

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

April 30, 2004

Opinion No. 04-083

Blind Vendor Contract

QUESTIONS

1. Are Visinity's actions with regard to counties, as described in the enclosed letters, in compliance with their contract and with applicable law?
2. What actions must Visinity take, and what documentation must be made, in order for Visinity to be entitled to receive commissions from vending machine sales on county property? For example, is an on-site visit required?
3. Can Visinity demand the commissions from an existing vending contract pursuant to which a county currently has vending machines, or must they wait until the contract expires or is modified?
4. Does the Department/Visinity have a right to require the county to have vending machines on its property, or may the county have all vending machines removed from the property?
5. Must the county furnish the space, the electricity, and other utility services free of charge for the vending machines placed by the Department/Visinity, or may the county charge a reasonable fee for such space and/or utility services?
6. When Visinity is operating vending machines on county owned property, what is required of Visinity with regard to the operation of the vending machines? For example, is Visinity required to ensure that the machines are kept filled, properly serviced, maintained, and in good working order? If not, who is responsible for this?
7. Does the Department and/or Visinity maintain liability insurance which would indemnify the county in the event that someone is injured in connection with the use of the vending machines? Can the county require such liability insurance?

OPINIONS

1. Visinity's letters to the Roane County Sheriff's Department, Scott County Juvenile Center, Scott County Highway Department, Scott County Courthouse, Gibson County Courthouse, and Decatur County Sheriff's Department, which you attached to the opinion request, lack sufficient information to determine whether Visinity's actions with regard to counties, as described in these letters, are in compliance with its letter of understanding with Tennessee Business Enterprises ("T.B.E."), a unit of the Tennessee Department of Human Services' ("DHS") Services for the Blind and Visually Impaired Division, and with applicable law.

2. For Visinity to be entitled to receive commissions from vending machine sales on county property, T.B.E. or Visinity, as T.B.E.'s agent, must have conducted a survey and determined that the county property lacked sufficient population to support an on-site manager but that the public property management desired vending machine services. T.B.E. or Visinity would then have the right to place vending machines on the property and arrange for vending services and maintenance.

3. Generally, T.B.E. or Visinity must wait until an existing contract expires or is modified before undertaking to provide vending services on county property. However, the county has an affirmative obligation to notify T.B.E. when existing contracts expire or are modified in any way, as required by the applicable statute, which became effective in 1994.

4. No. Neither T.B.E. nor Visinity have a right to require the county to have vending machines on county property. The county may have all vending machines removed from its property.

5. Yes. The county must furnish the space, the electricity, and other utility services free of charge for the vending machines placed by DHS or Visinity.

6. The letter of understanding between T.B.E. and Visinity requires that Visinity "obligate each independent contractor that it engages to operate vending machines" to "service, fill and maintain its vending machines in accordance with prevailing standards in the vending machine industry."

7. The letter of understanding between T.B.E. and Visinity requires that Visinity "obligate each independent contractor that it engages to operate vending machines" to "carry insurance coverages which are regular and customary in the vending machine industry," but does not specify what that coverage is or whether it would indemnify the county if someone were injured in connection with the use of the vending machines. Neither the statute nor the letter of understanding addresses the county's ability to require such liability insurance.

ANALYSIS

1. Your questions relate to 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 the Tennessee Department of Human Services’ (“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). As your questions relate only to vending services on county property, Tenn. Code Ann. § 71-4-501 *et seq.* governs.¹

You attached to your opinion request 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. Visinity’s letters to the Roane County Sheriff’s Department, Scott County Courthouse, Gibson County Courthouse, and Decatur County Sheriff’s Department advised 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. Visinity’s letters to the Scott County Juvenile Center and Scott County Highway Department advised that the vend price for soda at these facilities would be increased to keep pace with increased sales taxes and manufacturers’ prices.

You asked whether Visinity’s actions with regard to the counties, as described in these letters, complied with their contract and with applicable law. This question cannot be answered based on these letters, as the letters do not address whether a contractual relationship existed between the counties and the vendors providing their vending machine services, whether Visinity had a contractual relationship with those same vendors, or whether the counties notified DHS when any existing contracts were terminated or modified.

Since 1994 when Tenn. Code Ann. § 71-4-501 *et seq.* was codified, whenever a new building or facility has been constructed on public property, including county 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). If DHS determined that the location was suitable for a vending facility, it could “exercise its priority to establish such a vending facility.” *Id.* If DHS exercised its priority under this part:

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.*

it shall have the right to establish such a vending facility, and it shall provide the necessary alterations, plumbing and electrical services, the necessary equipment, merchandise, a licensed or temporary manager, and the appropriate supervision of the manager. The public property management shall cooperate with the department in whatever manner necessary in order for it to carry out the provisions of this part. The space for the vending facilities and utilities shall be provided at no cost; provided, that the cost of telephone service shall not be the responsibility of the public property management. . . .

Tenn. Code Ann. § 71-4-503(b). 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 income generated from the vending machines placed under the provisions of this section shall accrue to the unassigned funds held by the department for its blind vendors.” Tenn. Code Ann. § 71-4-504(b).

The letter of understanding between T.B.E. and Visinity relates to vending services provided at locations where there is no licensed blind vendor assigned as manager. Pursuant to this letter of understanding, Visinity, on behalf of T.B.E., may “operate, or provide for the operation, of vending machines in available unassigned vending locations” using independent contractor vending machine operators, “identify and collect revenues due T.B.E. pursuant to the statutory priorities,” provide detailed reporting and make recommendations to enhance T.B.E.’s vending related revenues, “survey and audit unassigned facilities,” and “provide consulting and advisory services to T.B.E. with regards to its vending program.” The letter of understanding also requires Visinity to notify T.B.E. in writing when it becomes aware of any vending opportunities.

Accordingly, Visinity’s actions, as described in the letters attached to the opinion request, appear to comply with the letter of understanding between T.B.E. and Visinity. However, these letters contain insufficient information to determine whether Visinity’s actions comply with the applicable law, as they do not address whether a contractual relationship existed between the counties and the vendors providing their vending machine services, whether Visinity had a contractual relationship with those same vendors, or whether the counties notified DHS when any existing contracts were terminated or modified.

2. You asked what actions Visinity must take, and what documentation must be made, in order for Visinity to be entitled to receive commissions from vending machine sales on county

property. As discussed above, for this to occur, T.B.E. or Visinity, as T.B.E.'s agent, must have conducted a survey and determined that the county property lacked sufficient population to support an on-site manager but that the public property management desired vending machine services. T.B.E. or Visinity would then have the right to place vending machines on the property and arrange for vending services and maintenance. Tenn. Code Ann. § 71-4-504(a).

3. You also asked whether Visinity could demand the commissions from an existing vending contract pursuant to which a county currently has vending machines, or whether they must wait until the contract expires or is modified. Based on the foregoing, T.B.E. or Visinity must generally wait until an existing contract expires or is modified before undertaking to provide vending services on county property. However, that requirement could be subject to challenge if the county has failed to comply with its affirmative obligation under the statute to notify T.B.E. when existing contracts expire or are modified in any way. Tenn. Code Ann. § 71-4-503(a).

4. You asked whether the Department/Visinity had the right to require the county to have vending machines on its property or whether the county could have all vending machines removed from the property. As set forth above, if, after conducting its survey, T.B.E. determines that the facility lacks sufficient population to support an on-site manager, it must then determine whether the public property management desires vending machine services. Tenn. Code Ann. § 71-4-504(a). If the public property management desires vending machine services, the department then has the right to place vending machines on the property and to make the necessary arrangements to ensure that vending machine services are provided. *Id.* However, neither T.B.E. nor Visinity has a right to require the county to have vending machines on county property. The county may have all vending machines removed from its property.

5. You also asked whether the county must furnish the space, the electricity, and other utility services free of charge for the vending machines placed by the Department/Visinity or whether the county could charge a reasonable fee for such space and/or utility services. The statute specifically requires that the space for the vending facilities and utilities be provided at no cost. Tenn. Code Ann. § 71-4-503(b).

6. You asked what was required of Visinity with regard to the operation of vending machines on county-owned property. The letter of understanding between T.B.E. and Visinity requires that Visinity obligate the independent contractors engaged to operate vending machines to install and operate those vending machines in accordance with all applicable laws; carry insurance coverages which are regular and customary in the vending machine industry; service, fill and maintain the vending machines in accordance with prevailing industry standards; pay any and all taxes and fees imposed upon it under any federal, state or local law, ordinance, regulation or code with regard to the ownership, use or operation of its vending machines; and pay Visinity commissions.

7. You also asked whether the Department and/or Visinity maintained liability insurance which would indemnify the county in the event that someone were injured in connection with the

use of the vending machines and whether the county could require such liability insurance. As discussed above, the letter of understanding between T.B.E. and Visinity requires that Visinity obligate the independent contractors engaged to operate vending machines to carry insurance coverages which are regular and customary in the vending machine industry. The letter of understanding does not specify what insurance coverage is regular and customary in the vending machine industry or whether it would indemnify the county if someone were injured in connection with the use of the vending machines. Neither the statute nor the letter of understanding addresses the county's ability to require such liability insurance.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

PAMELA A. HAYDEN-WOOD
Senior Counsel

Requested by:

Honorable Don McLeary
State Senator
11-A Legislative Plaza
Nashville, TN 37243-0227