



General Services Commission

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Opinion Committee

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

Dear General Morales,

Recently enacted state and federal telecommunications laws require that the General Services Commission (GSC) reassess its purchasing procedures in order to respond to the significant challenges posed by the changes. Both state and federal statutes mandate competition in the provision of local exchange service. This competition now affords customers the choice of a local exchange service provider. While competition in interexchange services, i.e., long distance, has existed for many years, securing local and long distance services as a package or as packaging combinations can produce substantial savings to the State. It is with this goal that GSC requests an Attorney General Letter Opinion addressing the following: (1) Is GSC authorized to acquire all telecommunications services (e.g., voice, data, etc.) for state agencies located in (a) state-owned buildings and (b) privately owned buildings? and (2) Can GSC make the acquisition of all telecommunications services by means of the catalog purchase procedure?

The first question is prompted by GSC consolidating the occupancy of multiple agencies into single state-owned buildings across the state. The project, called the Lone Star Initiative, intends to save overall funds by eliminating more costly leases. As part of the project, GSC provides assistance in designing, implementing, and operating PBX systems to support the state agency operations. GSC purchases and coordinates installation of wiring, jacks, station sets, and voice mail systems and pays for the completed construction project with approved bond money. In an effort to achieve overall savings to the state, GSC wants to procure telecommunications service for the various buildings, rather than have each agency secure its own. GSC will be the sole customer of the carriers and will backbill the service to the individual agencies in the same cost recovery mode as currently conducted for the capitol complex. Many state agencies, however, will continue to office in privately owned buildings, and GSC seeks to acquire telecommunications services for their use.

The catalog purchase procedure would permit GSC to acquire the services of more than one provider and catalog their services. This would allow GSC and the using agency to select a local service provider based on whether the provider were operational in that part of the state or in that

city where the agency is located. This is necessary as eligible providers of local exchange service may not be operational in all areas of the state.¹

GSC'S PURCHASING AUTHORITY

GSC asserts that the State Purchasing and General Services Act (the Act), *Tex. Gov't Code Ann. § 2151.001 et seq. (Vernon Pamph. 1996)*, grants GSC the power to purchase telecommunications services for state agencies. Section 2155.061 establishes that GSC shall acquire by purchase all services for state agencies. *Id.* § 2155.061(a). While the Act exempts "a service of a public utility," *id.* § 2155.001(2)(D), the exemption does not apply to these contemplated GSC telecommunications services purchases. State agencies no longer will have to purchase from solely the local telephone company or the lone long distance service provider. Various vendors³ can provide the sought service, and GSC will acquire the services, as required by Section 2155.061, in compliance with the purchasing procedures permitted by the Act. Support for GSC's position is evidenced in the Section 2157.121 provision that permits GSC to acquire telecommunications services by the competitive sealed proposal purchase procedure, *see id.* §2157.121, among other methods.

This purchasing authorization is consistent with the changing environment of telecommunications and with the Act's legislative intent of competitive bidding securing the best price for the State's purchases.⁴ Services of a public utility were exempt from GSC's purchasing

¹ Providers of local exchange service must apply for certification with the Public Utility Commission of Texas and must designate areas of operation. See *Public Utility Regulatory Act of 1995, Tex. Rev. Civ. Stat. art. 1446c-0 §§ 3.2531, 3.2532 (Vernon Supp. 1996)(PURA 95)*.

² The Act does not define public utility, but the Public Utility Regulatory Act of 1995, the state's foundation for the provision of telecommunications services, defines public utility as any person or corporation owning or operating for compensation equipment or facilities for the conveyance, transmission, or reception of communications over a telephone system *as a dominant carrier. PURA 95 § 3.002(9)(emphasis added)*. A dominant carrier for local exchange service is any provider providing local exchange service within a certificated area on September 1, 1995, and as to any other service for which a competitive alternative is not available in a particular geographic market, i.e., the local telephone company. *Id.* § 3.002(2).

³ GSC's purchase of telecommunications services does not preclude the public utility from consideration as a provider.

⁴ "The purpose and intent of competitive bidding ordinances and statutes are well stated . . . [The] purpose [of competitive bidding] is to stimulate competition, prevent favoritism and secure the best work and materials at the lowest practicable price, for the best interests and benefits of the taxpayers and property owners." *Texas Highway Commission v. Texas Association of Steel Importers*, 372 S.W.2d 525 (Tex. 1963).

authority because the service was available solely from the one provider.⁵ Competitive bidding would be futile, as there would be no alternative providers and, therefore, no price competition. Clearly, such is no longer the case.

This grant of authority applies, GSC believes, to the purchase of telecommunications services, regardless of whether or not the agencies office in state-owned buildings. Physically and technically, GSC's purchase of telecommunications services for state agencies in privately owned buildings is like the purchase that the state agencies themselves would make, except that the purchase would benefit from GSC's negotiations and purchase of service in quantity. In any cases where GSC's purchase would behoove neither GSC nor the agency, GSC is authorized to delegate the purchasing function to the agency. *Id.* § 2155.131.

GSC would accomplish billing for the services pursuant to its authority to operate an effective and economical system for purchasing the services. *Id.* § 2155.061(b).

GSC'S CHARGE AND CONTROL AUTHORITY

In addition to its Section 2155.061 power, authority for GSC's purchase of telecommunications services for state agencies in state-owned buildings is found in GSC's charge and control authority. GSC will be providing shared tenant service (STS) by acquiring the telecommunications services used by state agencies in state-owned buildings. STS is defined as the centralized telecommunications services provided to tenants in a building or complex. *Newton's Telecom Dictionary 1043 (10th ed. 1996)*. A provider of STS is recognized by the Public Utility Regulatory Act of 1995, *Tex. Rev. Civ. Stat. art. 1446c-0 (Vernon Supp. 1996)(PURA 95)*, as a telecommunications provider, but GSC would be exempt as "the term does not include any state agency or state institution of higher education or any service provided by any state agency or state institution of higher education." *PURA 95 § 3.002(11)*.

GSC is conducting the Lone Star Initiative as directed by the Act. The Act generally empowers, as provided by law and appropriations, GSC to acquire necessary real and personal property, modernize, remodel, build, and equip buildings for state purposes and make contracts necessary to effectuate these purposes. *Tex. Gov't Code Ann. § 2166.052*. GSC is to select and purchase sites in Texas cities on which to construct state office buildings that house state departments and agencies. *Id.* § 2166.060(a). It must plan, construct and initially equip the buildings. *Id.* § 2166.060(b). These provisions are applicable to construction projects financed in whole or in part by bond issue. *Id.* § 2166.001(4). GSC also is authorized to allocate space in state

⁵ Such may be the case in telephone exchanges where competitive telecommunications providers may not be operational.

buildings to state agencies, *id.* § 2165.001(b), and to lease the allocated space,⁶ *id.* § 2165.004(a) To effectuate the leases, GSC can adopt necessary rules, *id.* § 2165.004(b), and can establish a system of charges and billings submitted monthly for services provided to ensure recovery of the services' costs, *id.* § 2166.005(b). GSC also is authorized to allocate space in state buildings to state agencies, *id.* § 2165.001(b), and to lease the allocated space,⁷ *id.* § 2165.004(a) To effectuate the leases, GSC can adopt necessary rules, *id.* § 2165.004(b), and can establish a system of charges and billings submitted monthly for services provided to ensure recovery of the services' costs, *id.* § 2166.005(b). Moreover, GSC's authority does not terminate when the building is completed and is occupied, for GSC has charge and control of state buildings, grounds, and property. *Id.* § 2165.001.

As prescribed by the Act, GSC is initially equipping buildings that it will lease to state agencies and departments. GSC is assisting in the design, implementation, and operation of PBX systems to support the state agency operations. GSC also is purchasing and coordinating installation of wiring, jacks, station sets, and voice mail systems. Pursuant to its leasing authority and to its control and charge authority, GSC can secure local exchange service for the tenant agencies. *See City of Big Spring v. Board of Control*, 404 S.W.2d 810, 814-15 (Tex. 1966)(*statutory authority to control, manage and direct affairs, property, and business of hospital permitted State Board of Control [GSC, see Tex. Gov't Code Ann. § 2151.003] to contract for hospital's permanent water supply*); *Tex. Att'y Gen. LO 95-049 (1995)*(*"In the alternative, Section 4.01(a) of the State Purchasing and General Services Act provides the commission with 'charge and control of all public buildings, grounds, and property of the state'" and thereby authorizes GSC's purchase of electric services on behalf of state agencies from City of Austin*). It also is authorized to backbill, as it does for agencies in the capitol complex.

GSC's telecommunications cost-saving measure is consistent with numerous mandates that require GSC, in its construction manager capacity, to consider the cost implications of utility and

⁶ This authority applies to space in buildings subject to Chapter 2166 of the Purchasing Act. *Tex. Gov't Code Ann. § 2165.004*. Chapter 2166 applies to the state's building construction projects. *Id.* § 2166.002. To the extent that, in the past, GSC may have delegated its charge and control authority to any state agency, thereby permitting the agency charge and control of its own building space (*see Tex. Gov't Code Ann. § 2165.002*), GSC revokes delegation of that authority by placing the agency in the state-owned building.

⁷ This authority applies to space in buildings subject to Chapter 2166 of the Purchasing Act. *Tex. Gov't Code Ann. § 2165.004*. Chapter 2166 applies to the state's building construction projects. *Id.* § 2166.002. To the extent that, in the past, GSC may have delegated its charge and control authority to any state agency, thereby permitting the agency charge and control of its own building space (*see Tex. Gov't Code Ann. § 2165.002*), GSC revokes delegation of that authority by placing the agency in the state-owned building.

telecommunications services. In comparing the financial advantage of the purchase of an existing building over construction of a new building or vice versa, GSC must consider the estimated cost of maintenance and operations, including telecommunications services, for each option. *Id.* § 2166.452(b). GSC must prepare a long-range plan on the needs of state agencies in Travis County and examine state-paid operation and maintenance costs, including telecommunications services. *Id.* §§ 2166.102(a), 2166.102(c)(5). Additionally, GSC can meet space needs of agencies in leased space by purchasing buildings but must factor operating costs, including utility costs, in determining the cost effectiveness of the purchase. *Id.* §§ 2166.453(b), 2166.453(h)(4).

The Chapter 2170 provisions, establishing GSC's intercity and capitol complex telecommunications authority, do not affect GSC's ability to provide the telecommunications services at issue. Section 2170.002 designates GSC as the agency responsible for obtaining telecommunications services, defined as intercity communications, *id.* § 2170.001(a)(1), i.e., at this point in time GSC's TEX-AN system. This provision clearly is the expressed specific authority for GSC's acquisition of interexchange telecommunications service, whether via TEX-AN or otherwise. Section 2170.051(a) designates GSC manager of the operation of a system of telecommunications services for all state agencies, i.e., the manager of TEX-AN. GSC also provides the capitol complex's centralized telephone service for state agencies, each house of the legislature, and legislative agencies in the capitol complex. *Id.*, § 2170.059. This constitutes the specific authority for acquiring the capitol complex's local service prior to this point, because local exchange service was available solely from a public utility.

PURCHASE PROCEDURES AVAILABLE

The second question requires a clarification of Attorney General Opinion No. DM-375, regarding "Whether a vendor that offers to sell local exchange service, interexchange, cellular telephone, mobile radio, or pager services may offer such services for sale through the catalog purchase method set forth in Government Code chapter 2157, subchapter B (RQ-705)?" *Op. Tex. Att'y Gen. No. DM-375 (1996)*. The conclusion in DM-375 was that the purchase of a cellular telephone, mobile radio, or pager did not authorize the acquisition of any telecommunications service that the vendor also might provide. The catalog purchase method was available, however, for purchases of the tangible cellular telephone, mobile radio, or pager equipment. DM-375 also determined that the catalog purchase method is available for solely automated information system purchases. GSC believes that Attorney General Opinion No. DM-375 is limited to the fact situation prompting the request and is inapplicable to the questions posed herein. GSC further asserts that the catalog purchase procedure established in Chapter 2157 is a procedure that GSC can use to acquire telecommunications services. A review of the Act's purchase procedures establishes GSC's authority.

The Act permits GSC wide latitude as to the purchase procedure it can utilize for telecommunications services. Section 2155.062 permits purchases by (1) contract,⁸ (2) multiple award contract,⁹ and (3) open market¹⁰ but expressly does not limit these means as the three purchase procedures available for GSC's use. *See Id.* § 2155.062. Chapter 2157 establishes additional purchase methods: (1) catalog purchase, (2) competitive sealed proposal,¹¹ and (3) preapproved contract terms and conditions.¹² The Chapter 2157 competitive sealed proposal procedure,¹³ applies specifically to "a telecommunications device, system or service," if GSC determines by rule that competitive sealed bidding¹⁴ and informal competitive bidding¹⁵ are impractical or disadvantageous. *Id.* § 2157.121. The procedure, nonetheless, is discretionary with use of its "may acquire" language, allowing for use of another purchase method. The preapproved terms and conditions method allows GSC to negotiate with vendors preapproved terms and conditions included in contracts for the purchase or lease of "a telecommunications device, system, or service or an automated information system." *Id.* § 2157.181. These provisions, GSC asserts, establish the general applicability of Chapter 2157 to "a telecommunications device, system, or service or automated information system."

Chapter 2157's catalog purchase procedure is similarly a valid purchase procedure for telecommunications services. This is first evident from Section 2157.004's reference to "telecommunications device, system, or service."

⁸ Contract and multiple contract award purchase procedures are explained in Sections 2156.001-2156.011.

⁹ The multiple contract award purchase procedure appears to be a reference to the "tie bids" authorized by Section 2156.010. The procedures applicable to contract awards at Sections 2156.001-2156.011, therefore, would apply.

¹⁰ Open market purchase procedures are outlined in Sections 2156.061-2156.066.

¹¹ Competitive sealed proposal procedures are outlined in Sections 2157.121-2157.126.

¹² Preapproved contract terms and conditions procedures are explained in Sections 2157.181-2157.184.

¹³ The competitive sealed proposal method also is outlined in Sections 2156.121-2156.128 and is applicable to purchases other than telecommunications services. Section 2156.130 states, "This subchapter does not affect Subchapter C, Chapter 2157." *Id.* § 2156.130. Subchapter C of Chapter 2157 establishes the competitive sealed proposal purchase procedure for "telecommunications device[s], system[s], or services[s] or automated information system[s]." *Id.* § 2157.121.

¹⁴ Section 2157.121's "competitive sealed bidding" apparently is a reference to the contract and multiple contract procedures.

¹⁵ Section 2157.121's reference to "informal competitive bidding" apparently is a reference to the open market method.

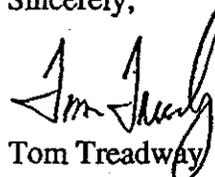
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Id. § 2157.004. Moreover, as with other chapters, Chapter 2157 establishes necessary definitions,¹⁶ one of which is “automated information system.” This definition does not render the chapter applicable to solely automated information systems. Chapter 2157 does mandate, however, that GSC or a state agency “shall purchase¹⁷ an automated information system through the catalog procedure provided by this subchapter” *Id.* § 2157.061 (*emphasis added*). In order to provide for such mandatory purchases, Chapter 2157 proceeds to establish certain criteria applicable to automated information systems. *See id.* §§ 2157.062, 2157.063, 2157.064(c-d), and 2157.066(a). Chapter 2157 also provides general requisites for the “telecommunications device, system or service” purchases. *See id.* §§ 2157.064(a-b), 2157.065, and 2157.066(b). The Act, therefore, authorizes use of the catalog purchase procedure for telecommunications services.

In summary, the State Purchasing and General Services Act authorizes GSC’s purchases of local exchange telecommunications service and interexchange telecommunications service for state agencies, whether or not the agencies are located in state-owned buildings. GSC is authorized to acquire shared tenant or like local exchange telecommunications service to the state agency tenants housed in state owned or leased buildings across the state, as GSC is the agency authorized to acquire and control the state’s buildings and property. GSC can conduct the purchases by means of the procedures established in the Act, including the catalog purchase procedure, and can backbill agencies for the services.

Please call me if I can provide any assistance or answer any questions concerning this matter.

Sincerely,



Tom Treadway
Executive Director
General Services Commission

TT:STP:csc

cc: Stephen T. Parker
Sarah Shirley
Rupaco T. González

¹⁶ See Chapter 2170 which provides definitions in the first section. Chapter 2170 establishes GSC as the state agency responsible for obtaining telecommunications services, *id.* § 2170.002, and manager of a system of telecommunications services for all state agencies, *id.* § 2170.051(a). Telecommunications services is defined as intercity communications facilities or services. *Id.* § 2170.001.

¹⁷ Section 2157.061 mandates use of the catalog procedure unless the commission or state agency determines the best value may be obtained from another authorized purchase method. *Id.* § 2157.061.