



**THE ATTORNEY GENERAL
OF TEXAS**

October 11, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Honorable Mark W. Stiles
Chairman
Committee on County Affairs
Texas House of Representatives
P. O. Box 2910
Austin, Texas 78768-2910

LO-89-81

Dear Representative Stiles:

This is in regard to your request for an attorney general opinion (RQ-1787) in connection with an ordinance of the City of Austin regarding use of a city landfill and a contract executed pursuant thereto with a solid waste disposal company, Texas Disposal Systems.

The ordinance establishes a reduced rate for a customer depositing more than a stated amount of municipal solid waste per month at a city sanitary landfill, provided that the city will have the right to utilize an equivalent amount of landfill space at equivalent adjusted rates for ten years following the effective date of the ordinance at a landfill site of the customer. To be eligible for the reduced rate a customer must hold a landfill permit from the Texas Department of Health or have filed a complete application for a permit. Pursuant to the ordinance, the city has executed a contract with Texas Disposal Systems (TDS).

You ask whether the ordinance or contract violates any state law and say that there is particular concern that the contract violates state antitrust laws "as it singles out Mr. Bob Gregory, owner of TDS." See Texas Free Enterprise and Antitrust Act of 1983, Bus. & Com. Code § 15.01 et seq. You state in your request:

The ordinance is a one-person ordinance, defining restrictions to meet Mr. Gregory's business specifications and allowing the contract to be written. Because of the exclusive specifications, other people in similar situations are unable to contract with the city to use the landfill.

The City of Austin in its brief in this matter states:

Currently, four Austin area waste haulers haul 15,000 gate yards or more a month: Texas Disposal Systems ('TDS'), Browning-Ferris Industries Waste Systems ('BFI'), Longhorn Disposal, and Central Texas Refuse. Of those four, two (BFI and Longhorn Disposal) hold a valid landfill permit and one (TDS) has filed an administratively complete application for a landfill permit. Consequently, three Austin landfill customers currently qualify for the volume discount rate established in Ord. No. 890105-J.

After passage of Ord. No. 890105-J, BFI and TDS both expressed interest in using the volume discount rate, and both were sent form contracts to review. On January 13, 1989, TDS entered into a contract with the City pursuant to Ord. No. 890105-J; a copy of that contract is attached hereto as Exhibit 'B'. To date, neither BFI nor Longhorn Disposal have chosen to execute such a contract.

. . . .

Contrary to the statements in Representative Stiles' opinion request, the ordinance is not a 'one-person' ordinance, and its specifications do not disallow others in similar situations from entering into identical contractual agreements.

First, we are unable to offer an opinion as to the overall validity of an ordinance or contract. We can address only specific legal questions. Also, we are unable to resolve questions of fact, such as are raised by the quoted assertions in your request and the city's brief. Evidence both as to the economics of solid waste disposal in the relevant market sector and as to particular arrangements, if any, underlying the contract and ordinance in question would most likely be necessary to a court's resolution of the antitrust issue you present. Such matters cannot be resolved in an attorney general opinion.

We do note that the contract and ordinance do not appear facially to constitute "per se violations" under the law of antitrust as it has evolved in the courts. See, e.g., Town of Hallie v. City of Eau Claire, 471 U.S. 34, 40 (1985) (municipality exempt from antitrust laws where acting under clearly articulated state policy to displace

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competition with regulation in the area in question); Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("per se violations" include price fixing, division of markets, group boycotts, and tying arrangements); see also Bus. & Com. Code § 15.05(g) (federal antitrust exemptions apply under state antitrust law); Health & Safety Code § 363.111, Acts 1989, 71st Leg., ch. 678, § 1, at 2683 (municipality may adopt rules for regulating solid waste disposal).

Please be advised that we are closing our file on (RQ-1787). Feel free to contact us should you have any questions in this matter.

Very truly yours,



William Walker
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Opinion Committee

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WW/mc

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