



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-092

December 18, 2014

The Honorable Roger A. Norman
Legislative Auditor
Division of Legislative Audit
172 State Capitol
Little Rock, Arkansas 72201-1099

Dear Mr. Norman:

I am writing in response to a question you have posed relating to four transactions involving Pike County's "trad[ing] in an existing piece of equipment toward the cost to 'lease' a new grader." You offer the following factual summary:

Essentially, Pike County traded in four existing pieces of equipment in order to acquire four new graders. The total value of the new graders was \$890,000, and Pike County was credited with traded equipment in the amount of \$291,750, leaving a net amount of \$589,250. The lease purchase agreement calls for thirty-five (35) monthly lease payments of \$1,906, and a final lease payment of \$531,906. Although these documents pertain to Pike County, other counties appear to be entering into this same type of transaction.

Notwithstanding your description of the acquired graders as "new," my inquiries reveal that they were used, having in fact been operated by prior owners in excess of 500 hours each when conveyed to Pike County. Without here reviewing the terms of the written contract, I will further note that both parties to the contract reportedly perceive the contract as being a lease with an option to buy. Pike County's acquisition of the graders was reportedly undertaken as an open-market transaction without going through any bidding process.

You offer the following provisional observation regarding this transaction:

[T]he transaction documented does not appear to be a purchase; rather, given the appreciable residual remaining at the end of the term, the transaction appears to be a lease.

Against this backdrop, you have posed the following question:

Can a county trade in equipment, under A.C.A. § 14-16-105(f)(2) (A), in the context of what appears to be a lease transaction, or do the terms of such a transaction preclude use of this Code provision?

RESPONSE

In my opinion, regardless of whether the underlying transaction involves a lease or a sale, determining the propriety of a trade-in of used equipment in all likelihood involves applying not the statute recited in your request,¹ but rather Arkansas Code title 14, chapter 22, which deals with county purchasing procedures.² Specifically, under A.C.A. § 14-22-106 as read within the context of this Code chapter, a trade-in of used county equipment is permissible as consideration supporting either an installment purchase of replacement equipment or a lease of such equipment with an option to purchase. Because this chapter directly addresses the issue raised in your request, I believe its provisions will control even if they conflict with the bidding requirements of A.C.A. § 14-16-105, which focuses primarily on straightforward sales of county property, mentioning trade-ins only in the course of reciting exemptions to the statute's requirements, including bidding. Moreover, even though the subsection (f) exemption for trade-ins is, in my estimation, ambiguous and in need of legislative clarification, I do not believe its ambiguities need be resolved in order to judge the propriety of the transaction at issue. Rather, because Code title 14, chapter 22 directly addresses the requirements for trading in equipment in conjunction with both leases and sales of replacement equipment, I believe this chapter will control. I am reinforced in this conclusion by the fact that this chapter's pertinent provisions are more recent than any possibly conflicting provisions of the statute you have recited.

¹ A.C.A. § 14-16-105 (Supp. 2013).

² A.C.A. § 14-22-101 through -115 (Repl. 1998 & Supp. 2013).

You have attached to your request a document captioned “Governmental Equipment Lease-Purchase Agreement” (the “Agreement”), which apparently sets forth the terms relating to the conveyance of all four graders. Although I am statutorily directed to render formal opinions on questions of state law submitted by specified officials,³ I am neither authorized nor equipped to construe such individual contracts. As I have noted generally with respect to the construction of contracts involving political subdivisions:

[T]his office cannot serve as a finder of fact and cannot construe either municipal [or county] . . . contracts. Accordingly, such questions must be left to the city [or county] attorney or, in the event of litigation, the courts.⁴

I can, however, both review what I consider the pertinent Code sections and suggest how these might bear on a court’s analysis of the Agreement itself.

Before addressing specifically the statute addressed in your request, I will briefly address the chapter of the Code dealing with county purchasing procedures, which I believe bears directly on the transaction you have described. Specifically, this chapter provides in pertinent part:

The following listed commodities^[5] may be *purchased* without soliciting bids:

³ A.C.A. § 25-16-706 (Repl. 2002).

⁴ Op. Att’y Gen. 2014-081, quoting 2009-099; *see also* Ops. Att’y Gen. 2004-067 (declining to determine the impact of a particular contract, stating that the question “may be impacted by the provisions of the contract between the parties, as well as various facts that are external to but related to the contract, including the intent of the parties to the contract, the manner in which the contract has been carried out, and the particular nature of the parties’ relationship in actual practice”); 2002-340 (“It is not the appropriate role of the Attorney General to construe the provisions of contracts or other agreements in the context of an Attorney General’s opinion, or to interpret the meaning of terms in such contracts or agreements in that context. This type of review often involves factual questions, such as intent, which the Opinions Division of the Attorney General’s office is not equipped or empowered by law to investigate.”); 98-121 (“All of the particular facts, including the terms of any agreement, would have to be considered in order to fully assess the validity of [the] contract. The construction of a contract is generally beyond the scope of an Attorney General opinion.”); *accord* Ops. Att’y Gen. 2014-033; 2012-059; 2005-021; 98-157; 98-072; 94-028.

⁵ Subsection 14-22-101(1) of the Arkansas Code (Supp. 2013) defines the term “commodities” as follows: “‘Commodities’ means all supplies, goods, material, equipment, machinery, facilities, personal property, and services other than personal services, purchased for or on behalf of the county[.]”

* * *

(11) *Used* or secondhand motor vehicles, *machinery, or equipment*[.]⁶

With respect to machinery of the sort here at issue, the Code defines the term “used” as including machinery “used a minimum of five hundred (500) hours.”⁷ The Code further defines the term “purchase” as follows:

“Purchase” means *not only the outright purchase* of a commodity *but also* the acquisition of commodities under *rental-purchase agreements or lease-purchase agreements or any other types of agreements whereby the county has an option to buy* the commodity and to apply the rental payments on the purchase price thereof[.]⁸

The Code defines the term “purchase price” as used in this statute to mean “the full sale or bid price without any allowance for trade-in.”⁹

Finally, the Code defines the term “trade-in purchases” as follows:

“Trade-in purchases” means all purchases where *offers must be included with the bids of each bidder for trade-in allowance* for used commodities[.]¹⁰

⁶ A.C.A. § 14-22-106 (Supp. 2013).

⁷ A.C.A. § 14-22-101(8)(A) (Supp. 2013).

⁸ *Id.* at subsection -101(4).

⁹ *Id.* at section -101(5). The Code reinforces this point as follows:

In the case of a purchase contract in which trade-ins are being offered on the purchase of commodities, the full purchase price shall govern the classification or purchase procedure to be followed in the solicitation for bids and the awarding of the contract.

A.C.A. § 14-22-113(a) (Repl. 1998). Subsection 14-22-104(1) (Supp. 2013) requires formal bidding “in each instance in which the estimated purchase price shall equal or exceed twenty thousand dollars (\$20,000).”

Presumably this definition applies to any “purchase” involving a trade-in, meaning that the property traded in will not be subject to an independent bidding requirement even if the underlying purchase is.¹¹

Implicit in the definition of “trade-in purchases” is the following corollary: if a “purchase” transaction is subject to bidding under this chapter, the recited value of used trade-in equipment in a “trade-in purchase” need not be the highest trade-in value recited among all bids. The county, after all, might accept the lowest overall responsible bid despite the fact that the trade-in value allowed under that bid is lower than that offered in other bids.¹² Unlike A.C.A. § 14-16-105, then, which requires that property falling within its scope be conveyed to the highest responsible bidder,¹³ this chapter countenances the possibility that a county might dispose of property by trade-in without necessarily realizing the maximum potential return on that disposition of property.

As should be apparent from the foregoing, the Code chapter devoted to county purchasing procedures directly addresses a transaction of the sort referenced in

¹⁰ A.C.A. § 14-22-101(7).

¹¹ This result, by the way, would not appear to raise a hazard that trade-in equipment might be significantly undervalued within the context of the entire purchase contract. If a bidder offering equipment undervalues a trade-in, he will presumably be disadvantaged relative to bidders who value the trade-in appropriately – unless, of course, the undervaluing bidder makes some other contractual concession to make up for the discrepancy. See further discussion in my text, *infra*.

The term “trade-in purchases,” while defined, appears nowhere else in this chapter of the Code. This is unsurprising, given that the point of the definition appears to be only to locate the trade-in as part of an overall “purchase,” which will or will not be subject to bidding as specified elsewhere within the chapter.

¹² As reflected in the following, the county might alternatively elect not to trade in the used equipment at all:

The purchasing official shall determine, with respect to trade-ins, what procedure shall be for the best interest of the county. If he so determines, such equipment or machinery may be sold outright under the law as provided.

A.C.A. § 14-22-113(b). As used in the final sentence of this statute, “the law as provided” would presumably be A.C.A. § 14-16-105, which generally controls an isolated (“isolated” in the sense of being contractually unassociated with any county “purchase”) sale of county property.

¹³ See A.C.A. § 14-16-105(e)(1)(A) (“If the appraised value of the property to be sold exceeds the sum of two thousand dollars (\$2,000), the county judge may sell the property to the highest and best bidder, upon sealed bids received by the judge or by Internet sale.”).

your question, which involved a trade-in of used county equipment in conjunction with a used-equipment “purchase” under the unusually broad definition in the statute recited above.¹⁴ Accepting as accurate the facts as reported to me from various sources – namely, that used equipment was traded in as partial consideration for the receipt of other used equipment – the used-goods exemption to the bidding requirements of A.C.A. § 14-22-106 would clearly apply.

The question remains, of course, whether A.C.A. § 14-16-105 might be read as likewise applicable, thus possibly creating a tension among various statutory provisions. In this regard, you imply in your question that if the trade-in was made in connection with a “purchase,” the disposition would be exempt from a bidding requirement, whereas if the trade-in was made in connection with a “lease,” the exemption would not apply.

In addressing this question, the first issue is whether the statute should be read as applicable only to the direct disposition of county property, as opposed to its trade-in as part of a purchase of new or used property. Stated differently, the question initially is whether this statute’s exemption simply excludes from the statute’s bidding provisions any disposition of county property made in the form of a trade-in on purchased “commodities” – a category that includes equipment of the sort conveyed to the county in this case.

Section 14-16-105 sets forth various appraisal, notice and bidding requirements applicable to the sale of county property.¹⁵ As noted by one of my predecessors,

¹⁴ This definition is “unusually broad,” of course, because one does not normally equate, as does the definition set forth at A.C.A. § 14-22-101(4), a “purchase” with an option lease where the option is never exercised. Under this definition, the distinction upon which your question focuses – namely, the possible status of the Agreement as a lease rather than a sale – becomes moot. Regardless of whether what you term the “residual” final payment due under the Agreement is characterized as an optional lease-purchase payment or an obligatory payment under a contract of sale, the Agreement involves a “purchase” as defined in the statute, thus triggering the Code chapter’s application.

¹⁵ A.C.A. § 14-16-105 (Supp. 2013). The statute’s focus on proceeds-generating sales transactions is immediately evident in subsection (a), which provides:

The county court of each county shall have power and jurisdiction to sell and cause to be conveyed any real estate or personal property belonging to the count and *to appropriate the proceeds of the sale* for the use of the county by proceeding in the manner set forth in this section.

(Emphasis added.)

the obvious intent of this statute is “to make public all dispositions of county property.”¹⁶ Subsection (f) specifically exempts the county from these requirements, however, with respect to certain transactions that involve what amounts to an in-kind equipment exchange. Specifically, the subsection provides for an exemption under the following circumstance:

When personal property of the county is traded in *on new or used equipment* and credit approximating the fair market price of the personal property is given to the county toward *the purchase price of new equipment*[.]¹⁷

This exemption is confusing in two respects – one obvious and one not. First, as reflected in my highlighted excerpts, the statute is internally inconsistent on its face in that it initially purports to apply to the “purchase” of either “new or used equipment,” whereas it subsequently purports to apply only to the “purchase” of “new equipment.” Notwithstanding your contrary suggestion, the equipment conveyed to the county in this case was used, meaning that if the final highlighted phrase were applied in isolation, the conveyance, being of “used” not “new” equipment, would fall outside the exemption. The first highlighted phrase, however, clearly indicates that the exemption applies to both new and used equipment. I cannot reconcile this outright internal conflict.¹⁸ Legislative clarification is warranted on this score.

The trade-in property would likewise not fall within the scope of the exemption if the underlying transaction were characterized as something other than a “purchase,” as that term is used in the statute. As noted above, the term “purchase” is very broadly defined in A.C.A. § 14-22-101(4) to include any variety of transaction that might result in the county’s finally obtaining title to the property conveyed to it. In boilerplate fashion, however, the Code expressly provides that this broad definition applies only “[a]s used in this chapter,”¹⁹ and

¹⁶ Op. Att’y Gen. 91-276, citing *State ex rel. Miller County v. Eason*, 219 Ark. 36, 240 S.W.2d 36 (1951).

¹⁷ A.C.A. § 14-16-105(f)(2)(A) (emphases added).

¹⁸ I will note again that the rest of A.C.A. § 14-16-105 focuses exclusively on the procedural requirements attending the direct sale of county property, uncomplicated by any attendant county-purchase transaction. Accordingly, logic would suggest that the exemption set forth in subsection (f) was intended to apply to *all* trade-in conveyances in the course of a “purchase” as defined in A.C.A. § 14-22-101(4). Logic alone, however, cannot serve to resolve the patent ambiguity in A.C.A. § 14-16-105(f).

¹⁹ A.C.A. § 14-22-101.

A.C.A. § 14-16-105 does not define the term. I lack any basis to speculate whether the legislature intended this term to be read as broadly in this statute as in the chapter of the Code devoted to county purchases of property. Again, legislative clarification is warranted.

Given these uncertainties, I cannot opine definitively whether a trade-in on a county's acquisition of used equipment would be subject to bidding under A.C.A. § 14-16-105. I can, however, offer an opinion that may resolve your concerns on this score. In my opinion, even if the traded-in property fell outside the subsection (f) exemption, meaning that the statute's bidding requirement might be deemed to apply, the trade-ins would nevertheless be exempt from the bidding requirement under the provisions of A.C.A. § 14-22-106. I base this opinion on two accepted principle of statutory construction: first, that a general statute does not apply where there is a specific statute governing a particular subject matter²⁰; and, secondly, that the provisions of an act adopted later in time ordinarily repeal the conflicting provisions of an earlier act.²¹ As noted above, A.C.A. § 14-16-105 deals with the outright sale of properties, mentioning conveyances-by-trade-in only to point out, albeit ambiguously, that they fall outside the statute's restrictions. Section 14-22-106, by contrast, is squarely on point, exempting from its chapter's bidding requirements all trade-ins associated with either an outright purchase agreement or a lease-purchase agreement entered into by the county. Moreover, A.C.A. § 14-22-106 was enacted later in time than was A.C.A. § 14-16-105(f).²² Accordingly, even if A.C.A. § 14-16-105 were read as applicable on its face, I do not believe its provisions should be given effect to the extent they conflict with those of A.C.A. § 14-22-106.

Finally, I should note the inapplicability of the case law and Attorney General opinions you recite as having given rise to your concerns. Although each of these authorities addressed the status of a contract as either a lease or sale, none did so in a context that bears on your request. Classifying a contract as either lease or sale was essential in one instance only to determine whether a transaction was

²⁰ *Donoho v. Donoho*, 318 Ark. 637, 887 S.W.2d 290 (1994).

²¹ *Daniels v. City of Fort Smith*, 268 Ark. 157, 594 S.W.2d 238 (1980).

²² The exemption codified at A.C.A. § 14-16-105(f) was enacted pursuant to Acts 1963, No. 213, § 1. The exemption from bidding on the purchase of used goods – presumably including “trade-in purchases” that involve a trade-in of used commodities contemplated in A.C.A. § 14-22-101(7) – was enacted pursuant to Acts 1989, No. 879, § 1.

subject to challenge as usurious²³; in another only to determine whether a county must comply with A.C.A. § 14-22-105 in disposing of property it held under a lease-purchase agreement²⁴; in another only to determine whether a particular transaction involved a theft of rented or leased property²⁵; and in the last to determine whether a proposed “lease agreement” would run afoul of the constitutional proscription against a political subdivision’s issuing interest-bearing evidences of indebtedness.²⁶

By contrast, identifying the Agreement as either a conditional-sales contract or a lease-purchase contract is not necessary, in my opinion, to determine what statutory requirements apply to a trade-in of equipment on a “purchase” as defined in A.C.A. § 14-22-101(4). As discussed above, when a county disposes by trade-in of property it clearly owns in connection with either a sale or a lease, A.C.A. § 14-22-106 will control, meaning no bids need be taken on the traded-in property.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,



DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

²³ *Fisher Trucking, Inc. v. Fleet Lease, Inc.*, 304 Ark. 451, 803 S.W.2d 888 (1991).

²⁴ Op. Att’y Gen. 91-276. This opinion focused on whether a county could dispose of property held under a “lease purchase agreement” without observing the requirements of A.C.A. § 14-16-105. Answering this question in no way clarifies whether those requirements apply when a county trades in used equipment in the course of entering into either a lease-purchase agreement or a conditional- sales agreement.

²⁵ Op. Att’y Gen. 91-332, addressing the possible application of A.C.A. § 5-36-115.

²⁶ Op. Att’y Gen. 95-185 (discussing the application of Ark. Const. art. 16, § 1).