

RECEIVED

By Opinion Committee at 4:24 pm, Nov 05, 2021

Received by Open Records

NOV 05 2021



JENNY P. DORSEY

COUNTY ATTORNEY

NUECES COUNTY COURTHOUSE
901 LEOPARD STREET, ROOM 207
CORPUS CHRISTI, TX 78401-3689
361.888.0391 • FAX: 361.888.0577

November 1, 2021

RQ-0438-KP

FILE# ML-49052-21

I.D.# 49052

VIA CERTIFIED MAIL

7021 0950 0000 0949 0046

Office of the Attorney General
Attention: Opinion Committee
Post Office Box 12548
Austin, Texas 78711-2548

RE: Request for Attorney General Opinion

Dear Attorney, General Paxton:

The Nueces County Attorney requests the opinion of the Texas Attorney General. The questions relate to the Emergency Powers of a County Judge.

QUESTIONS:

What, if any, are the limitations of the County Judge's Emergency Powers under § 418.1015 (b) of the Government Code? Specifically, we seek clarification regarding a County's contracting authority under Ch. 418.

- a. May the County Judge execute a contract unilaterally without ratification by the Commissioners Court to address the emergency?
- b. If the Judge can execute a contract unilaterally under her emergency powers, must the contract be taken to the County's commissioner court for ratification?
- c. May the County Judge suspend competitive bidding statutes or procedural laws and rules to enter into a contract to address the emergency, specifically Local Gov't Code § 262.023?
- c. May the County Judge suspend these provisions on an "appropriate local scale" even when ample time exists to bring emergency-related actions before the commissioners?
- d. Does the Governor's Disaster proclamation suspending statutes and administrative rules regarding contracting or procurement for state agencies apply to political subdivisions of the State of Texas?

e. Is “necessary action in coping with a disaster” listed in 418.016 within the sole discretion of the County Judge, as the Emergency Management Director for the county under 418.1015(b)?

BACKGROUND:

On March 13, 2020, Governor Abbott issued a proclamation under the Texas Disaster Act of 1975 (the Disaster Act), declaring a state of disaster throughout all counties in Texas.¹ Additionally, many counties and cities, including Nueces County, declared a local state of disaster and began issuing local orders restricting businesses and activities.² The Disaster Act codified in chapter 418 of the Government Code, sets forth the duties and powers of the governor and local authorities under a declared disaster. Prior to COVID-19, the Disaster Act had rarely been reviewed by courts or the Attorney General.

The Disaster Act states that the County Judge – as Emergency Management Director to the County – “serves as the governor’s designated agent in the administration and supervision of the duties” under the Disaster Act.³ The Governor has broad authority to suspend regulatory statutes, including provisions of the Disaster Act.⁴ Section 418.015 (b) of the Government Code further states that “An emergency management director may exercise the powers granted to the governor under this chapter on an appropriate local scale.”⁵

Since the 2020 disaster proclamation, the Attorney General’s office has examined the authority of county judges.⁶ Additionally, the Eighth District Court of Appeals examined the powers of the governor and county judges in a recent ruling on the conflict between the Governor’s executive orders and the El Paso County Judge’s county emergency order.⁷

Here, the following facts are understood should the County Judge use emergency powers to execute a contract:

- That contract is not inconsistent or contrary with a Governor’s Executive Order.
- The contract relates to the emergency.
- The County Judge finds it necessary to use emergency powers to address the emergency.

¹ See TEX. GOV’T CODE § 418.014(a) (2020) (authorizing the Governor to declare a state of emergency); see The Governor of the State of Tex., Proclamation No. 41-3720, 45 Tex. Reg. 2094, 2095 (2020).

² See TEX. GOV’T CODE ANN. § 418.108(a), (d), (f), (g) (2020) (authorizing the presiding officer of the governing body of a political subdivision and granting certain powers once a disaster is declared).

³ TEX. GOV’T CODE ANN. § 418.1015(b).

⁴ See GOV’T CODE § 418.016.

⁵ GOV’T CODE § 418.1015(b).

⁶ See Tex. Att’y Gen. Op. No. KP-0324 (2020) (discussing authority of local governmental entities to restrict, delay, or prohibit eviction procedures); see also Tex. Att’y Gen. Op. No. KP-0304 (2020) (discussing authority of county judge to commandeer private property); Tex. Att’y Gen. Op. No. KP-0322 (2020) (discussing county authority to require facial coverings in courtrooms and county buildings).

⁷ See *State v. El Paso County*, 618 S.W.3d 812 (Tex. App.—El Paso, Nov. 13, 2020, no pet.).

- Strict compliance with the ordinary procurement or contracting process would prevent, hinder, or delay necessary action in coping with the current declared disaster.

The Governor's Emergency Powers Under the Disaster Act are Broadly Defined

The governor's powers are broadly defined by the Disaster Act. The governor "may issue executive orders, proclamations, and regulations" that "have the force and effect of law."⁸ The governor "may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance . . . would in any way prevent, hinder or delay necessary action in coping with a disaster."⁹ Additionally, the governor "may use all available resources of state government and of political subdivisions that are reasonably necessary to cope with a disaster," including reassigning resources and personnel of state departments and commandeering private property.¹⁰ The governor may recommend the evacuation of people and control the movement of persons and occupancy in a disaster area.¹¹ The governor may purchase, lease, or enter other arrangements with agencies of the United States for temporary housing units and may assist political subdivisions in acquiring sites for temporary housing and emergency shelters.¹² The governor may apply to the federal government on behalf of local governmental units, the state, and individuals for loans and grant programs.¹³

County Judge's Emergency Powers Under the Disaster Act

The following powers and procedures are expressly spelled out in the Disaster Act. Section 418.108(a) of the Government Code authorizes the presiding officer of a governing body of a political subdivision to declare a local state of disaster.¹⁴ County judges are designated as the emergency management director for their county.¹⁵ An emergency management director "serves as the governor's designated agent in the administration and supervision of duties" under the Act, and the Emergency Management Director "may exercise the powers granted to the governor under [chapter 418] on **an appropriate local scale.**"¹⁶

Once a local disaster is declared, local emergency or interjurisdictional emergency management plans are activated and take effect immediately.¹⁷ A county judge or mayor may order the evacuation of all or part of the population from a threatened area under their jurisdiction if the county judge or mayor "considers the action necessary for the

⁸ TEX. GOV'T CODE ANN. § 418.012.

⁹ GOV'T CODE § 418.016(a).

¹⁰ GOV'T CODE § 418.017(a)-(c).

¹¹ GOV'T CODE § 418.018(a), (c).

¹² GOV'T CODE § 418.020.

¹³ GOV'T CODE §§ 418.021, 418.022.

¹⁴ GOV'T CODE § 418.108(a).

¹⁵ See GOV'T CODE § 418.1015(a).

¹⁶ GOV'T CODE § 418.1015(b) (emphasis added).

¹⁷ GOV'T CODE § 418.108(d).

preservation of life or other disaster mitigation, response, or recovery.¹⁸ A county judge or mayor may control “ingress to and egress from a disaster area” under their jurisdiction and authority and may “control the movement of persons and the occupancy of premises in that area.”¹⁹ In a conflict between a mayor and county judge, “the decision of the county judge prevails.”²⁰ A county judge is also the emergency management director of the county and serves as the governor’s “designated agent” in managing the disaster and “may exercise the powers granted to the governor under this chapter on an appropriate local scale.”²¹ Furthermore, the “presiding officer” of a political subdivision may suspend “any deadline imposed by **local law**” for a county located in a disaster-stricken area if the county judge issues a proclamation that the county is unable to comply because of the disaster.²² A county judge can later issue an order ending the suspension of a deadline.²³

Quorum and Contracting Power of the Commissioners Court

The Texas Constitution provides that the Commissioners Court of a county “shall exercise such powers and jurisdiction over all county business, as conferred by this Constitution and the laws of the State, or as may be hereafter prescribed.”²⁴ Ordinarily, contracts must be entered into by the commissioners court acting as a body and individual commissioners have no authority to bind a county by their separate actions.²⁵ Likewise, a county judge has no authority on her own to bind the county by her separate actions or agreements.²⁶ Therefore, a contract must be ratified by a quorum of the commissioners court to constitute a valid contract that binds the county. No court has reviewed the authority of a county judge to unilaterally enter into an agreement by invoking emergency powers. We seek clarification regarding this aspect of county business. We note that that a commissioners court can later ratify an otherwise unenforceable contract executed by an individual member of the commissioners court.²⁷ Therefore, it is possible that a unilateral contract executed by a county judge could be ratified by a quorum of a commissioners court. However, if a

¹⁸ *Id.* § 418.108(f).

¹⁹ *Id.* § 418.108(g).

²⁰ *Id.* § 418.108(h)(2).

²¹ *Id.* § 418.1015(a).

²² GOV’T CODE § 418.1075(a) (emphasis added).

²³ GOV’T CODE § 418.1075(b).

²⁴ TEX. CONST. Art. V., § 18(b).

²⁵ *Eastex Wildlife Conservation Ass’n v. Jasper, et al., County Dog & Wildlife Protective Ass’n*, 450 S.W. 2d 904, 907 (Tex. Civ. App.—Beaumont 1970, writ ref’d n.r.e.) (individual commissioner could not bind county in road designation); *Canales v. Laughlin*, 214 S.W.2d 451 (Tex. 1948) (holding individual commissioners could not bind county).

²⁶ See *Canales*, 214 S.W.2d at 455; *Nueces County v. De Pena*, 953 S.W.2d 835, 836-387 (Tex. App.—Corpus Christi 1997, no writ) (holding that county judge has no authority on his own to settle a dispute brought against county absent action by the commissioners court).

²⁷ *Galveston County v. Gresham*, 220 S.W. 560, 563 (Tex. Civ. App.—Galveston 1920, writ ref’d) (citing *Boydston v. Rockwall County*, 24 S.W. 272 (Tex. 1893); *Rodgers v. Taylor County*, 368 S.W.2d 794 (Tex. Civ. App.—Eastland 1963, writ ref’d n.r.e.); *Stratton v. Liberty County*, 582 S.W.2d 252 (Tex. Civ. App.—Beaumont 1979, writ ref’d n.r.e.); see also *Lane v. Hale County*, No. 07-98-0262-CV, 1999 WL 438913 (Tex. App.—Amarillo June 28, 1999, no pet.) (not designated for publication). We assume in this situation that the contract is one that commissioners court has the authority to enter under the Constitution and other laws of the state.

county judge *can* bind the county in a contract under emergency powers, would ratification by the commissioners court even be necessary?

Additionally, the Disaster Act also waives the quorum requirements for the governing body of a local governmental entity, “notwithstanding any other law,” if: 1) the entity is wholly or partly located in an area of a disaster declared by the president of the United States or the governor, *and* 2) a majority of the members of the governing body cannot attend a meeting as a result of the disaster.²⁸ Must the county judge bring a disaster related contract and other emergency related actions to the court, if ample time exists for a quorum of the commissioners court to meet and deliberate?

CONCLUSION:

While the above powers are expressly articulated in the Disaster Act, there is little guidance related to how and to what extent an Emergency Management Director “may exercise the powers granted to the governor under [chapter 418] on an appropriate local scale.” We note that the Attorney General has previously opined that “the Legislature expressly conferred *some, but not all*, of the extraordinary emergency powers given to the Governor to local government authorities.”²⁹

We greatly appreciate any clarification.

Sincerely,

/s/ Jenny P. Dorsey

Jenny P. Dorsey
Nueces County
County Attorney

²⁸ GOV'T CODE § 418.1102(b).

²⁹ Tex. Att’y Gen. Op. No. KP-0304 (2020) at 2 (emphasis added).