

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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NASHVILLE, TENNESSEE 37243

November 19, 2004

Opinion No. 04-166

TBE Program

QUESTIONS

1. Does a “public property” as defined at Tenn. Code Ann. § 71-4-502(4) have the authority to secure vending services without recognizing the priority found at Tenn. Code Ann. § 71-4-502(3)? If so, under what circumstances?
2. If a public property has entered into a contract with a vending service provider without, as required by the statutory priority, giving the right of first refusal to the Department of Human Services (“DHS”), can DHS require the public property to terminate the contract if DHS wishes to exercise its priority or, in lieu of DHS’ direct or contracted operation of the vending site, can DHS require a negotiated commission rate with the vending service provider and require that commissions be paid to DHS?
3. Can DHS’ Services for the Blind program contract with a private vending machine management company to arrange for third-party vending and to collect commissions from the operation of vending machines on its behalf?
4. If vending is provided through a third party, does DHS have the authority to set the prices of products to be vended in order to ensure an adequate commission to be generated for the unassigned fund under Tenn. Code Ann. § 71-4-504?

OPINIONS

1. No. Only entities excluded from the definition of “public property” may secure vending services without recognizing this priority. Entities encompassed within the statutory definition of “public property” are subject to the priority found at Tenn. Code Ann. § 71-4-502(3) and must provide DHS notice and an opportunity to exercise its right of first refusal or, with regard to cafeterias, to submit a competitive proposal for the operation of the proposed cafeteria.
2. The statute does not specify any specific remedies for a public property’s failure to recognize the priority established under the statute. Instead, the statute includes a dispute resolution mechanism for disputes that may arise under its provisions between DHS and the management of

public property which DHS may initiate to redress issues related to the failure of a public property to recognize the statutory priority.

3. Yes. DHS has specific statutory authority “to make the necessary arrangements to ensure that vending machine services are provided and that the vending machines are properly maintained.” Tenn. Code Ann. § 71-4-504(a). Therefore, subject to any regulations or restrictions related to state contracts, DHS’ Services for the Blind program may contract with a private vending machine management company to arrange for third-party vending and to collect commissions from the operation of vending machines on its behalf.

4. If DHS elects to contract with third parties for the provision of vending services at unassigned vending facilities on public property, both parties’ authority, including the authority to set the prices of products to be vended, would be determined by reference to the relevant contract.

ANALYSIS

1. The questions posed by the opinion request relate to the same facts and law that were the subject of Op. Tenn. Att’y Gen. 04-083 (April 30, 2004). Here, as there, the subject of the opinion request is a letter of understanding between Tennessee Business Enterprises (“T.B.E.”) and Visinity L.L.C. (“Visinity”) and letters sent by Visinity to several counties in Tennessee concerning vending machine operations in county facilities. T.B.E. is a unit of DHS’ Services for the Blind and Visually Impaired Division, which administers the statutory program that gives blind vendors priority in providing vending services on public property under the Randolph Sheppard Act, 20 U.S.C. § 107 *et seq.*, and Tenn. Code Ann. § 71-4-501 *et seq.* Tenn. Code Ann. § 71-4-502(2). Your questions also relate only to vending services on property owned by county and local governments, so Tenn. Code Ann. § 71-4-501 *et seq.* governs.¹

Also attached to the opinion request are several letters, including a letter from DHS advising federal, state, and local government property management officials that Visinity had been engaged to act as its management agent for matters governed by the Randolph Sheppard Act, 20 U.S.C. § 107 *et seq.*, and Tenn. Code Ann. § 71-4-501 *et seq.*, and requesting that the property managers cooperate with Visinity, grant Visinity access to their vending machines locations, and identify for Visinity all vendors operating vending machines on their property. Also provided is a letter from DHS to vending companies servicing vending machines in federal, state, and local government facilities, which included this same information and requested that they provide Visinity certain information concerning their operations and pay Visinity “all amounts accruing or payable to the State pursuant to the statutory priorities with respect to vending machines that you operate in a government facility.” In addition, Visinity’s letters to the Roane County Sheriff’s Department, Gibson County Courthouse, and Decatur County Sheriff’s Department have been provided, advising

¹The Randolph Sheppard Act only governs the provision of vending services on federal property or property occupied by a federal agency or instrumentality. 20 U.S.C. § 107 *et seq.*

that the vendors servicing the vending equipment in these county facilities would begin remitting to Visinity, instead of to the county or facility, the commissions generated from vending machine sales in these county facilities.

The first question is whether a “public property,” as defined at Tenn. Code Ann. § 71-4-502(4), has the authority to secure vending services without recognizing the priority found at Tenn. Code Ann. § 71-4-502(3) and, if so, under what circumstances. Only entities excluded from the definition of “public property” may secure vending services without recognizing this priority. Entities encompassed within the statutory definition of “public property” are subject to the priority found at Tenn. Code Ann. § 71-4-502(3) and must provide DHS notice and an opportunity to exercise its right of first refusal or, with regard to cafeterias, to submit a proposal for the operation of the proposed cafeteria.

Tenn. Code Ann. § 71-4-502(4) defines “public property” to include “all property owned or leased by the state of Tennessee, any county, municipality, or any other entity which is created by act of the general assembly to perform any public function.” Excluded from this definition are primary and secondary schools, and entities created under Title 42 (Aeronautics) and their operations. *Id.* In addition, in 1996, the legislature expanded this exclusion to include institutions governed by the University of Tennessee system, the state university and community college system, and their operations, except for vending facilities already operating at these institutions on April 29, 1996, vending facilities in any new structures on their campuses, and at least one vending facility on any new campus developed by either of these systems. *Id.*, 1996 Tenn. Pub. Acts 829. Therefore, based on this definition, all of these excluded entities have the authority to secure vending services without recognizing the priority found at Tenn. Code Ann. § 71-4-502(3), with the exception of the specified vending facilities in the University of Tennessee, state university, and community college systems.

The priority found at Tenn. Code Ann. § 71-4-502(3) is the right of the Department of Human Services or its successor, as the state licensing agency under the Randolph-Sheppard Act, 20 U.S.C. §107 *et seq.*, “to establish on any public property a vending facility² to be operated by a blind individual.” This priority applies to all existing, altered, or new buildings, facilities, or grounds encompassed within the definition of “public property” set forth above. Tenn. Code Ann. § 71-4-502(3). Pursuant to this priority, whenever a new building or facility has been constructed on public property within the state, or when existing contracts have expired or been changed in any way, notice to DHS has been required. Tenn. Code Ann. §§ 71-4-502(4) and 71-4-503(a). DHS was then required to investigate and survey the property “to determine if, in its judgment, the location is suitable for one (1) or more vending facilities.” Tenn. Code Ann. § 71-4-503(a). DHS then:

²Tenn. Code Ann. § 71-4-502(5) defines “vending facility” as all locations, structures, or spaces, including automatic vending machines, cafeterias, catering services, food concession vehicles, cart services, and counters, “which may sell foods, beverages, confections, newspapers, periodicals, tobacco products, and other articles and services,” whether dispensed by machine or attendant.

shall have the right of first refusal and the exclusive right to the operation of any and all vending facilities on any public property which it determines are capable of being operated by a blind individual which it licenses, or by an individual who may be operating the facility as a temporary manager until a licensed blind individual can assume the operation of the vending facility.

Tenn. Code Ann. § 71-4-502(3); *see also* Tenn. Code Ann. § 71-4-503. If, after conducting a survey, DHS determined that there was:

not sufficient population to support an on-site manager but the public property management desire[d] vending machine services, the department shall have the right to place vending machines on the property and to make the necessary arrangements to ensure that vending machine services are provided and that the vending machines are properly maintained.

Tenn. Code Ann. § 71-4-504(a).

The priority applicable to vending facilities on public property includes cafeterias but with some limitations. Tenn. Code Ann. § 71-4-505(a). As with other vending facilities on public property, if a new cafeteria is to be constructed and/or an existing cafeteria contract expires, DHS must be notified pursuant to § 71-4-503 and afforded the opportunity to submit a proposal for the operation of the proposed cafeteria. Tenn. Code Ann. § 71-4-505(b). If DHS' proposal:

when considered with all other proposals, is found to be competitive in terms of quality of service, pricing of merchandise, and the rate of commission and/or the rental to be paid, then a priority shall be granted to [DHS] and the cafeteria operation shall be awarded to [DHS]. [DHS'] proposal will not be considered competitive if its proposed payment of annual commissions and/or rental fees is not within two percent (2%) of that submitted by an organization which would otherwise be awarded the cafeteria operation. Nothing in this section shall be construed to allow the property management to take any action regarding an existing facility to defeat an already existing facility.

Id.

The priority did not “supercede any cooperative agreements . . . in effect between [DHS] and public property management on July 1, 1994,” when the statute was enacted related to the operation of vending facilities on public property. Tenn. Code Ann. § 71-4-506. In addition, DHS may enter into less restrictive agreements if, in DHS' judgment, such agreements are in the best interest of the blind vendors' program. *Id.*

2. The opinion request also asks whether, if a public property has entered into a contract with a vending service provider without, as required by the statutory priority, giving the right of first refusal to DHS, DHS can require the public property to terminate the contract if DHS wishes to exercise its priority or, in lieu of DHS' direct or contracted operation of the vending site, DHS can require a negotiated commission rate with the vending service provider and require that commissions be paid to DHS.

The statute does not contain any specific remedies for a public property's failure to recognize the priority established under the statute. Instead, the statute includes a dispute resolution mechanism for disputes that may arise between DHS and the management of public property "concerning any matter contained in this part." Tenn. Code Ann. § 71-4-507. Either party may initiate an administrative hearing by filing a complaint setting forth the dispute with the secretary of state. Tenn. Code Ann. § 71-4-507(a). The secretary of state lacks jurisdiction to hear complaints concerning the qualifications or status of a licensed or temporary manager who is operating under a license or agreement of the department. Tenn. Code Ann. § 71-4-507(b). The secretary of state also lacks jurisdiction to hear or establish damages for or against any person, any officer or employee of the state, or any public property's governing body or its officers or employees. *Id.* With respect to all other disputes arising under this statute, the parties are entitled to an administrative hearing before an administrative law judge ("ALJ") appointed by the secretary of state, appeal of the ALJ's initial decision to the secretary of state, and judicial review of the secretary of state's final order under the Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-301 *et seq.* *Id.* DHS may utilize this process to require the public property to recognize the statutory priority or to seek other appropriate remedies.

3. The next question is whether DHS' Services for the Blind program can contract with a private vending machine management company to arrange for third-party vending and to collect commissions from the operation of vending machines on its behalf. DHS and its commissioner are charged with the administration or supervision of all public welfare activities of the state, including the Services for the Blind program. Tenn. Code Ann. §§ 71-1-105 and 71-1-107. As the designated state licensing agency under the Randolph-Sheppard Act, 20 U.S.C. § 107 *et seq.*, and Tenn. Code Ann. § 71-4-501 *et seq.*, DHS is responsible for providing vending services on public property. Tenn. Code Ann. § 71-4-502(2). DHS has specific statutory authority "to make the necessary arrangements to ensure that vending machine services are provided and that the vending machines are properly maintained." Tenn. Code Ann. § 71-4-504(a). Therefore, subject to any regulations or restrictions related to state contracts, DHS' Services for the Blind program may contract with a private vending machine management company to arrange for third party vending and to collect commissions from the operation of vending machines on its behalf.

4. Finally, the request asks whether, if vending is provided through a third party, DHS has the authority to set the prices of products to be vended in order to ensure an adequate commission to be generated for the unassigned fund under Tenn. Code Ann. § 71-4-504. As previously stated, DHS and its commissioner are charged with the administration or supervision of all public welfare activities of the state, including the Services for the Blind program. Tenn. Code Ann. §§ 71-1-105 and 71-1-107. As the designated state licensing agency under the Randolph-

Sheppard Act, 20 U.S.C. § 107 *et seq.*, and Tenn. Code Ann. § 71-4-501 *et seq.*, DHS is responsible for providing vending services on public property. Tenn. Code Ann. § 71-4-502(2). DHS has specific statutory authority “to make the necessary arrangements to ensure that vending machine services are provided and that the vending machines are properly maintained.” Tenn. Code Ann. § 71-4-504(a). With regard to vending facilities on public property operated by a blind manager, DHS has delegated by rule the authority to set the prices of products to be vended to the manager but has retained the right to intervene if the manager fails to comply with policy and to resolve disputes. Tenn. Comp. R. & Regs. § 1240-6-9-.03(5) (Aug. 1998). If DHS elects to contract with third parties for the provision of vending services at unassigned vending facilities on public property, as DHS has contracted for certain services with Visinity, both parties’ authority, including the authority to set the prices of products to be vended, would be determined by reference to the relevant contract.

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