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March 31, 2000

RQ-0217-JC

The Honorable John Cornyn
Attorney General State of Texas
PO Box 12548
Austin, Texas 78711-2548

FILE # ML-51361-00
I.D. # 41361

Re: Request for Attorney General Opinion

Dear General Cornyn:

Please accept this request for an Attorney General opinion on the following issues:

I. Questions Presented

Whether an annual contract with a temporary day labor agency is exempt from competitive bid pursuant to the statutory exemption for procurements necessary to preserve or protect the public health or safety of a municipality's residents.

Is the purchase of equipment and materials, used exclusively for solid waste collection, also exempt from competitive bid under the public health or safety exemption?

II. Background

Due to the statewide low unemployment rate, many Texas municipalities are turning to the temporary day labor market to meet their staffing needs, especially in the solid waste collection field. The skills required for solid waste collection are minimal and easy to train which makes temporary day labor an attractive choice. The downside to using temporary day labor, is finding a reliable source and steady stream of qualified day laborers. For this reason, municipalities will often contract their needs with a temporary day labor agency.

Herein lies the question. If a municipality anticipates spending more than \$15,000 in one year with a temporary day laborer provider, must the contract be put out for competitive bid?

III. State Competitive Bid Law and Leon Valley

State law requires that before a Municipality enters into a contract which requires an expenditure of more than \$15,000, the contract must be put out for competitive sealed bid or competitive sealed proposal. Sec. 252,021 Texas Local Government Code. However, State law also provides several exemptions to the competitive bid requirement, one of which is the exemption for procurements necessary to preserve or protect the public health or safety. Sec. 252,022 (a) (2) Tex.Loc.Govt.Code.

The Texas Court of appeals has interpreted the “public health or safety exemption” to allow a municipality to award an exclusive franchise for garbage collection to a private company without going through the competitive bid process. *Browning-Ferris, Inc. v. Leon Valley*, 590 S.W. 2d 729 (Tex.Civ.App.- San Antonio 1979, writ ref’d n.r.e.). The court, relying on an earlier decision of the Texas Commission of Appeals, held that “when it is necessary to preserve or protect the public health of the citizens of a county or city, a condition requiring prompt and unrestrained action in order to remedy such a situation exists, regardless of whether such condition has been brought about by a public health, carry the idea of timely, efficient, and effective action which keeps intact and unimpaired the good health of the citizens in advance of its impairment.” *Id.* at 734; citing *Hoffman v. City of Mount Pleasant*, 126 Tex. 632, 89 S.W. 2d 193 (1936).

IV. Analysis

Regular collection of solid waste is necessary to preserve and protect the public health and safety of a municipality’s residents. For some Texas municipalities, access to the temporary day laborer market is mandatory for them to provide regular solid waste collection services. If these cities are unable to utilize temporary day laborers to meet operational staffing needs, they could be forced to reduce the scope or frequency of solid waste collection services. a reduction in solid waste collection services means that solid waste, both household and landscape waste, will remain uncollected in the community longer increasing the likelihood of rodent infestation, disturbance, dispersal and stench.

Following the analysis of the Appellate Court in Leon Valley, an annual contract for temporary day laborers would be exempt from competitive bid, because the temporary day labor contract is necessary to preserve and protect the public health of the municipality’s residents. In other words, if the substance of contract goes toward preserving or protecting the public health or safety of the municipality’s residents, then under Leon Valley it should be exempt from competitive bid.

This leads to the second question contained in this request, whether the public health or safety exemption to competitive bid can be applied to the purchase of equipment and material used exclusively for solid waste collection. Texas law requires that municipalities competitively bid procurements in excess of \$15,000, this includes equipment and materials purchased for solid waste collection services. The question arises, however, when the equipment or materials purchased are to be used exclusively for solid waste collection services, "to preserve or protect the health or safety of the municipality's residents."

Garbage trucks for example, are used exclusively for solid waste collection. The procurement of garbage trucks would seem to fall within the exemption for procurements necessary to preserve or protect the public health or safety of a municipality's residents. Residential trash containers purchased by the city are also used exclusively for solid waste collection. would the procurement of residential trash containers fall within this exemption? unfortunately, the court in Leon Valley provides little guidance as to what limits apply to the public health or safety exemption to competitive bid, therefore necessitating this request.

Your attention to this request is greatly appreciated. If I or my staff can be of any assistance, please do not hesitate to call.

Sincerely,

A handwritten signature in black ink, appearing to read "Tony Goolsby", with a stylized flourish at the end.

Tony Goolsby
State Representative
District 102

TG/jv