



General Services Commission

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VIA HAND DELIVERY

July 10, 2000

The Honorable John Cornyn
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711

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OPINION COMMITTEE

FILE # ML-41509-00

I.D. # 41509

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RQ-0257-JC
OFFICE OF THE ATTORNEY GENERAL
EXECUTIVE ADMINISTRATION
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RE: Request for Opinion related to current procurement authority and "reverse auctions"

Dear General Cornyn:

On behalf of the General Services Commission, I am writing to request an Attorney General's Opinion regarding the application and meaning of Chapters 2155, 2156, and 2177 Texas Government Code, and whether any of the authorized methods of purchasing goods thereunder includes the process of "reverse auctions."

BACKGROUND: The General Services Commission (GSC) is the centralized purchasing agency for the State of Texas. GSC's authority to conduct purchasing activities for goods and services is found generally in Chapters 2155 and 2156 of the Texas Government Code (Code). Other GSC activities, such as purchase of automated information systems and construction of facilities are found in other chapters of the Code not relevant here.

For goods and services purchasing, three methods are authorized – contract purchase procedure, multiple award contract procedure and open market purchase procedure. Section 2155.062 (a), Texas Government Code.

All three methods are forms of competitive bidding, which traditionally includes the following steps:

- 1) agency development of specifications or requirements;
- 2) solicitation or publication to relevant vendors of the specifications or requirements;
- 3) a set time and location for the return of "sealed bids";
- 4) a public opening and reading of the bids; and
- 5) a contract award to the lowest bidder meeting specifications or the bidder offering the "best value". See Section 2155.074, Texas Government Code.

The Texas Supreme Court has stated the purpose and intent of competitive bidding statutes as..."requir[ing] due advertisement, giving opportunity to bid, and contemplates a bidding on the same undertaking upon each of the same material items covered by the contract; upon the same thing. It requires that all bidders be placed upon the same plane of equality and that they each bid upon the same terms and conditions involved in all the items and parts of the contract, and that the proposal specify as to all bids the same, or substantially similar specifications. Its purpose is to stimulate competition, prevent favoritism and secure the best work and materials at the lowest practicable price, for the best interests and benefit of the taxpayers.... There can be no competitive bidding in a legal sense where the terms of the letting of the contract prevent or restrict competition, favor a contractor or materialman, or increase the cost of the work or the materials or other items going into the project." Texas Hwy. Commis. v. Texas Ass'n of Steel Importers, Inc., 372 SW2d 525, 527 (Tex. 1963), quoting Sterrett v. Bell, 240 SW 2d 516, 520 (Tex. Civ. App. Dallas), 1951, no writ.

GSC has recently been given authority to conduct a pilot procurement program, using electronic commerce technology. See Chapter 2177, Texas Government Code; HB 1, Article I-49, note 17 (76th Legislative). However, Section 2177.002 (h), Texas Government Code, specifically directs that the electronic commerce network authority does not "...affect any other law that requires the Commission or other state agency to award a procurement contract through competitive bidding." Section 2177.002 (h), Texas Government Code. Thus far, the pilot has been structured to mimic the classic sealed bid procurement process, complying with the steps outlined in current law.

One of the optional components that electronic purchasing systems offer is a process known as "reverse auctions". There is no definition of "reverse auction" in state law nor is an entry found in Webster's Dictionary, 10th edition or in Black's Law Dictionary, 6th edition.

An electronic reverse auction entails:

- 1) prequalifying vendors according to non-price related criteria that may be relevant to the purchase;
- 2) All "qualified vendors" are awarded a contract, in which the vendors agree to the reverse auctioning process and procedures;
- 3) Vendors are trained on use of the on-line bid system;
- 4) Agency issues a specific Request for Quotation, that provides time, place and duration for the reverse auction;
- 5) The on-line process is conducted; it entails:

- a. At an established start time, on-line pricing bids are posted by the qualified vendors on a secured website that only the Qualified Vendors and agency personnel and auction provider have access to;
- b. Each bidder sees the last bid price offered, although they cannot determine the identity of the bidder;
- c. Multiple bids may be received, each of which must be lower than the last bid amount offered to be accepted;
- d. At the established time, the bidding is stopped. The offeror of the last bid (lowest) amount would be eligible to receive an award or purchase order, if otherwise determined to be responsible and in compliance with specifications.

Before GSC employs reverse auctions as a method of purchase, it needs to assure itself and the vendor community that it has authority to conduct this process.

QUESTIONS: Is the process of reverse auctions a currently authorized method of conducting competitive bidding?

Specifically, does the statutory requirement for the receipt by GSC of "sealed bids" preclude using an electronic process in which pricing is shared among the participants granted security access to the reverse auction, including competing vendors?

Does the statutory requirement to protect the "identification, security and confidentiality of bids submitted through the use of ...electronic commerce network...." (Sec. 2156.005 (b), Texas Gov't Code) preclude using an electronic process in which pricing is shared among the participants granted security access to the reverse auction, including competing vendors?

Should you have questions related to this request, please contact Ms. Cynthia J. Hill, Legal Counsel, GSC, at (512) 463-6422. I thank you for your attention to this matter.

Respectfully submitted,


Jim Muse
Executive Director

JM:CJH:rrb