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STATE OF ARKANSAS
OFFICE OF THE ATTORNEY GENERAL
JUSTICE BUILDING, LITTLE ROCK 72201

(501) 371-2007

Opinion No. 85-91

March 27, 1985

The Honorable John Bearden
State Senator
State Capitol Building
Little Rock, Arkansas 72201

HAND DELIVERED

Dear Senator Bearden:

You have requested an opinion concerning the legality of a mandatory repurchase provision in an "Invitation to Bid" issued by the Washington County Quorum Court and County Judge. That "Invitation" is attached hereto for reference.

Arkansas Statutes Annotated §17-304 et seq. (Repl. 1980) provides for the method of sale of county property. That method mandates the county judge to enter an order in the county court describing the property; the property to be appraised by the assessor and bids to be let if the value of the property exceeds \$500.00.

"Such property" Section 17-308 states "shall not be sold for less than three-fourths [3/4] of its appraised value."

Upon acceptance of a bid the County Judge shall submit same to the Quorum Court for its approval and if approved, may sell and convey such property to the highest bidder. Ark. Stat. Ann. §17-308.

Finally, §17-309 provides:

Any sale or conveyance of real or personal property belonging to any county not made pursuant [to this method] shall be null and void. . . Provided that the procedures for sale and conveyance of county property set forth in this Act shall not apply in those instances where personal property of the county is traded in on new or used equipment and credit, approximating the fair market price of such personal property is given the county toward the purchase price of new equipment. (Emphasis added).

In State of Arkansas ex rel v. Cate, 236 Ark. 836, 371 S.W.2d 541 (1963) at issue was the sale of a tract of land to Cate. The public notice on the sale had stated it would be sold "subject to a certain lease. . . with Clyde Cate". Prospective purchasers, the Court

found, were thus discouraged from bidding on the property for fear of "buying a lawsuit". Id. at 843. The Court cited with approval the following language of 7 C.J.S. 1255:

Any act of . . . seller or purchaser which diminishes competition and stifles or chills the sale, vitiates the sale.

Id. at 843.

More directly on point is Douthit v. Allen, 244 Ark. 667, 426 S.W.2d 812 (1968) in which a city's invitation to bid for the purchase of a tractor specified that the bidder would repurchase the vehicle for a fixed sum at the city's option. "This [arrangement]", the Court held, "places the city in a position to dispose of an expensive piece of property without the safeguard of competitive bidding."

In both cited cases, the Arkansas Supreme Court struck the sales as not in compliance with competitive bidding principles as expressed in statutes and city ordinances, respectively.

The attached invitation provides under the heading "Specification:"

Bids shall be presented on the basis of a guaranteed repurchase agreement.

Guaranteed repurchase is defined at Page 2 of the invitation as follows:

1. A guaranteed trade-in value should the County decide to purchase new equipment in a future bid.
2. A minimum bid to be made by the bidder at public auction or on sealed bid in the event the County elected to sell the machinery.
3. The bid or public auction shall be held within six (6) months after the expiration of the contract term.
4. The County reserves the right to retain the equipment and to waive the guarantee repurchase provisions.

The trade-in value option is specifically exempt from §17-305 by virtue of §17-309. However, Option #2, which mandates a minimum bid, runs afoul of the statutory scheme set out in §§17-304 because it does not contemplate or allow for competitive bidding in a free marketplace and thus, has the same "stifling effect" on competition as those schemes stricken in the cases above and in contrast to the clear language of §17-305.

Therefore, it is my opinion that the guaranteed repurchase portion of the attached "Invitation" is legally suspect.

The Honorable John Bearden
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The foregoing opinion, which I hereby approve, was prepared by
Deputy Chief of Staff R.B. Friedlander.

Sincerely,

A handwritten signature in dark ink, appearing to read "Steve Clark", written over a horizontal line.

STEVE CLARK
Attorney General

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