

Clerk of court, competitive bidding

Number: INFORMAL

Date: April 07, 2005

The Honorable Dwight E. Brock
Clerk of the Circuit Court
Collier County
Post Office Box 413044
Naples, Florida 34101-3044

Dear Mr. Brock:

As the auditor for the county commission, you ask whether you may authorize the payment for changes to a competitively bid county construction contract where such changes were made by change order without further competitive bid.

You have provided factual background on a county contract for expansion of the county courthouse and jail. According to your letter, the initial contract in 1999 called for the expansion of a chiller plant (air conditioning system) to accommodate the increased size of the courthouse and jail. This project has been completed. A second contract for a courthouse annex and parking garage was executed in 2004, necessitating an expansion of the chiller plant that could not be accommodated in the existing system. You state that it has been proposed that an additional chiller plant be constructed through a change order on the 1999 contract or the 2004 agreement, with no competitive bidding.

This office has been informed by the county that it does not wish to join in your request, stating that the question is speculative in nature, since no change order has been issued. The county further disputes the factual background you have presented. This office will not comment upon the county's proposed actions, absent a request from a majority of the members of the county commission, nor may this office make a determination of whether a specific expenditure is illegal. The following general comments, however, are offered to assist you in addressing this matter.

The clerk of the circuit court is a constitutional officer deriving his or her authority and responsibility from both constitutional and statutory provisions.[1] As county auditor, the clerk is required by law to refuse to sign and deliver county warrants for unlawful expenditures, even though such expenditures have been approved by the board of county commissioners.[2] Section 129.09, Florida Statutes, imposes personal liability upon "[a]ny clerk of the circuit court, acting as county auditor, who shall sign any warrant for the payment of any claim or bill or indebtedness against any county funds in excess of the expenditure allowed by law, or county ordinance, or to pay any illegal charge against the county, or to pay any claim against the county not authorized by law, or county ordinance[.]"

In Attorney General Opinion 70-134, this office addressed the clerk's duty and responsibility as ex officio auditor of the county's expenditures as follows:

"The auditing function of the clerk includes more than the arithmetical determination as to the amount of the claim being presented for payment and the clerk has a duty to determine the legality of an expenditure before dispensing public funds. When an examination by the clerk as auditor of a particular claim presented for payment leads him to believe that the expenditure is not authorized by law, or is otherwise illegal, the clerk may properly withhold his approval of payment. This action by the clerk is in accord with the apparent purpose of the constitutional provision, making the clerk of the circuit court ex officio auditor of the county, which is to provide a check and balance system that insures proper expenditure of public funds."

Thus, the clerk's duties and responsibilities as county auditor clearly include making a determination of the legality of the claims which are presented for payment by the clerk as custodian of the county funds in order to pay only those obligations which are proper expenditures of public funds.[3] As the Court in *Alachua County v. Powers*,[4] stated:

"The clerk has the authority and responsibility to perform the auditing functions both as an arm of the board in auditing the records of constitutional officers and as a watchdog of the board in the case of pre-auditing accounts of the board in determining legality of expenditure. The phrase "legality of expenditure" includes that the funds are spent for a public purpose, *that the funds are spent in conformity with county purchasing procedures or statutory bidding procedures*, that the expenditure does not overspend any account or fund of the budget as finally adopted and recorded in the office of the clerk. If the board becomes concerned, it has the authority to require a performance audit or post-audit by an independent accounting firm." [5] (e.s.)

While this office has not addressed the particular situation you have raised, you may wish to review Attorney General Opinions 2003-29 and 96-52 which discuss the necessity of competitive bidding under certain circumstances. I am enclosing copies of these opinions for your consideration.

As the ex officio auditor of county funds, you have the authority to refuse to sign and deliver county warrants for payment of an illegal contract.[6] Moreover, as noted above, section 129.09, Florida Statutes, forbids the clerk acting as the county auditor from signing illegal warrants and provides both personal and criminal liability for violating its provisions. Ultimately, therefore, it is the clerk of the circuit court acting as the county auditor who must determine whether a claim for payment is valid.

I trust that these informal comments will be helpful in your resolution of the questions you have raised.

Sincerely,

Lagran Saunders
Assistant Attorney General

ALS/tfl

Enclosures: Ops. Attn'y Gen. Fla. 03-29 and 96-52.

[1] See Art. VIII, s. 1(d), Fla. Const.

[2] See *also* s. 28.12, Fla. Stat., stating:

"The clerk of the circuit court shall be clerk and accountant of the board of county commissioners. He or she shall keep the minutes and accounts and perform such other duties as provided by law. The clerk shall have custody of the seal and affix the same to any paper or instrument as required by law."

[3] See *Alachua County v. Powers*, 351 So. 2d 32 (Fla. 1977); *Mayes Printing Company v. Flowers*, 154 So. 2d 859 (Fla. 1st DCA 1963).

[4] 351 So. 2d 32 (Fla. 1977).

[5] *Id.* at 37.

[6] *Mayes Printing Company v. Flowers*, *supra*. And see *Alachua County v. Powers*, *supra* at 36 (clerk forbidden to sign illegal warrants).