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OPINION COMMITTEE



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COMMITTEE ON CORRECTIONS
Texas House of Representatives

April 22, 2008

The Honorable Greg Abbot
Texas Attorney General
Attn: Opinions Committee
P.O. Box 12548
Austin, Texas 78711

FILE # 11L-45649-08

I.D. # 45649

RQ-0703-GA

Dear General Abbott:

In January 2007, the Texas Department of Transportation issued a request for proposals for the design, marketing and sale of specialty license plates, as a result of HB 2894(79R). Subsequently, the department selected a winning bidder and awarded a purchase order. As a result, one of the firms not selected filed a protest based on several grounds, including whether preferences were properly applied by TxDOT. The protest was subsequently denied by TxDOT. There remain several legal questions related to this matter that I seek your clarification which are outlined below.

BACKGROUND

Prior to enactment of HB 845 (79R) by Rep. Howard in 2003, which amended Government Code § 2155.444, the state was required to give purchasing preference to a Texas-based company if the price and quality of its products were equal to an out-of-state bidder. HB 845 extended that preference to services.

As seen in the attached document, Schedule 4 from the related RFP by TxDOT, bidders were to certify they qualified as a Texas Resident Bidder if they listed a Texas address:

Pursuant to Government Code § 2155.444(c)(2), a *Texas Resident Bidder* is defined under 1 TAC § 111.2(10), as:

“A bidder with its principal place of business in Texas, including a bidder whose majority owner or parent company has its principal place of business in Texas.”

Pursuant to Texas Government Code § 2155.444(c)(2)(B), a *Principal Place of Business in Texas* is defined under 1 TAC § 111.2(9), as:

“A permanent business office located in Texas from which a bid is submitted and from which business activities are conducted other than submitting bids to governmental agencies, where at least one employee works for the business entity submitting bids.”

MEMBERS:

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Information has been presented to my office and TxDOT that the firm which was awarded the purchase order listed a Texas address in its proposal and certified it was a Texas Resident Bidder yet conducted no business in Texas, nor had a place of business save for apparently using an address in Austin of a company that has no legal connection to the bidder. This information also suggests that the firm's president appears to have been the only employee of the entity prior to award of the contract, purportedly resides and offices in Australia, and performs nearly all of his business in that location rather than Texas.

Pursuant to Texas Procurement Manual § 2.25, if a company certified it was a Texas Resident Bidder by signing the attached document, and that information was found to be false:

“Any misrepresentation or false statement that is deemed material by the state, is a breach of contract, which shall void or make voidable any solicitation or resulting contract. Such bidders may be removed from the Centralized Master Bidders List (CMBL) or any other state bid list, in addition to being barred from participating in future contracting opportunities with the State of Texas.”

One of the grounds for the firm filing the protest was their suggestion that because the competitive process resulted in the award of a purchase order for \$1, that bidding preferences should have been applied. Correspondence from TxDOT suggests the department does not believe preferences should have been applied. While the purchase order for this program was for \$1, proposals were presented to TxDOT on how to run a program that would design new specialty plates, market that product and generate additional revenue for the state.

In the attached February 26, 2008 letter from TxDOT Executive Director Saenz denying an appeal to a protest decision on this procurement, he asserted that no preferences should have been applied because there was no tie in the scoring of the different proposals. Legal counsel for the protesting firm disagrees and asserts that it is not a tie of the *proposal scores* that matters, but a tie in the *dollar amount* that was actually bid by the competing firms. Because the purchase order is for \$1, and all bidders submitted a \$1 bid with their complete proposals, the protesting firm asserts that preferences should have been applied.

This matter appears to be addressed in 34 TAC § 20.38(b)(1)(B), which states: “The commission may award a contract to a nonresident bidder only if its bid is lower than the lowest bid submitted by a responsible Texas bidder by the same amount that a Texas bidder would be required to underbid the nonresident bidder to obtain a comparable contract in the state where the nonresident's principal place of business is located.” While the winning bidder did affirm they were a Texas bidder (which is in question as noted previously), they did not check the box seeking Texas bidder preferences. The team protesting the department's decision did check the box seeking a preference.

QUESTIONS SUBMITTED FOR YOUR CONSIDERATION:

If a non-Texas resident or company located outside of Texas sets up a Texas business entity, and that business entity conducts no business in Texas other than retaining an attorney, is that company considered a Texas Resident Bidder, and is it considered to have a Principal Place of Business in Texas? If a company does not have a Principal Place of Business in Texas and is not a Texas Resident Bidder, and signs an affirmation that it is a Texas Resident Bidder, and is subsequently awarded a state purchase order, what recourse exists to address this discrepancy?

If there is a competitive procurement and each competing firm submitted a \$1 bid, and presented proposals to generate additional state revenue which are scored differently by the procuring agency, should bidding preferences apply, and if so which preferences are applicable? If bidding preferences were not appropriately applied by a state agency during a procurement, and the agency disagrees that bidding

preferences should have been applied, what recourse exists to compel the agency to re-consider preferences?

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Jerry Madden", with a long horizontal flourish extending to the right.

Jerry Madden

Enclosures:

- Feb. 26, 2008 Letter from TxDOT Executive Director Amadeo Saenz, Denial of Appeal
- Feb. 10, 2008 Article by Emily Ramshaw, *Dallas Morning News*, State officials, competing firms spar over Texas' specialty license plate business
- Correspondence from legislators and business groups to TxDOT
- Appeal materials filed with TxDOT by Pinnacle Technical Resources