National Defense Authorization program administered by the Governor’s Office. Under the 1208 program, any law enforcement agency may obtain surplus property for the express use in detection and prosecution of drug related offenses. The property is strictly accounted and may not be used for any other purpose and may not be disposed of without authorization. The U.S. Marshall’s Service program on the other hand is strictly a contract based program available only to those agencies which provide housing for federal prisoners. This program consists of access to two “types” of surplus property: accountable and non accountable. The accountable property is to be tracked and requires authorization from the U.S. Marshal’s Service prior

to disposal, while non accountable property has no tracking requirement and is fully disposable upon transfer to the agency. Defining property as either accountable or non accountable appears at first blush to be simple according to the value of the property which is set at \$1,000. Unfortunately, after speaking with the U.S. Marshal's Service, it is not that simple. It appears that several exceptions to this rule exist; some including items with serial numbers, furniture, and vehicles regardless of value, while some exclude items which are valued much higher than \$1,000 which have not been issued serial or identification numbers. Therefore, a rule of thumb has been expressed by the U.S. Marshal's Service indicating that "big ticket items" should be considered accountable including vehicles, furniture, heavy equipment, computers, printers, trailers, etc.

### SUMMARY

In accordance with the analysis above, we have reached the following answers to our three primary questions herein.

1. Does the Sheriff, or any elected official, have authority to enter into a binding contract with the United States Marshal's Service to house federal prisoners in the county jail? – YES

2. Does the sheriff, or any elected official, have the authority to accept surplus items provided under an agreement with the federal government? – YES

3. Who may dispose of surplus items provided to a county agency by the federal government and must they be included in county inventory? – SUCH ITEMS MAY BE DISPOSED OF BY THE AGENCY TO WHOM THEY WERE PROVIDED, AND THE ITEMS ARE NOT REQUIRED TO BE INCLUDED IN "COUNTY" INVENTORY.

We respectfully urge the Attorney General to issue an opinion in agreement with and expounding upon our conclusions here.

Sincerely,

Smith County Criminal District Attorney

BY: Keith Downs  
Keith Downs  
Assistant Criminal District Attorney  
Smith County, Texas



**MATT BINGHAM**  
Acting Criminal District Attorney  
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February 7, 2004

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

FILE # ML-43483-0A  
I.D. # 43491

re: Supplemental Request for Opinion regarding the following questions;

1. Does the Smith County Sheriff, or any elected official, have the authority to sign contracts and encumber the County without approval of the Commissioners Court?,
2. Does the Smith County Sheriff, or any elected official, have the authority to donate, sell, trade or destroy County property without the approval of the Commissioners Court?, and
3. Does the Smith County Sheriff, or any elected official, have the authority to accept donated property without the approval from the Commissioners Court?

To the Honorable Attorney General Abbott:

On February 5, 2004, the Smith County Criminal District Attorney's Office submitted a request to the Attorney General for an opinion regarding the ability of the county sheriff to enter into a contract to house federal prisoners and whether the sheriff had the authority to accept and dispose of property received under this contract. However, Smith County Commissioner Frank Sawyer had requested certain broader questions to be submitted to the Attorney General. Assistant Criminal District Attorney, Keith Downs, spoke to Commissioner Sawyer on January 12, 2004 and advised him that the issues did not reflect the full inquiry expressed by Judge Becky Dempsey and the Smith County Commissioners Court in open session on December 22, 2003 and that it would be necessary to alter those questions in order to narrow the issues for submission. Commissioner Sawyer seemed to understand this advise and appeared to consent to possible changes. However, upon review to the submission to your office, Commissioner Sawyer expressed concerns that his specific questions were not addressed. Commissioners Sawyer indicated that he wished to maintain the broad nature of the request in order to receive from the Attorney General an opinion as to the scope of authority of the Smith County Commissioners Court. Therefore, we ask that the Attorney General accept this supplement to the Smith County District Attorney's earlier submission sent February 5, 2004.

Analysis of Specific Questions from Commissioners Frank Sawyer

1. Commissioner Sawyer asks, does the Smith County Sheriff, or any elected official, have the authority to sign contracts and encumber the County without approval of the Commissioners Court? This question has been answered by the Attorney General in Letter Opinion 90-95 dated November 27, 1990. In that opinion, the Attorney General answered a question very similar to the inquiry made the issue of this office's earlier request. When asked whether the Commissioners Court had sole authority to enter into a contract to house federal inmates, the Attorney General, relying on prior caselaw, states that, "... the Texas Constitution does not repose sole authority in the commissioners court to contract on behalf of the county. Rather, Section 18 has been construed to confer sole authority on the commissioners court to enter into contracts binding on the county, unless a statute specifically provides otherwise." emphasis in original. See Anderson v. Wood, 152 S.W. 2d 1084 (Tex. 1941). Therefore, based upon this opinion and supporting caselaw, we have concluded that in certain statutorily authorized situations, a Smith County elected official may sign a contract and encumber the county without commissioners court approval. However, we have not compiled a list of those specific statutory exceptions, except the federal prisoner contracting authority included in the earlier request.

2. Commissioner Sawyer asks, "does the Smith County Sheriff, or any elected official, have the authority to donate, sell, trade or destroy County property without the approval of the Commissioners Court?" This question is best answered by a specific statutory regulation found in Texas Local Government Code § 263.152. This statute governs the disposition of county surplus and salvage property and specifically authorizes the commissioners court to "periodically sell the county's surplus and salvage property by competitive bid....order any of the property destroyed or otherwise disposed of as worthless if the commissioners court undertakes to sell that property...and is unable to do so..." This appears to grant the commissioners court exclusive authority to dispose of "county property". Therefore, this office has concluded that the commissioners court has exclusive authority to dispose of county property that is no longer of use to the county. However, this office has not concluded that all property obtained by elected officials, including federal surplus property (made the subject of the earlier request) is in fact county property at the time it is obtained. The determination of the classification of property, as county property, is more fully examined in the earlier request.


3. Finally, Commissioner Sawyer asks, "does the Smith County Sheriff, or any elected official, have the authority to accept donated property without the approval from the Commissioners Court?" This too is governed by a specific statutory authority. In 1999, the legislature first granted Texas counties

the authority to accept donation, gifts, bequest, or devise of money or other property. Local Government Code § 81.032. Prior to this statute's enactment, a county was not authorized to accept donations of property. After this statute was enacted, it specifically grants this authority to the commissioners court. Therefore, this office has determined that neither the sheriff nor any elected official may accept donated property into the county without approval of the commissioners court. However, as with the previous question, this office has not determined that all property obtained by county elected officials is in fact donated to the county. Certainly, property obtained under the terms of a contract could be determined to be compensation and would not be subject to the restrictions of this statute. Also property obtained from other governmental entities could fall outside of the definition of a donation, as is the case in the Smith County policy. Therefore, the classification of property as donated is determined on a case by case basis.

Summary

The commissioners court is the sole contracting authority of the county unless another elected official has been granted specific statutory authority to enter into a contract. Further, only the commissioners court may dispose of county surplus and salvage property, so long as such property is under the control of the county. And finally, only the commissioners court is authorized to accept donations on behalf of the county. However, not all property held by an elected is properly classified as county property, nor is it under the exclusive control of the commissioners court. The Smith County Criminal District Attorney's Office has found no statutory authority or legal opinions which classify federal surplus property as county property under the control of the commissioners court. Therefore, a determination must be made as to the classification of property held by elected officials prior to determination of authority to dispose or accept this property. The Smith County District Attorney's Office has made inquiry with both the Texas Association of Counties and the Texas Attorney General's Office regarding these issues and have found no direct authority regarding the issues raised in the prior request for an opinion concerning the issue of federal surplus property or contracting authority regarding housing of federal inmates other than LO 90-95.

Sincerely,

  
Matt Bingham  
Acting Smith County Criminal District Attorney  
Smith County, Texas

  
Keith Downs  
Assistant District Attorney

enclosure

Government Code § 263.152