



THE UNIVERSITY OF TEXAS SYSTEM
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Vice Chancellor and General Counsel

RQ-0428-GA

December 20, 2005

VIA HAND DELIVERY

Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
300 W. 15th Street
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-44534-05

I.D. # 44534

Re: Request for an Opinion regarding TEX. CONST. art. XVI, §21 related to the Procurement of Printing Services

Dear General Abbott:

For a number of years, the procurement departments at institutions of The University of Texas System (UT System) and Texas A&M University System (Texas A&M System) have questioned the necessity of requiring competitive bids in every instance in which printing services are purchased.

Our policy has been one of strict adherence to the requirements set out in TEX. CONST. art. XVI, §21 which provides, in relevant part:

All stationery, printing, fuel used in the legislature and departments of the government other than the judicial department, printing and binding of the laws, journals, and department reports, and all other printing and binding and the repairing and furnishing of the halls and rooms used during meetings of the legislature and in committees, except proclamations and such products and services as may be done by handicapped individuals employed in nonprofit rehabilitation facilities providing sheltered employment to the handicapped in Texas, shall be performed under contract, to be given to the lowest responsible bidder, below such maximum price and under such regulations as shall be prescribed by law.

TEX. CONST. art XVI, §21 (1876, amended 1978) (emphasis added).

The term "printing" is not specifically defined within Article XVI, Section 21. TEX. CONST. (1876, amended 1978). However, in *Director of the Department of Agriculture and*

Environment v. Printing Industries Association of Texas, the Texas Supreme Court stated that "[t]he framers knew and understood the term 'printing' in its broadest sense, i.e. a means of word processing or graphic reproduction." *Id.*, 600 S.W.2d at 271 n.7. It, therefore, appears that Article XVI, Section 21 applies to both printing and copying services and requires that all contracts for such services be awarded to the "lowest responsible bidder."

A strict interpretation has led to questionable results. One of our employees was traveling in order to make a seminar presentation and needed extra copies of the material to be distributed to participants. He had the hotel run the necessary copies and was charged less than \$10.00. His request for reimbursement was questioned because he had not secured three competitive bids before asking the hotel to make the copies.

Recently, the Texas Building and Procurement Commission (TBPC) promulgated rules that appear to us to be well-grounded in common sense. Breaking with longstanding tradition, Section 2.21.3 of the TBPC Procurement Manual, governing Procedures for Procuring Printing and Copying, now provides as follows:

This procedure applies to all printing, and to all document reproduction that is not incidental copying or performed by your agency's Quick Copy Center.

1. Collect the following:
 - a. Detailed SOW (Statement of Work) for the job.
 - b. Reasonable estimate of the purchase price.
 - c. Other requirements such as delivery date.
2. *If the estimated purchase price does not exceed \$5,000, you are not required to purchase your print job using a competitive process. Follow your agency's policies regarding purchases that do not exceed \$5000.*^[8]
3. If the estimated purchase price exceeds \$5,000 but does not exceed \$25,000 you may:
 - Purchase the job directly from a State franchise print shop.^[9] If your agency is located outside of Travis County, take special note of freight expenses and delivery time requirements when evaluating this option.
 - Purchase the job directly from TCI.^[10]
 - Purchase the job from a TXMAS contract.
 - Purchase the job using the Open Market Informal Purchase procedure provided that you give first preference to TCI.

(emphasis added)

In discussions with TBPC, Tex. Gov't Code §2155.132(e) was cited as authority to support an exception to what appears to be a clear constitutional mandate. Section 2155.132(e) provides:

(e) Competitive bidding, whether formal or informal, is not required for a purchase by a state agency if the purchase does not exceed \$2,000, or a greater amount prescribed by commission rule.

Keying in on the language in the constitutional provision — "... and under such regulations as shall be prescribed by law." — TBPC concluded that it is authorized to promulgate the exception to the competitive bidding requirement for purchases under \$5,000.

UT System and Texas A&M System endorse TBPC's construction and applaud the common sense and cost-effective approach represented by the TBPC Procurement Manual. If institutions of higher education were governed by TBPC purchasing policy, that would end the matter and we would inform our purchasing personnel to comply with Section 2.21.3.

Purchases by institutions of higher education, however, are not regulated by TBPC but instead are governed by Tex. Educ. Code §§51.9335, 73.115, and 74.008 which authorize the acquisition of goods and services "...by the method that provides the best value to the institution...." Various procurement methods are permitted, including competitive bidding. One factor institutions may consider in determining best value includes "...any other relevant factor that a private business entity would consider in selecting a vendor...." In addition, Section 51.9335 states "[a]n institution of higher education may, but is not required to, acquire goods or services as provided by Chapters 2155, 2156, 2157, 2158, 2167 and 2170, Government Code." Tex. Educ. Code §§73.115 and 74.008 permit certain institutions to "... adopt rules and procedures for the acquisition of goods or services." In addition, Tex. Educ. Code §§65.31 and 85.21 permit the Board of Regents of UT System and the Texas A&M System to promulgate rules for the operation, control and management of their respective Systems and institutions.

Because the TBPC rule allowing procurement of printing services under \$5,000 by means other than competitive bidding is promulgated under Tex. Gov't Code Chpt. 2155 and because institutions of higher education are also authorized to promulgate rules and procedures for the operation, control, and management of those institutions (including for the acquisition of goods or services), we request your formal opinion indicating that institutions of higher education may promulgate rules setting a threshold dollar amount under which printing services may be procured without a competitive bidding process.

We believe such an interpretation would be consistent with the language of Article XVI, Section 21, TEX. CONST., which contemplates that reasonable "regulations as prescribed by law" would be necessary to implement the intent of the provision. Such an interpretation would also be consistent with the Texas Supreme Court's opinion in *Director v. Printing Industries of Texas*, 600 S.W.2nd 265, 268 (Tex., 1980), in which Justice Denton observed, after a careful analysis of the history and legislative intent of the competitive bidding requirement concerning printing:

The framers could not have envisioned the rapid growth of the State's word processing needs, nor the technical advances in the printing industry. Regardless of that fact, they did not intend to frustrate administrative expediency and economy by this provision, but rather, they intended to promote such virtues....

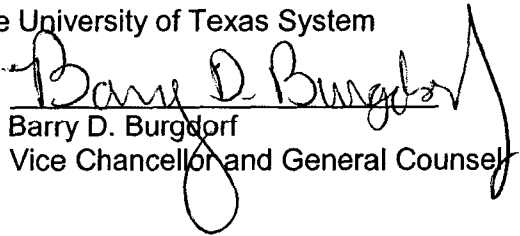
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We believe that a reasonable exception to a strict and absolute competitive bidding requirement, such as the rule promulgated by the TBPC, fully promotes the virtues of administrative expediency and economy and believe you will concur that institutions of higher education can promulgate similar rules to create a similar exception.

Sincerely,

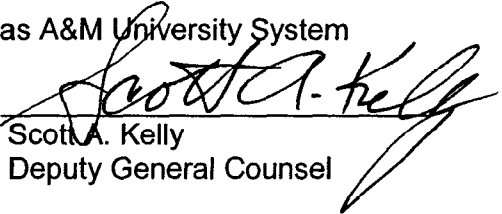
The University of Texas System

By:


Barry D. Burdorf
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Texas A&M University System

By:


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