



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 15, 1995

Mr. Carl Mullen
Acting Executive Director
General Services Commission
P.O. Box 13047
Austin, Texas 78711-3047

Letter Opinion No. 95-049

Re: Whether the General Services Commission may enter a seven-year contract with the City of Austin for the provision of electric services to state buildings and facilities in Austin (ID# 35204)

Dear Mr. Mullen:

You request our opinion as to whether, on behalf of all state agencies, the General Services Commission (the "commission") may enter a seven-year contract with the City of Austin for the provision of electric services to state buildings and facilities located in Austin. You have not submitted a copy of the proposed contract for our review. Indeed, this office does not construe contracts. Attorney General Opinions DM-192 (1992) at 10, M-697 (1987) at 6. We do, on the other hand, opine on a public entity's authority to enter into a particular contract, if we can answer the question as a matter of law. See Attorney General Opinion DM-192 (1992) at 10 n.14. We believe that we may resolve the issue you raise as a matter of law.

The State Purchasing and General Services Act, V.T.C.S. article 601b,¹ mandates that the commission purchase or otherwise acquire all services for all state agencies. V.T.C.S. art. 601b, § 3.01(a). Although section 3.01 defines the term "services" to exclude services of public utilities, *see id.* § 3.01(c)(4), the City of Austin's utility company is municipally owned. The Public Utility Regulatory Act of 1995, Act of Mar. 29, 1995, 74th Leg., R.S., ch. 9, § 1, 1995 Tex. Sess. Law Serv. 31, 31, defines "public utility" to exclude a municipal corporation.² Act of Mar. 29, 1995, 74th Leg., R.S., ch. 9,

¹The Seventy-fourth Legislature nonsubstantively codified the State Purchasing and General Services Act as title 10, subtitle D of the Government Code. See Act of April 21, 1995, 74th Leg., R.S., ch. 41, § 6, 1995 Tex. Sess. Law Serv. 324, 420. The codification becomes effective September 1, 1995. *Id.* § 8, at 420. The enactment also repeals V.T.C.S. article 601b, effective September 1, 1995. See *id.* § 5, at 420.

²The Public Utility Regulatory Act of 1995 is a nonsubstantive revision of article 1446c, V.T.C.S. Act of Mar. 29, 1995, 74th Leg., R.S., ch. 9, § 3(a), 1995 Tex. Sess. Law Serv. 31, 87. The legislature repealed V.T.C.S. article 1446c. See *id.* § 2(a), at 87.

§ 1, 1995 Tex. Sess. Law Serv. 31, 33, 46, 63 (sections 1.004, 2.001, and 3.001(3)). Thus, section 3.01(a) of article 601b authorizes the commission to contract with the City of Austin for the provision of electricity to state buildings and facilities located in Austin.³

Nothing in the State Purchasing and General Services Act limits the duration of a contract the commission may enter. Moreover, we are unaware of any other provision, statutory or constitutional, that would limit the duration of a contract the commission may execute in these circumstances. Article VIII, section 6 of the Texas Constitution prohibits an appropriation for longer than two years. In *Texas Public Building Authority v. Mattox* the Texas Supreme Court concluded that article VIII, section 6 does not forbid the execution of a contract that “does *not* bind the state to purchase a fixed quantity of goods or services each year, but rather which binds the state only to purchase those quantities which within its sole discretion it determines it needs.” *Texas Pub. Bldg. Auth. v. Mattox*, 686 S.W.2d 924, 929 (Tex. 1985); see also *City of Big Spring v. Board of Control*, 404 S.W.2d 810, 814-15 (Tex. 1966); *Charles Scribner's Sons v. Marrs*, 262 S.W. 722, 724-26 (Tex. 1924); Attorney General Opinion O-1627 (1940) at 5.

As an example of a contract not prohibited by article VIII, section 6, the *Texas Public Building Authority* court cited to the contract at issue in *City of Big Spring v. Board of Control*, 404 S.W.2d 810 (Tex. 1966). In *City of Big Spring* the Supreme Court reviewed a contract whereby the City of Big Spring agreed to provide water to a local state hospital at a fixed rate per gallon as long as the state hospital remained at its current site. *City of Big Spring*, 404 S.W.2d at 811.

The contract about which you ask, like the contract at issue in *City of Big Spring*, has a duration longer than two years. Under the Supreme Court's decisions in *Texas Public Building Authority* and *City of Big Spring*, such a contract does not contravene article VIII, section 6 of the constitution if the contract involves the provision of a commodity at a specified rate per unit the state uses. We assume the contract about which you ask requires the City of Austin to provide electricity to the state, in return for which the state will pay the City of Austin at a rate, specified in the contract, per unit of electricity the state uses. Consequently, we believe the contract about which you ask does not contravene article VIII, section 6 of the constitution.

We also note that article III, section 49 of the Texas Constitution prohibits, except in certain circumstances irrelevant here, the creation of debt “by or on behalf of the State.” The making of a contract for the provision of a utility service for a number of years does not create a debt for purposes of article III, section 49 where the state's liability arises upon its use of the utility service during each year. See *City of Big Spring*, 404 S.W.2d at 815 (quoting *City of Tyler v. L.L. Jester & Co.*, 78 S.W. 1058 (1904)). Assuming that the contract about which you ask makes the state liable for electricity as

³In 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.”

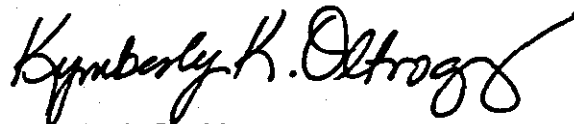
the state uses the service, we believe the contract does not contravene article III, section 49 of the constitution.

In sum, we believe the commission may enter the seven-year contract you have described with the City of Austin for the provision of electric services to state buildings and facilities located in Austin. As we have indicated, we premise our conclusion on two assumptions: first, that the contract involves the provision of electricity at a specified rate; and second, that the contract about which you ask makes the state liable for electricity as the state uses the service.

S U M M A R Y

The General Services Commission may enter a seven-year contract with the City of Austin for the provision of electric services to state buildings and facilities in Austin so long as the contract involves the provision of electricity at a specified rate per unit the state uses and the contract makes the state liable for electricity only as the state uses the service.

Yours very truly,



Kimberly K. Oltrogge
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Opinion Committee