

IO # 15195
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CHAIRMAN
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COMMISSIONERS
PHILLIP A. ARONOFF
ROBERT E. DAVIS

General Services Commission
1711 San Jacinto P.O. Box 13047
Austin, Texas 78711-3047
(512) 463-3446

EXECUTIVE DIRECTOR
LIAS B. "BUBBA" STEEN

STATE OF TEXAS

RQ-341

February 27, 1992

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The Honorable Dan Morales
Attorney General
Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711-2548

Opinion Committee

Re: Request for opinion on the applicability of Article 601b, Texas Civil Statutes, Section 3.102, to state employees and the legal effect on contracts awarded in violation of that section.

Dear General Morales:

The General Services Commission respectfully requests your opinion as to whether the prohibition described in Section 3.102 of Article 601b, Texas Civil Statutes, applies to state employees.

The section reads in its entirety as follows:

Sec. 3.102. A state agency may not accept a bid or award a contract that includes proposed financial participation by a person who received compensation from the agency to participate in the preparation of the specifications or request for proposals on which the bid or contract is based. A bidder or contract participant may provide free technical assistance to an agency under this section.

The section was added to the Commission's organic statute by Chapter 8, Acts, 72nd Legislature, Second Called Session (1991).

Since this is a new section, there is no established administrative construction. The Commission staff is of the opinion that the Legislature did not intend that the prohibition would be applied to state employees. The section has been understood by the Commission to be intended to prohibit outside contractors, and more particularly consultants, from preparing specifications or requests for proposals so as to give themselves an unfair advantage over competitors, when bidding on those same matters.

The Commission is aware that other statutory provisions may apply which effectively prohibit state employees who participate in the drafting of specifications from using that experience thereafter for their own financial gain. The newly adopted Section 7A of Article 6252-9b, Texas Civil Statutes, makes it a criminal offense for a former state employee who "participated" in a "particular matter" to receive compensation for rendering services on behalf of any person regarding that matter. It seems clear that the circumstances described in Section 3.102 (i.e., proposed financial participation by a person who was paid for helping to prepare specifications) would fall within the scope of Section 7A's criminal prohibition. Thus, a former state employee would be forbidden from receiving compensation for rendering services to a person regarding a matter for which he or she prepared specifications, irrespective of whether Section 3.102 applies to state employees.

This conclusion does not dispose of the question. The two statutory provisions are aimed at different parties: Section 3.102 forbids a state agency from accepting a bid or awarding a contract, whereas Section 7A addresses former state employees. In addition, Section 7A provides for criminal penalties in case of a violation; Section 3.102 is silent as to the legal effect of a contract awarded, intentionally or unintentionally, to a prohibited person.

Your review and opinion as to whether Section 3.102 applies to state employees will be appreciated. Please do not hesitate to contact me at 463-3446 if you require additional information.

Sincerely,



Jack L. Reynolds
Associate Deputy Director for Administrative Services

JLR:CJB:ksg

cc: Anne S. Wynne, Chairman, GSC
Phillip A. Aronoff, Commissioner, GSC ✓
Robert E. "Bob" Davis, Commissioner, GSC
Betty McKool, Commissioner, GSC
Ronald "Ron" Kirk, Commissioner, GSC
Nora W. Chavez, Commissioner, GSC
Cassie G. Carlson, Associate Deputy Director for
General Services, GSC
Judith M. Porras, General Counsel, GSC
C. J. Brandt, Jr., Legal Counsel, GSC



STATE OF TEXAS

General Services Commission

1711 San Jacinto P.O. Box 13047
Austin, Texas 78711-3047
(512) 463-3446

IO#15324
CAB

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EXECUTIVE DIRECTOR
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Opinion Committee

re: IO#15195

March 13, 1992

Ms. Celeste Baker
Assistant Attorney General
Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711-2548

Re: Request for opinion on the applicability of Texas Civil Statutes, Article 601b, Section 3.102 to former employees

Dear Ms. Baker:

This supplements the request for opinion concerning the application of Texas Civil Statutes, Article 601b, Section 3.102 ("Section 3.102"), submitted by letter dated February 27, 1992.

The commission's concerns about the applicability of the referenced section may be restated as requiring analysis of basically two different situations. That is, would Section 3.102 prohibit awarding a contract to an entity that currently employs a former employee of the agency who had received compensation for preparing specifications ("former employee") in either of the following cases: ✓

(1) Where the former employee has no direct involvement in a current employer's efforts to obtain the contract nor would the former employee's current compensation be directly related to or affected by the current employer's receipt of the contract; or

(2) Where the former employee has a significant direct involvement in obtaining the contract such as reviewing, preparing, or submitting the bid or proposal and the former employee's current compensation may be based upon the current employer's receipt of the contract?

Additionally, I would refer you to this agency's rule, 1 T.A.C. Section 111.4(h) relating to restrictions on recruitment of employees. Subsection (1) of this rule absolutely prohibits any person from offering employment to the employees of this agency or another agency that purchases under delegated authority, if the employee is involved significantly in handling a procurement in

which the person offering employment is interested. Subsection (2) of the rule absolutely prohibits a former employee from appearing before the commission, for compensation, on any matter involving a specific transaction with which the former employee was significantly involved while employed with the agency.

We respectfully request your consideration of these supplemental points. Please call me at 463-3446 if you have further questions.

Sincerely,



Jack L. Reynolds
Associate Deputy Director for Administrative Services

JLR:JMP:ksg