



Texas Council On Purchasing
From People With
Disabilities

Post Office Box 13047
Austin, Texas 78711-3047
(512) 463-3244

CHAIRMAN
ROBERT A. SWERDLOW, Ph.D.
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BOBBIE F. TEMPLETON
ARNOLD M. THORNER

RQ-0099-SC

August 6, 1999

The Honorable John Comyn
Attorney General of Texas
OFFICE OF ATTORNEY GENERAL
Price Daniels Building
209 W. 14th Street
Austin, Texas 78711

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Opinion Committee

RE: Request for Legal Opinion regarding whether lobbying restrictions under Texas law, Chapter 305, Government Code or under H.B. 1, General Appropriations Act, Article IX, §5, 75th Legislative Session apply to a Central Non-Profit Agency under state contract pursuant to Chapter 122, Human Resources Code?

And

Whether a federal Internal Revenue Code, § 501(c) (3) non-profit organization, under state contract pursuant to Chapter 122, Human Resources Code, can lobby public officials?

Dear General Comyn:

The Texas Council on Purchasing from People with Disabilities ("Texas Council") requests your assistance in interpreting aspects of federal and state law which will aide the Council in the performance of its duties. The Texas Council is made up of a nine-member body. Chapter 122 of the Human Resources Code outlines various powers and duties for the Texas Council which enable the Council to carry out the state's policy for the employment of the disabled. The Texas Council implements the state's policy for Texans with Disabilities by supporting a program of services and products manufactured or provided by such persons. The services and products produced are offered for sale to various state agencies and departments as well as political subdivisions by community rehabilitation programs ("CRP"). The Texas Council reviews and approves the quality of the products and services, as well as approves prices for these items to reflect changing market conditions. This program is referred to as the State Use or Set Aside program ("the program"). In 1998, the program conducted over \$48 million dollars in total sales.

The Texas Council was established to:

"further the state's policy of encouraging and assisting persons with disabilities to achieve maximum personal independence by engaging in useful and productive employment activities and, in addition, to provide state agencies, departments, and institutions and political subdivisions of the state with a method for achieving conformity with requirements of nondiscrimination and affirmative action employment matters related to persons with disabilities", Human Resources Code, §122.001.

Part of the Texas Council's responsibilities include seeking legislative changes to the statutes governing the program to ensure program improvements and opportunities for the disabled. Although the Texas Council receives no legislative appropriation, the Council members adhere to the requirements of General Appropriations Act, H.B. 1, Art. IX, §5, 76th Leg. Sess. at p. IX-44. This section relates to the legislative prohibition against providing political aid and legislative influence. In accordance with this section, the Texas Council provides information to Legislators and Legislative Committees upon their request.

The Texas Council meets quarterly and may schedule additional meetings as needed. Under §122.012(a), Human Resources Code, the Texas Council receives limited administrative support from the General Services Commission. The Texas Council cannot administer the day-to-day operations of the program on its own. Chapter 122 requires that the Texas Council contract with a central nonprofit agency ("CNA") to carry out the day to day functions of the program. TIBH serves as the current designated CNA under contract with the Texas Council. TIBH has been the only CNA for the program serving both the Texas Council and its predecessor, the Texas Committee on Purchases of Products and Services of Blind and Severely Disabled Persons, for over 20 years.

Section §122.019(a) of the Human Resources Code, sets forth a statutory list of duties that must be included in the contract between the Texas Council and the CNA. These duties include: (1) recruiting and assisting CRPs in the development and submission of applications for the selection of suitable products and services; (2) facilitate the distribution of orders among CRPs; (3) managing and coordinating the day-to-day operation of the program; and (4) promoting increased supported employment opportunities for persons with disabilities. In §122.019(b), the statute provides marketing and marketing support services, such as: (1) assistance to CRPs regarding solicitation and negotiation of contracts; (2) direct marketing of products and services to consumers; (3) research and development of products and services; (4) public relations activities to promote the program; (5) customer relations; (6) education and training; (7) accounting services related to purchase orders, invoices, and payments to CRPs; and (8) other duties designated by the council.¹

The Memorandum of Agreement ("MOU") between the Texas Council and TIBH identifies both the Council's duties and CNA's duties in Articles II & III respectively.²

While the statute clearly rests the day-to-day operations with the CNA, the overall legislative policy logically rests with the Texas Council. The Texas Council can establish criteria for the recognition and approval of CRPs. V.T.C.A., Human Resources Code §122.003(j). The Texas Council determines the fair market price of all products and services manufactured or provided by CRPs and must revise them periodically to reflect changing market conditions. V.T.C.A., Human Resources Code §122.007(a), (c). The Texas Council may adopt rules to carry out the "implementation, extension, administration or improvement of the program." V.T.C.A., Human Resources Code §122.013(a). While the MOU delegates the preparation of the annual report to the Governor, Lt. Governor and Speaker of the House to the CNA, it is the Texas Council that is required by law to report on the financial condition and policy aspects of the program. V.T.C.A., Human Resources Code §122.022(a), (b). It seems quite reasonable that the Texas Council can make suggestions and provide information to the Legislature for the improvement of this vital program given its statutory role in the process.

While TIBH carries out the day-to-day functions of the program such actions do not include legislative lobbying. TIBH is a 501(c)(3) corporation.³ It appears to have hired Lobbyists to attend to legislation associated with the set aside program,⁴ which includes the restructuring of the Texas Council itself.⁵ More importantly, such lobbying by a nonprofit corporation appears prohibited by the federal tax laws. Under the Internal Revenue Code section 501(c)(3) charitable corporations may apply and attain income tax exemption status if "no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." See, Internal Revenue Code, §501(c)(3). By virtue of the state set aside program, TIBH, as the CNA, receives taxpayer dollars as part commission, money paid by state agencies for the goods and services provided by CRPs as mandated by Chapter 122, Human Resources Code. Whether this is appropriate and lawful is the subject of the Texas Council's inquiry.


If a substantial part of the organization's activities substantially involve influencing legislation then their application for tax exemption will be denied or their tax-exempt status revoked. See Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983).⁶ However, the crux of the question is what is "substantial" in the face of other activities engaged in by the organization.

Apparently, there is no brightline test that has been applied, but for the most part the IRS will look at all of the activities of an organization and make a determination based on its findings. There have been revocations of tax exempt status for single instances of engaging in unauthorized activities as set forth in 501(c)(3). In part, the rationale of interpreting the 501(c)(3) strictly is that the tax exemption is to benefit public charities and activities as a form of public trust. Thus some organizations engaging in lobbying may be viewed as promoting their own interest and not public interest.

TIBH has alternative means to have its views expressed. First, legislative committees can invite testimony regarding the set aside program. Such views and information from a wide audience allows such committees to better assess public programs. Second, registered and authorized groups, pursuant to Chapter 305 of the Government Code, may exercise those rights to petition the government on behalf of citizens and special organized groups. TIBH is a member of the State Use Program Association and appears able to have a wide range of views known and lobbied for through this organization.⁷ Third, as private citizens, TIBH officers and employees may also contact legislators to express their views.

There is also a practical aspect to the Texas Council's concerns. In the event that the Texas Council pursues a Legislative agenda on behalf of the set aside program while the CNA pursues an agenda contrary to the Texas Council, it can produce poor results or no results. This does not inure to the benefit of the program or the Texas Council's responsibility to exercise proper oversight.

Sincerely,



Robert A. Swerdlow, Ph. D. ^{E.L.}
Chairman
Texas Council on Purchasing from People with Disabilities

Enclosures

- Cc: Meg Pfluger, Council Member
Texas Council on Purchasing from People with Disabilities
- Bob Templeton, Council Member
Texas Council on Purchasing from People with Disabilities
- John Luna, Council Member
Texas Council on Purchasing from People with Disabilities
- Dr. Gwen Morrison, Council Member
Texas Council on Purchasing from People with Disabilities
- Byron Johnson, Council Member
Texas Council on Purchasing from People with Disabilities