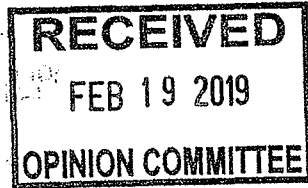




RQ-0272-KP



SHAREN WILSON
Criminal District Attorney
Tarrant County

February 15, 2019

FILE # ML-48500-19
I.D. # 48500

Honorable Ken Paxton
Office of the Texas Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Via C.M./R.R.R. #7015 3430 0000 8628 9589

Re: Request for Opinion regarding
TEX. LOC. GOV'T CODE SEC. 140.003,
PURCHASING AND FINANCIAL ACCOUNTING
FOR DISTRICT ATTORNEYS, JUVENILE
BOARDS, AND PROBATION DEPARTMENTS;
TEX. LOC. GOV'T CODE CH. 262,
PURCHASING AND CONTRACTING AUTHORITY
OF COUNTIES; AND THE DIVISION OF POWERS
BETWEEN THE TARRANT COUNTY
PURCHASING AGENT AND THE TARRANT
COUNTY CRIMINAL DISTRICT ATTORNEY

Dear General Paxton:

The Tarrant County Criminal District Attorney's office [CDA] is a specialized local entity enumerated in TEX. LOC. GOV'T CODE SEC. 140.003. As such, the CDA is entrusted by state law with authority over purchases, which must conform with the purchasing requirements of TEX. LOC. GOV'T CODE CH. 262, SUBCHAPTER C. The CDA may make a contract with a county under which the county performs purchasing functions for the entity. LGC 140.003(b). Such a contract is permissive, not mandatory.

In Tarrant County, there is no such contract between the current CDA and the county. Rather, while most routine office purchases are sent through the county Purchasing Agent's normal procedure, other purchases are handled directly by the CDA's office following statutory procedures and statutory requirements.

Nevertheless, and despite the clarity of the law on the issue, the Tarrant County Purchasing Agent has expressed his belief that all purchases by the CDA must follow local rules, policies, and procedures adopted by the Purchasing Agent and commissioners court, not merely the statutory requirements specified for the CDA. The result is that the CDA, despite strictly following the laws applicable to specialized local entities, experiences difficulty in timely making legally-authorized CDA purchases. We believe the Purchasing Agent is acting in good faith but is misinformed as to the applicable law. The resulting difficulties are not contemplated by or consistent with the applicable statutes that protect the CDA's discretion in purchasing.

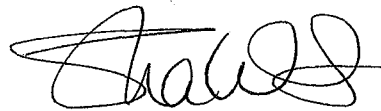
Accordingly, we ask that your office clarify the scope of the CDA's discretion and the scope of the power of the Purchasing Agent when no TEX. LOC. GOV'T CODE § 140.003 (b) contract has ceded authority over CDA purchases to the county. Specifically, we ask that you opine on whether the Purchasing Agent has the authority to adopt local rules, policies, and procedures under TEX. LOC. GOV'T CODE CH. 262, SUBCHAPTER B of Chapter 262 (with the approval of commissioner court) and apply those local county SUBCHAPTER B rules, policies, and procedures to the CDA when (1) the CDA has followed all relevant SUBCHAPTER C statutory requirements (either because the purchase is exempt from competitive bidding or because competitive bidding has occurred) and the purchase will require an expenditure in excess of \$ 50,000, and (2) when the purchase will require an expenditure equal to or less than \$ 50,000.

A brief in support of this request and setting out the legal issues in more detail is enclosed.

We respectfully request your opinion regarding application of the purchasing laws and the scope of the CDA's authority to make purchases unhindered by local purchasing rules, policies, and procedures that reach beyond the constraints set out in applicable statutes in the circumstances described above.

Respectfully submitted,

CRIMINAL DISTRICT ATTORNEY
TARRANT COUNTY, TEXAS



SHAREN WILSON
CRIMINAL DISTRICT ATTORNEY
TARRANT COUNTY, TEXAS

Enclosures:

Brief in support

Tarrant County Policies and Procedures, Tarrant County Purchasing, October 16, 2018

**BRIEF IN SUPPORT OF
REQUEST FOR OPINION OF THE
TEXAS ATTORNEY GENERAL**

TEX. LOC. GOV'T CODE SEC. 140.003, PURCHASING AND FINANCIAL ACCOUNTING FOR DISTRICT ATTORNEYS, JUVENILE BOARDS, AND PROBATION DEPARTMENTS; TEX. LOC. GOV'T CODE CH. 262, PURCHASING AND CONTRACTING AUTHORITY OF COUNTIES; AND THE DIVISION OF POWERS BETWEEN THE TARRANT COUNTY PURCHASING AGENT AND THE TARRANT COUNTY CRIMINAL DISTRICT ATTORNEY

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OVERVIEW

Tarrant County has a Criminal District Attorney [CDA]. Texas Gov't Code § 44.320. The CDA is a "specialized local entity" for purposes of purchasing laws. Texas Loc. Gov't Code § 140.003. A specialized local entity must follow statutory requirements in making purchases under Subchapter C, Chapter 262, Texas Loc. Gov't Code. That Subchapter, bearing the short title of the County Purchasing Act, Texas Loc. Gov't Code § 262.021, and captioned "Competitive Bidding in General", mandates competitive bidding or competitive proposal procedures, a reverse auction, or a method of purchase described by Chapter 2269, Texas Gov't Code, where the contract will require an expenditure exceeding \$ 50,000. Texas Loc. Gov't Code § 262.023 (a). When the expenditure will not exceed \$ 50,000, the competitive requirements of Subchapter C do not apply. The Subchapter C competitive requirements for purchases requiring an expenditure in excess of \$ 50,000 apply to a specialized local entity as if it were a county. Texas Loc. Gov't Code § 140.003(b). Texas Loc. Gov't Code Subchapter C is the only part of Chapter 262 explicitly applied to specialized local entities such as the CDA. Texas Loc. Gov't Code § 140.003(b). The specialized local entity may make purchases autonomously or via a contract with the county, so long as the purchases comply with legal requirements.

Tarrant County has a Purchasing Agent who is appointed pursuant to Texas Loc. Gov't Code § 262.011. The Purchasing Agent has adopted local purchasing rules, policies, and procedures ("local rules" or "local county rules"), approved by the commissioners court, that layer additional rules and procedural requirements on top of the statutory requirements. The adoption of such additional local rules by the Purchasing Agent with the approval of commissioners court is

authorized by the Texas Local Government Code, specifically in Section 262.011(o), which is in Subchapter B of Chapter 262. Subchapter B further states “The county purchasing agent shall purchase all supplies, materials, and equipment required or used, and contract for all repairs to property used, by *the county or a subdivision, officer, or employee of the county*, except purchases and contracts required by law to be made on competitive bid.” Texas Loc. Gov’t Code § 262.011(d). A person, including *an officer, agent, or employee of a county or of a subdivision or department of a county* violates the law if a purchase is made in violation of this provision. Texas Loc. Gov’t Code § 262.011(m). Subchapter B *does not* include reference to a Criminal District Attorney, state officers such as a Criminal District Attorney, or specialized local entities. Subchapter B encompasses only county officers, the county, and subdivisions of the county. The CDA is none of these types of county entities or officials.

Dispute has arisen with regard to local county rules adopted under Subchapter B that exceed the Subchapter C statutory requirements for purchases over \$50,000 in the context of purchases by the CDA. Dispute has also arisen about the ability of the Purchasing Agent to enforce local county rules (which the Purchasing Agent has adopted and which were approved by the commissioners court under Subchapter B) in the context of purchases up to and under \$ 50,000 for or by the CDA.

APPLICABLE LAW

For purchasing, § 140.003 of Texas Loc. Gov't Code sets off Criminal District Attorneys from the county, defining the CDA as one of a few named "specialized local entities". That Section provides in relevant part as follows:

Sec. 140.003. PURCHASING AND FINANCIAL ACCOUNTING FOR DISTRICT ATTORNEYS, JUVENILE BOARDS, AND PROBATION DEPARTMENTS.

(a) In this section, "specialized local entity" means:

(1) a district or criminal district attorney;

...

(b) A specialized local entity shall purchase items in accordance with the same procedures and subject to the same requirements applicable to a county under Subchapter C, Chapter 262. For the purposes of this section, a specialized local entity is treated as if it were a county. A specialized local entity may make a contract with a county under which the county performs purchasing functions for the entity.

...

Part (b) of Section 140.003, Texas Loc. Gov't Code, is of special importance. It requires the CDA, as a specialized local entity, to purchase items "in accordance with the same procedures and subject to the same requirements applicable to a county under Subchapter C, Chapter 262". Subchapter C is entitled "Competitive Bidding in General". The CDA does not contest that the statutory requirements of Subchapter C apply to specialized local entities. The statutory requirements of Subchapter C apply to the CDA because the CDA is treated "as if it were a county". But the law does not treat the CDA's office "as if it were Tarrant County" or even "as if it were part of a county". Indeed, although the Tarrant County CDA has a district geographically

coextensive with Tarrant County, other specialized local entities under Texas Loc. Gov't Code § 140.003 comprise more than one county. Just as if it were any county in Texas, a specialized local entity – here, the CDA – must comply with Chapter 262, Subchapter C. When a purchase will require an expenditure over \$ 50,000, competitive bidding or another Subchapter C procedure must be followed, unless the type of purchase does not so require.

There are certain expenditures set out as mandatory exemptions from competitive bidding, even when they will require expenditures over \$ 50,000. Texas Loc. Gov't Code § 262.022(5) and Texas Gov't Code § 2254.002 (professional services); Texas Loc. Gov't Code § 262.0241 (county-owned golf course). And, in addition, Subchapter C, Texas Loc. Gov't Code § 262.024, permits a commissioners court, by order, to grant certain discretionary exemptions from competitive bidding for county purchases. The commissioners court does this for the county because a county acts through its commissioners court in approving purchases. Because the CDA is treated as if it were a county, but not as if it is Tarrant County or a subpart of Tarrant County, it appears that this discretionary exemption power is necessarily held by the CDA for purchases by the CDA. This power to exercise a discretionary exemption would necessarily fall to the specialized local entity (here, the CDA) because in the absence of the agreement of the specialized local entity, the commissioners court has no authority over the expenditures of the specialized local entity after the limited budget review of the specialized local entity by the commissioners court before the commencement of the fiscal year. *See* Tex. Att'y Gen. Op. No. JC-0209 (April 12, 2000) (*discussing the same concept in context of a juvenile probation department, another specialized local entity under Texas Loc. Gov't Code § 140.003*). Nevertheless, the Purchasing Agent attempts to apply all parts of Chapter 262, including Subchapter B and local rules adopted thereunder, to

the purchase of all goods and services for “district” officials as if a CDA were a department of the county for purposes of purchasing. The law does not support this approach.

The Purchasing Agent’s local rules adopted under Subchapter B of Section 262 purport to govern every purchase, regardless of amount, for any “department” of Tarrant County, but as that term is over broadly defined by the local rules. There is no statutory application of the Subchapter B local rules to the CDA.

Enclosed with this brief is a copy of the local rules, formally called “Tarrant County Policies and Procedures, Tarrant County Purchasing, October 16, 2018.” This is the current version of the County’s Purchasing policy book adopted by the Purchasing Agent with the approval of the commissioners court under Subchapter B. Please see the Application section on page 4 of this policy compilation.

There is no contract between the current CDA and the county for the county to take over the purchasing function for the CDA. Such a contract is optional pursuant to Texas Loc. Gov’t Code § 140.003 (b). Since it is optional, it would appear that if a CDA opted to contract, the contract could cover the entire range of purchases for the CDA or only some of the purchases and/or procedures related to CDA purchases, with the final responsibility resting on the CDA to ensure that all relevant statutory provisions of Subchapter C are satisfied with regard to purchases over \$50,000. A CDA could opt, by contract or otherwise, to adhere to all of the Subchapter B local rules, even those in excess of the mandatory requirements of Subchapter C, but the local rules may not be rightfully imposed by fiat of the Purchasing Agent, even with the approval of the commissioners court. There is no requirement that there be a Texas Loc. Gov’t Code § 140.003(b) contract at all for the CDA to access the county purchasing system when the CDA deems it

appropriate to do so. The CDA believes that where a purchase is below the Subchapter C trigger amount, local rules adopted under Subchapter B do not apply to CDA purchases unless the CDA chooses to use them, and that accessing the county purchasing system through the Purchasing Agent is not required for every CDA purchase.

Please know that even in the absence of any contract under Texas Loc. Gov't Code § 140.003 (b) in Tarrant County, most routine purchases for the CDA go through the county Purchasing Agent and the usual county procedures. Nevertheless, not all CDA purchases go through the Purchasing Agent, and that is when dispute arises. The CDA retains the discretion protected by statute to handle purchases directly, and on occasion exercises that discretion by making purchases that comply with all statutory procedures applicable to the CDA (and to the expended funds) but that do not pass through the Purchasing Agent. This statutorily-protected discretion is normally exercised by the CDA when time is of the essence, or when the added local county rules in excess of the Subchapter C statutory purchasing requirements do not, in the sole discretion of the CDA, appear to be the optimal method of purchase in the context of a particular purchase.

These purchases are usually, but not always, from funds governed by Texas Code of Criminal Procedure art. 59.06 (forfeiture funds) or from apportionment funds that come in through the state Comptroller from the current Apportionment Act. Prior opinions have reiterated the broad discretion given to the attorney representing the state concerning forfeiture funds:

[Code of Criminal Procedure art. 59.06(d)] therefore does not merely grant spending authority to the law enforcement agency or the attorney representing the state; it also grants spending discretion. The subsection evidences the legislative intent that there generally be no "front-end" review of the spending decisions of the prosecutor or law enforcement agency, that is, that there be no interference with the

discretion exercised by the local law enforcement agency or the attorney representing the state in spending forfeiture funds. Read in conjunction with subsection (d), subsection (g)'s express provision for an annual audit by the commissioners court or municipal governing body suggests that such audit is exclusive of any "front-end" review authority of the county auditor. As we wrote in Attorney General Opinion 246, at 5-6, the legislative history of chapter 59 of the Code of Criminal Procedure supports the legislative intent that there be no "front-end" review of forfeiture-fund spending decisions. *See*, Op. Tex. Att'y Gen. No. DM-247 (1993).

Both offices, the CDA and the Purchasing Agent, believe they are following the law and performing the duties legislatively assigned to them. Both would benefit from your opinion on this matter.

SUMMARY

From the CDA's perspective: If the type of purchase by the CDA is one that has a mandatory exemption from competitive bidding, it is exempt from competitive bidding and from local county rules, policies, and procedures adopted under Subchapter B. If the CDA expenditure amount will be up to or less than \$ 50,000 for a CDA purchase, it is also exempt from competitive bidding, and from local county rules, policies, and procedures adopted under Subchapter B. And the CDA may exercise a discretionary exemption if it is within the type where a discretionary exemption is permitted in Subchapter C. In each circumstance, the CDA must either directly or through others, such as the Purchasing Agent, ensure that Subchapter C of Texas Loc. Gov't Code chapter 262 is satisfied, but CDA purchases are not required to satisfy local county rules, policies, and procedures beyond explicit requirements of Subchapter C in the absence of a contract between the CDA and the county under Texas Loc. Gov't Code § 140.003 (b). While the procedures of Subchapter C of Chapter 262 clearly apply to \$ 50,000+ expenditures by or for the CDA, the CDA

Brief in Support of Request for Opinion of the Texas Attorney General
Request from Tarrant County Criminal District Attorney

RE: Texas Local Government Code Chapters 140 & 262, the Purchasing Agent, and the CDA
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submits that Subchapter B, and local rules adopted under Texas Loc. Gov't Code, Chapter 262, Subchapter B, § 262.011(o), do not. The Subchapter B local rules do not rightly restrict how the CDA may choose to comply with the competitive bidding requirements of Subchapter C.

The Purchasing Agent's position, as set out in the local county rules, policies, and procedures adopted by the Purchasing Agent and approved by commissioners court, is that all of the local county rules, policies, and procedures apply not only to the county itself but also to specialized local entities, such as the Tarrant County Criminal District Attorney.

QUESTIONS PRESENTED

We ask that your office clarify the scope of the CDA's discretion and the scope of the power of the Purchasing Agent when no Texas Loc. Gov't Code § 140.003 (b) contract has ceded the statutory authority of the CDA over CDA purchases.

Specifically, we ask that you opine on the following:

1. When no contract for purchasing exists between a CDA and a county for the county to perform purchasing functions, and the CDA has complied with all Texas Loc. Gov't Code, Chapter 262, Subchapter C requirements as to a purchase that will require an expenditure over \$ 50,000, may the local Purchasing Agent insist on adherence by the CDA to local rules, policies, and procedures adopted by the Purchasing Agent and approved by the commissioners court under Texas Loc. Gov't Code, Chapter 262, Subchapter B, § 262.011(o)?

2. When no contract for purchasing exists between a CDA and a county for the county to perform purchasing functions, the purchase will require an expenditure over \$ 50,000, and the purchase is for an item that is mandatorily exempt from competitive bidding, may the local Purchasing Agent insist on adherence by the CDA to local rules, policies, and procedures adopted by the Purchasing Agent and approved by the commissioners court under Texas Loc. Gov't Code, Chapter 262, Subchapter B, § 262.011(o)?
3. When no contract for purchasing exists between a CDA and a county for the county to perform purchasing functions, the purchase will require an expenditure over \$ 50,000, and the purchase is for an item for which Subchapter C sets out a discretionary exemption for competitive bidding, may the CDA exercise the discretionary exemption and decide that an item will be exempt from competitive bidding, without the involvement of the commissioners court? In such an instance, may the local Purchasing Agent insist on adherence by the CDA to local rules, policies, and procedures adopted by the Purchasing Agent and approved by the commissioners court under Texas Loc. Gov't Code, Chapter 262, Subchapter B, § 262.011(o)?
4. When no contract for purchasing exists between a CDA and a county for the county to perform purchasing functions, the purchase will require an expenditure less than or up to \$ 50,000, may a Purchasing Agent insist on adherence by the CDA to local rules, policies, and procedures adopted by the Purchasing Agent and approved by the commissioners court under Texas Loc. Gov't Code, Chapter 262, Subchapter B, § 262.011(o)?

We respectfully request your opinion regarding application of the law in the circumstances described above.

Respectfully submitted,

/s/ Sharen Wilson
SHAREN WILSON
CRIMINAL DISTRICT ATTORNEY
TARRANT COUNTY, TEXAS