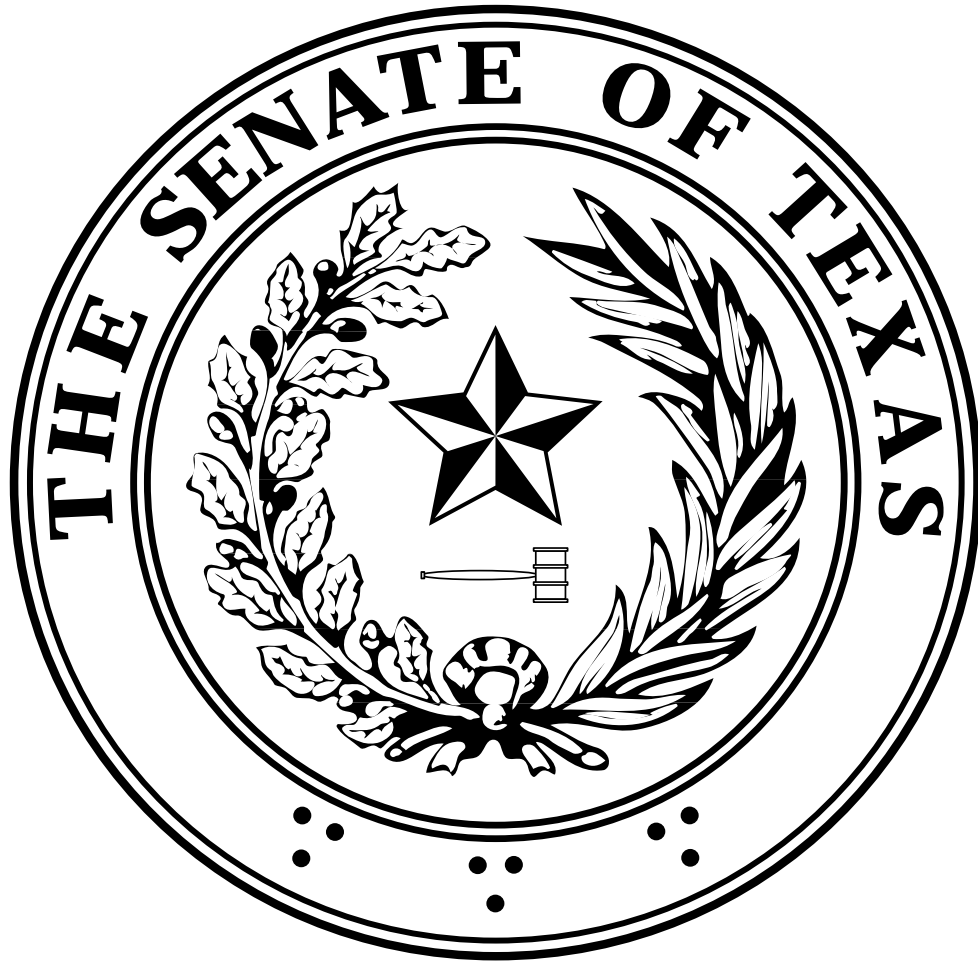


Senate Committee on State Affairs
Report to the 77th Legislature



Charge 10

State Use Program

Acknowledgments

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Executive Summary

The Charge:

Review Texas' State Use Program and the benefit provided to persons with disabilities. The committee shall examine the powers and duties of the Council on Purchasing from People with Disabilities (the Council); funding methods for the Council staff and activities; the Council's oversight of the central non-profit and community rehabilitation program work centers; the utilization by and satisfaction of customers with goods and services provided under the program; the nature of disabilities required for participating in the program; and the adequacy of rules governing the State Use Program, including whether standards of eligibility for work center products and services should be added to statute. The committee shall also ensure the appropriate nature and amount of involvement by people with disabilities in the production of goods and provision of services.

Findings and Recommendations:

The Texas State Use Program provides employment opportunities not otherwise available to disabled Texans. The program employed more than 5,700 disabled workers in 1999. Despite the program's success in providing useful and productive employment opportunities for disabled workers, problems and disputes have plagued the program in recent years and highlighted the program's shortcomings. Saving the program from further disintegration requires statutory changes and the promulgation of administrative rules.

The relationship between the Council and TIBH has diminished in recent years but may be aided by changes in statute to more fully address the rights and limitations of each party in relation to each other and the program. The Code's lack of clarity has resulted in conflicts between the parties regarding all aspects of their relationship. If not clarified, the Code will likely provide continued validity to the disagreements between the Council and TIBH.

The Council has failed to provide guidance to TIBH and CRPs in the program's administrative rules, resulting in the Council's inability to ensure the program remains successful. Without guidance, CRPs run the risk of investing substantial

efforts and resources in developing products or services that do not further the goal of the program to provide useful and productive employment activities to persons with disabilities. More clearly defined administrative rules would allow TIBH and the CRPs to expand the program within recognized bounds without jeopardizing the program's purpose.

The Council lacks the ability to effectively administer the program. Effective administration requires the Council undertake several duties, including developing and implementing policy, overseeing the performance of the CNA, and establishing criteria for recognition of CRPs. The Council's inability to fully perform these duties is partially the result of a lack of staff. To fulfill its statutory responsibilities, the Council must rely heavily on information and advice from TIBH, creating the potential for conflicts of interest between the two entities and adding to the inadequacy of support given to the Council during periods when the relationship is contentious.

TIBH has been the only CNA designated to run the day-to-day operations of the program and has been responsible for the growth of the program and the expansion of job opportunities for disabled persons. At the same time though, TIBH has been criticized for its internal business practices and has come under scrutiny for its operation of the program. TIBH has been unreceptive to the state's supervision of its activities. Legal conflicts have arisen in the past out of attempts by the Council and other state agencies to review information maintained by TIBH. To what extent the state, or the public, has access to TIBH's records has yet to be fully resolved. Such conflicts have contributed to TIBH's expenditure of funds earned from the program on items unrelated to the provision of jobs to disabled persons.

Although GSC is statutorily required to provide administrative, clerical, and legal support, GSC has made no significant effort to provide oversight, policy guidelines, or administrative support to the Council. GSC is also statutorily required to provide the Council with a monthly list of all items purchased under the exception procedure provided in the Code. GSC has never performed this duty.

While the program has continually provided employment opportunities for many

disabled persons, ambiguous statutory language and the lack of administrative rules render the program difficult to administer, diminishing the program's integrity and leaving the Council, the CNA, and CRPs vulnerable to undue criticism and litigation. The Council's failure to adopt meaningful rules, TIBH's use of funds earned through its management of the program for purposes that do not benefit persons with disabilities, and GSC's reluctance to provide the Council with staff and support, have all contributed to the recent unfavorable scrutiny.

Specific recommendations may be found at the end of this report.

Senate Committee on State Affairs

Lieutenant Governor Rick Perry charged the Senate Committee on State Affairs with reviewing “Texas’ State Use Program and the benefit provided to persons with disabilities. The committee shall examine the powers and duties of the Council on Purchasing from People with Disabilities (the Council); funding methods for the Council staff and activities; the Council’s oversight of the central non-profit and community rehabilitation program work centers; the utilization by and satisfaction of customers with goods and services provided under the program; the nature of disabilities required for participating in the program; and the adequacy of rules governing the State Use Program, including whether standards of eligibility for work center products and services should be added to statute. The committee shall also ensure the appropriate nature and amount of involvement by people with disabilities in the production of goods and provision of services.”¹

Because the charge is similar to a charge given by Texas House Speaker James E. “Pete” Laney to the House Committee on General Investigating, the House and Senate committees worked closely and examined the issue together. The two committees held joint public hearings in Austin on March 20 and April 25, 2000, to take testimony from interested parties, including Council members, representatives of state agencies that work with disabled persons, representatives from the central nonprofit agency and community rehabilitation programs, and private citizens representing the disabled and business communities.

This report summarizes the testimony received and contains the findings and recommendations of the Senate Committee on State Affairs.

History of the State Use Program

The legislature created the State Use Program (program) in 1975 as a pilot program to give preferential contracts for products and services manufactured or

¹Letter from Lieutenant Governor Rick Perry to the Senate Committee on State Affairs, January 27, 2000.

provided by blind or visually impaired Texans.² To help implement the program, TIBH Industries, Inc., formerly known as the Texas Industries for the Blind and Handicapped, was formed three years later to coordinate the sale of such products and services. TIBH has been intricately involved in the program since its formation in 1978. Moreover, TIBH has been the only entity authorized to carry out the day-to-day operations of the program. With support from TIBH, lawmakers expanded the program in 1981 to include products and services manufactured or provided by people of all disabilities.³

The products and services sold through the State Use Program are purchased from community rehabilitation programs (CRPs). CRPs are government or nonprofit private organizations under which disabled Texans manufacture products or perform services for sale. CRPs have continually provided useful and meaningful employment opportunities for persons with disabilities and have enabled the program to fulfill its statutory purpose.

Prior to 1995, the program was governed by the Texas Committee on Purchases of Products and Services of Blind and Severely Disabled Persons, which was composed of private citizens and representatives from five state agencies.⁴ In 1995, the legislature changed the committee's name to the Texas Council on Purchasing from People with Disabilities (Council)⁵ and changed the membership of the nine-member board to mostly volunteer, private citizens appointed by the governor.⁶ The legislature also authorized the Council to designate a central nonprofit agency (CNA) to carry out the day-to-day operations of the program.⁷ The program has continually served a portion of the disabled community who typically have trouble obtaining mainstream employment and tend to work in a more structured environment.

² Chapter 734, Acts of the 64th Legislature, Regular Session, 1975 (Article 664-5, Vernon's Texas Civil Statutes).

³ Chapter 556, Acts of the 67th Legislature, Regular Session, 1981 (Chapter 122, Human Resources Code).

⁴ Ibid.

⁵ Section 122.002(4), Human Resources Code.

⁶ Section 122.003(a), Human Resources Code.

⁷ Section 122.019(a)(3), Human Resources Code.

Texas Council on Purchasing from People With Disabilities

The Council, which meets quarterly, is charged with furthering the state's policy of assisting and encouraging persons with disabilities to achieve personal independence by engaging in useful and productive employment activities.⁸ The Council approves products and services manufactured or provided by persons with disabilities to be placed on 'set aside' and sold to state agencies and departments, as well as political subdivisions, without being subject to the state's competitive procurement statutes. The Human Resources Code (Code) requires state agencies to purchase products or services offered through the program if they meet the agencies' requirements or needs.⁹ While an exception procedure may be used if an agency documents that a product or service available on the set aside list does not meet its needs,¹⁰ the applicable statute has never been enforced to ensure agencies are utilizing the program whenever possible.¹¹

The Council's statutory duties include the following:

- 1) establish criteria for recognition and approval of community rehabilitation programs for participation in the program;¹²
- 2) determine the fair market value of products and services offered for sale through the program and ensure that they provide the best value for the state;¹³
- 3) test the goods and services to ensure quality;¹⁴ and

⁸ Section 122.001, Human Resources Code.

⁹ Section 122.008, Human Resources Code.

¹⁰ Section 122.016, Human Resources Code.

¹¹ State Auditor's Office, *An Audit Report on The State Use Program*, September 2000.

¹² Section 122.003(3)(j), Human Resources Code.

¹³ Section 122.007(a), Human Resources Code.

¹⁴ Section 122.007(d), Human Resources Code.

- 4) contract with a central nonprofit agency to carry out the day-to-day functions of the program.¹⁵

The Council is authorized to adopt rules to carry out the above statutory duties,¹⁶ but to date has failed to fully address many issues pertinent to the operation of the program.

General Services Commission

The Council does not have statutory authorization to employ its own staff to carry out the above functions. To fulfill its obligations, the Council is supposed to receive administrative, clerical, legal, and other support from the General Services Commission (GSC) in accordance with legislative appropriation.¹⁷ Since 1995, GSC has requested minimal funds through legislative appropriation to support the program. Currently, GSC provides the Council with part-time legal support and an administrative assistant who dedicates 50 percent of her time to activities related to the program.¹⁸ The Council reimburses GSC's costs out of fees collected from a portion of TIBH's management fees. A review of GSC's past legislative appropriation requests for support provided to the Council is summarized in the table below:

¹⁵ Section 122.019(a)(3), Human Resources Code.

¹⁶ Section 122.013(a), Human Resources Code.

¹⁷ Sections 122.007(d) and (e), 122.012(a), and 122.013(b), Human Resources Code.

¹⁸ Section 122.013(b), Human Resources Code.

**General Service Commission
Budget and Legislative Appropriation Requests
1995-2003**

X	FY 1995 (actual)	FY 1996 (actual)	FY 1997 (actual)	FY 1998 (actual)	FY 1999 (actual)	FY 2000 (est.)	FY 2001 (budgeted)	FY 2002 (requested)	FY 2003 (requested)
Salary & Wages	0	7,744.00	13,416	14,016.00	14,054.00	15,149.00	14,318.00	14,318.00	14,318.00
Other Personnel Costs	0	423.82	876.37	1,490.21	430.79	1,294.85	1,240.00	1,240.00	1,240.00
Operating Costs	0	14,647.35	9,488.05	8,946.92	13,841.27	18,084.70	13,604.00	13,604.00	13,604.00
Capital Expenditures	0	0	0	0	2,020.74	0	0	0	0
Total	0	22,815.17	23,780.42	24,453.13	30,346.80	34,528.55	29,162.00	29,162.00	29,162.00

While the legislature envisioned that combined efforts would administer the program, the voluntary board membership and limited assistance received from GSC require the program to rely heavily on TIBH for its administration. Such reliance is authorized in statute, which requires the Council to contract with a CNA to “manage and coordinate the day-to-day functions of the program.”¹⁹

TIBH Industries, Inc.

Since 1978, TIBH has been the CNA under contract with the Council. As CNA, TIBH is statutorily responsible for the following:

- 1) recruit and assist CRPs in developing and submitting applications for the selection of suitable products and services for the program;²⁰
- 2) facilitate the distribution of orders among CRPs;²¹
- 3) manage and coordinate the day-to-day operations of the program,

¹⁹ Section 122.019, Human Resources Code.

²⁰ Section 122.019(a)(1), Human Resources Code.

²¹ Section 122.019(a)(2), Human Resources Code.

including the general administration of contracts with CRPs;²² and

- 4) promote increased supported employment opportunities for persons with disabilities.²³

Each year, the Council is statutorily required to review the services provided by the CNA and the revenues required to operate the program to determine whether the agency's performance complies with contractual specifications.²⁴ Moreover, at least once every two years, the Council must review and renegotiate the contract with the CNA.²⁵ The Council has statutory authority to set the management fee rate that the CNA can charge the CRPs for services, which include product development, marketing, and contract negotiation. The management fee is computed as a percentage of the selling price of the product or service.²⁶ The statute does not clearly dictate how often the Council should examine the management fee rate to determine whether it generates enough funds to finance the program.

The Council's reliance on TIBH as a substitute for Council staff affects many areas of the program. Currently, information regarding the approval of products and services for set aside and the certification of CRPs for participation in the program is provided to the Council by TIBH. Much of this information is self-reported to TIBH by the CRPs, with no verification by another entity.²⁷ Due to the nature of the program -- the CNA's management fee being a percentage of the selling price of products or the contract price of services purchased through the program -- the amount of goods and services put on set aside directly impacts the income earned by the CNA. Consequently, the more products and services purchased through the program, the more money made by the CNA, creating the

²² Section 122.019(a)(3), Human Resources Code.

²³ Section 122.019(a)(4), Human Resources Code.

²⁴ Section 122.019(c), Human Resources Code.

²⁵ Section 122.019(d), Human Resources Code.

²⁶ Sections 122.019(e) and (f), Human Resources Code.

²⁷ Office of the State Auditor, *An Audit Report on The State Use Program*, September 2000.

perception of a conflict of interest. Adopting rules and hiring staff to confirm that information provided to the Council is verifiable and accurate will enable the Council to uphold the integrity of the program by ensuring that products and services placed on set aside are appropriate.

Another area of conflict relates to access to records maintained by TIBH. Disputes have arisen regarding access by the public, the Council, and the State Auditor's Office. For example, in response to the Council issuing an invitations for bid in 1998, GSC received a request under the Open Records Act²⁸ for information about TIBH, including, among other documents, an audited financial statement, an operational budget, and tax returns.²⁹ GSC requested an Attorney General opinion on whether the TIBH documents were subject to the Act's required public disclosure provisions.³⁰ An informal letter ruling issued by the Attorney General's Office in April 1998 concluded that information collected, assembled, or maintained by TIBH may be subject to disclosure if a governmental body owns or has a right of access to the information.³¹ TIBH sued the Attorney General's Office, arguing that the letter ruling misinterpreted the Open Records Act.³² TIBH dismissed the lawsuit in January 2000.³³ Right of access to TIBH records and documents by governmental entities and the public remains unclear and continues to be a disputed issue.

Community Rehabilitation Programs

Through the years, CRPs have increased employment opportunities for persons with disabilities in Texas. In 1995, 180 CRPs employed 4,602 disabled Texans

²⁸ Chapter 552, Government Code.

²⁹ Pat Thomas, Southeast Keller Corporation, in a letter to the General Services Commission, January 19, 1998.

³⁰ Judy Ponder, General Counsel, General Services Commission, in a letter to the Open Records Division of the Office of the Attorney General, January 30, 1998.

³¹ Tex. Att'y Gen. No. OR98-1051 (April 27, 1998).

³² Plaintiff's Original Petition, *TIBH Industries, Inc. v. The Attorney General of the State of Texas*, 261st Judicial District, Travis County District Court No. 98-04793.

³³ Notice of Nonsuit, *TIBH Industries, Inc. v. The Attorney General of the State of Texas*.

through the program, paying more than \$11 million in wages to those workers.³⁴ In 1999, 159 CRPs employed 5,767 disabled Texans who earned more than \$16.8 million in salaries.³⁵

While the Council is statutorily authorized to establish criteria for the recognition and approval of CRPs for participation in the program, the current rules only require the statutory mandate that CRPs maintain accreditation by a nationally accepted vocational rehabilitation accrediting organization and provide services that have been approved for purchase by a state habilitation or rehabilitation agency.³⁶ Neither the Code nor the Council's rules provide for specific oversight of CRPs by the Council. While the Code does not limit the Council's ability to adopt more detailed rules regarding criteria for CRP participation in the program, the Council to date has not established such criteria. As a result, the Council's rules fail to require accountability on the part of CRPs.

Further, the Council has no way to ensure the appropriate nature and amount of involvement by people with disabilities in the manufacture of goods and provision of services on set aside or that the benefits intended by the program are bestowed on persons with disabilities. Much of the data requested by the Council regarding CRPs is self-reported.³⁷ The Council maintains no oversight other than through the CNA and has no ability to verify information reported by the CRPs. Additional specificity in the Council's rules and additional staffing for the Council could provide CRPs with much needed guidance and ensure that CRPs are accountable to the program and that the program is accountable to disabled persons.

The Council's Relationship with TIBH

The Council (along with its predecessor) and TIBH had a longstanding and

³⁴ Texas Council on Purchasing from People with Disabilities, *1995 Annual Report*, by TIBH, pages 3-4.

³⁵ Texas Council on Purchasing from People with Disabilities, *1999 Annual Report*, by TIBH, pages 5, 7.

³⁶ Section 189.6, Title 40, Texas Administrative Code; Section 122.003(3)(j), Human Resources Code.

³⁷ Office of the State Auditor, *An Audit Report on The State Use Program*, September 2000.

apparently positive relationship since 1978. In 1997, however, some Council members had reservations regarding their ability to establish that TIBH was the best provider for the program.³⁸ The Council is statutorily required to review the services provided by TIBH on an annual basis.³⁹ Since TIBH has been the sole administrator of the program, the Council has no gauge by which to assess TIBH's performance. Further, TIBH was the Council's sole source for all information regarding pricing and contracting data and set aside decisions, rendering TIBH the Council's sole source of information on the success of the program. Without an external source for information, the Council elected to authorize the issuance of invitations for bid (IFB) for CNA services in early 1998 to test TIBH's abilities as the administrator of the program.⁴⁰ The Council had hoped the IFB process would ensure the program was served by the most qualified organization.⁴¹ Instead, the action sparked a controversy that engulfed the program and called its integrity into question.

In response to the Council's authorization of an IFB, TIBH filed suit in Travis County District Court against the Council and its chairman in his official and personal capacity; and GSC and its executive director in his official and personal capacity.⁴² The lawsuit challenged the Council's authority to use a competitive bid process to select a CNA. TIBH pointed to ambiguous statutory provisions and legislative history to support its contention that the Council lacked authority to designate a CNA by using competitive bidding procedures.⁴³ The suit also pointed to provisions of the IFB that would have required TIBH to deliver all files,

³⁸ Bob Templeton and Meg Pfluger, Members, Texas Council on Purchasing from People with Disabilities, in testimony presented to the Joint Hearing of the Senate Committee on State Affairs and the House Committee on General Investigating, March 20, 2000.

³⁹ Section 122.019(c), Human Resources Code.

⁴⁰ Bob Templeton, Member, Texas Council on Purchasing from People with Disabilities, testimony presented to the Joint Hearing of the Senate Committee on State Affairs and the House Committee on General Investigating, March 20, 2000.

⁴¹ Meg Pfluger, Member, Texas Council on Purchasing from People with Disabilities, testimony presented to the Joint Hearing of the Senate Committee on State Affairs and the House Committee on General Investigating, March 20, 2000.

⁴² Plaintiff's Original Petition, *TIBH Industries, Inc. v. Dr. Robert A. Swerdlow, in his official capacity, Texas Council on Purchasing from People with Disabilities, Texas General Services Commission, and Tom Treadway, in his official capacity*, 345th Judicial District, Travis County District Court No. 98-01686.

⁴³ Section 122.002(1), Human Resources Code.

records, reports, and documentation to the Council as an unlawful confiscation of TIBH's assets and contended that TIBH could not be forced to give a successor CNA an orientation briefing.⁴⁴

Upon hearing TIBH's request for a temporary injunction, the district court ruled in March 1998 that the Council could not require TIBH to turn over its files, records, reports or documentation; could not require TIBH to train or brief any successor CNA; and could not award a contract to a CNA as a result of the IFB. The court order was intended to preserve the status quo pending further order of the court.⁴⁵

In what was seen as a positive move, the two parties agreed to mediation and signed a settlement agreement in July 1998.⁴⁶ Subsequently, TIBH filed a nonsuit, dismissing its suit against the Council.⁴⁷ Unfortunately, TIBH's nonsuit resulted in further controversy. Questions remained regarding the court's initial ruling and the effect of TIBH's nonsuit on that ruling. While both parties agreed in mediation and subsequent agreements to continue their relationship,⁴⁸ they failed to resolve all of the issues, specifically, whether the Council and the public had access to TIBH records and whether the Council could competitively bid the contract for a CNA. The Council has recently filed an appeal to resolve the remaining issues.⁴⁹ The ongoing legal battles have practically halted all communication between the two sides.

Subsequent to the initial litigation in 1998, a flurry of legal maneuvers by TIBH and the Council aggravated tensions between the two. For example, the Council

⁴⁴ Plaintiff's Original Petition, *TIBH Industries, Inc. v. Dr. Robert A. Swerdlow*.

⁴⁵ Order, *TIBH Industries, Inc. v. Dr. Robert A. Swerdlow*, filed March 11, 1998.

⁴⁶ Mediation Settlement Agreement between the Texas Council on Purchasing from People with Disabilities and TIBH Industries, Inc., effective September 1, 1998.

⁴⁷ Notice of Nonsuit, *TIBH Industries, Inc. v. Dr. Robert A. Swerdlow*, filed January 19, 2000.

⁴⁸ Mediation Settlement Agreement between the Texas Council on Purchasing from People with Disabilities and TIBH Industries, Inc., effective September 1, 1998; Memorandum of Agreement Between the Texas Council on Purchasing from People with Disabilities and the Designated Central Nonprofit Agency, TIBH, Industries, Inc., effective September 1, 1998; and the Extension of Memorandum of Agreement between the Texas Council on Purchasing from People with Disabilities and the Designated Central Nonprofit Agency, TIBH Industries, Inc., August 31, 1999.

⁴⁹ Brief of Appellants, *Dr. Robert Swerdlow, et al, v. TIBH*, No. 03-00-00203-CV (Tex. Ct. App.- Austin 2000).

requested opinions from the Office of the Attorney General regarding whether a CNA is restricted from engaging in lobbying activities by state or federal law,⁵⁰ and whether the Council has authority to obtain services from the State Auditor's Office to conduct audits of a CNA.⁵¹ In each instance, TIBH submitted briefs to the Attorney General's Office that not only attacked the substance of the requests, but also argued that opinions should not be rendered because the requests were improper.⁵²

Controversy Regarding Expansion of the Program

In addition to legal battles, the Council faced criticism about the types of jobs offered to persons with disabilities through the program. Some advocacy groups wanted to see the program expand into technological products and services.⁵³ Jobs provided through the program consisted primarily of janitorial or custodial-type services.⁵⁴ Of the more than \$51 million in goods and services generated by more than 5,700 disabled employees in the program in 1999, only \$9 million came from products.⁵⁵ During this same period, 72 percent of disabled workers employed through the program were paid between \$5 and \$5.99 per hour, and 13 percent were paid between \$6 and \$6.99. Only 15 percent were paid more than \$7 per hour.⁵⁶

In 1997, TIBH recommended and the Council approved a proposal by a CRP to

⁵⁰ Tex. Att'y Gen. No. RQ-0099-JC.

⁵¹ Tex. Att'y Gen. No. RQ-0122-JC.

⁵² Douglas M. Becker, Gray & Becker, Attorneys at Law, representing TIBH, in letters to the Office of the Attorney General, September 23, 1999, and November 12, 1999.

⁵³ Belinda Carlton, Executive Director, Coalition of Texans with Disabilities, in a letter to the House General Investigating Committee, March 16, 2000.

⁵⁴ Texas Council on Purchasing from People with Disabilities, *1999 Annual Report*, by TIBH, pages 8-37.

⁵⁵ Dr. Robert Swerdlow, Member, Texas Council on Purchasing from People with Disabilities, statement presented to the Council, September 24, 1999 (Minutes No. 18).

⁵⁶ Texas Council on Purchasing from People with Disabilities, *1999 Annual Report*, by TIBH, page 6.

have disabled workers assemble computers for sale to the state under the set aside program.⁵⁷ GSC, however, objected because the proposal would have conflicted with the Qualified Information System Vendor (QISV) procedure for state agencies to select computers, software, and associated technologies.⁵⁸ GSC operates the QISV program for 2,000 approved vendors, whose products must meet certain statutory criteria to participate in the program. The program requires state agencies to make a “best value” determination by seeking at least three bids from the list of approved vendors, in direct conflict with the set-aside program that excludes products from facing competition.⁵⁹ An Attorney General’s opinion agreed with GSC.⁶⁰ In March 1999, the Council rescinded its decision to place computers assembled by disabled workers on the set-aside list.⁶¹

Further Controversy

In March 1999, the Council approved a proposal offered by a Houston-based CRP for a postage meter contract under the program.⁶² Additional mailing system products offered by that CRP were approved in June of that year.⁶³ Southeast Keller Corporation (SEK) proposed that it assemble, test, and service postage meters, scales, and related items manufactured and owned by Francotyp-Postalia, Inc., a for-profit corporation authorized by the U.S. Postal Service to manufacture and own postage meter equipment.⁶⁴ SEK projected total sales at \$370,326.16.⁶⁵

⁵⁷ Texas Council on Purchasing from People with Disabilities meeting, September 12, 1997 (Minutes No. 8).

⁵⁸ Tom Treadway, Executive Director, General Services Commission, in a letter to the Office of the Attorney General, June 5, 1998.

⁵⁹ Chapter 2157, Government Code.

⁶⁰ Op. Tex. Att’y Gen. No. DM-496 (December 21, 1998).

⁶¹ Texas Council on Purchasing from People with Disabilities meeting, March 26, 1999 (Minutes No. 15).

⁶² Ibid.

⁶³ Texas Council on Purchasing from People with Disabilities meeting, June 25, 1999 (Minutes No. 16).

⁶⁴ Texas Council on Purchasing from People with Disabilities meeting, December 10, 1999 (Minutes No. 19).

⁶⁵ Mary Williams, Southeast Keller Corporation, testimony presented to the Texas Council on Purchasing from People with Disabilities meeting, March 26, 1999 (Minutes No. 15).

At the time, the Council lauded the program as an example of future partnerships that merge products and services.⁶⁶

Not everyone lauded the alliance. Critics of the Council's decision to include the Francotyp-Postalia postage meters on the set aside list pointed to the failure of the Council to adopt rules that would provide meaningful guidance to the Council, TIBH, or the CRPs regarding expansion of the program, or provide meaningful limitation to participation in the program.⁶⁷ As a result, it was argued, CRPs could minimally serve as a receiving and shipping agent for for-profit corporations seeking to get unfair advantages over other non-State Use Program suppliers of products or services.⁶⁸

Stamford, Conn.-based Pitney Bowes, a for-profit company that leases postage meters and has about 90 percent of the state's mailing system business, argued that by partnering with a CRP in the program, a for-profit corporation could receive preferential treatment by avoiding the competitive bidding procedures under generally applicable procurement statutes. The partnership would provide the for-profit corporation an unfair advantage because state agencies would be required to purchase its products or services due to their inclusion in the program. Purchases of the same products or services from non-program participants would be precluded without the benefit of competitive procurement normally required by law.⁶⁹ Further, Pitney Bowes expressed concerns that to use the program for this purpose did not serve the statutory policy of creating employment opportunities for persons with disabilities. Pitney Bowes questioned whether disabled persons were doing an appropriate amount of work to the postage meters for the meters to qualify under the set aside program.⁷⁰

⁶⁶ Byron E. Johnson, Member, Texas Council on Purchasing from People with Disabilities, statement presented to the Council, March 26, 1999 (Minutes No. 15).

⁶⁷ Patrick F. Thompson, Attorney for Vinson & Elkins, Representing Pitney Bowes, Inc., testimony presented to the Joint Hearing of the Senate Committee on State Affairs and the House Committee on General Investigating, March 20, 2000.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

At its December 1999 meeting, the Council temporarily suspended from the set aside program the Francotyp products “approved at the March 1999 Council meeting in addition to any products approved at subsequent meetings,” pending receipt and review of further information about the project from SEK.⁷¹ A few months later, the Council continued the suspension until such time when the Council approves rules that “address the issues of service contracts for future undefined services and the rental and sale of products not owned by a CRP.”⁷² SEK continues to request the Council accept its proposal and return the products to the set aside list.⁷³

Office of the State Auditor

The controversy over the postage meter contract raised questions about the program and specifically the Council’s ability to oversee the program. At the request of legislators, the State Auditor’s Office (SAO) conducted an audit of the program, including the Council and TIBH.⁷⁴ The SAO report, released September 2000, includes the following findings:

- The Council lacks the staff to monitor the program and to adequately fulfill its statutory responsibilities.
- The Council has not formulated clear criteria for deciding which goods and services are suitable for the program.
- The structure of the management fee paid to TIBH needs to be reevaluated due to questions about its reasonableness and the

⁷¹ Bob Templeton, Member, Texas Council on Purchasing from People with Disabilities, statement presented to the Council, December 10, 1999 (Minutes No. 19).

⁷² Meg Pfluger, Member, Texas Council on Purchasing from People with Disabilities, statement presented to the Council, March 24, 2000 (Minutes No. 20).

⁷³ Nathaniel Rido, Chief Operating Officer, Southeast Keller Corporation, in a letter to Dr. Robert Swerdlow, Texas Council on Purchasing from People with Disabilities, September 12, 2000.

⁷⁴ The Hon. Bill Ratliff, State Senator, in a letter to Larry Alwin, State Auditor, November 1, 1999.

appropriateness of some of TIBH's expenditures. TIBH was paid almost \$3 million in management fees in 1999. TIBH has expended about \$468,000 over the past three years on items that do not directly benefit workers with disabilities.

- TIBH does not track sufficient data to fully evaluate the cost of services provided to CRPs. All CRPs are charged the same management fee rate regardless of how much assistance TIBH provides each CRP.
- TIBH lost more than 650 state warrants in excess of \$3.6 million. Although the warrants were not cashed and are being reissued, this illustrates TIBH's lack of adequate accounting controls over cash receipts and collections. TIBH did not discover the loss for over five months even though its line of credit kept rising dramatically, due to not as much money being deposited into TIBH accounts as was received in payments. Costs associated with the missing warrants are estimated at more than \$92,000.
- TIBH has resisted all efforts by the Council to obtain information needed to effectively oversee the program. Although TIBH derives virtually all of its revenue from the program, TIBH has asserted that many of its records are proprietary and, therefore, not available to the Council or the public. The Human Resources Code allows the SAO, the Legislative Budget Board, and the Governor's Office to inspect records pertaining to the program, but it does not specifically state whether the Council may access or possess TIBH's records.
- No mechanism exists to monitor CRP compliance with the program. CRP data is self-reported without independent verification. Further, there is no verification of worker disability.
- GSC does not provide compliance exception reports to the Council as required by law.⁷⁵

⁷⁵ Office of the State Auditor, *An Audit Report on The State Use Program*, September 2000.

It should be noted that TIBH disagreed with most of the findings and recommendations⁷⁶ while the Council⁷⁷ and GSC⁷⁸ generally agreed with the report. TIBH, however, has verbally indicated its intentions to implement the recommendations of the SAO.⁷⁹

Administrative Rules Governing the Program

In January 1997, the Council repealed its administrative rules and proposed new sections to implement 1995 legislative changes to the Code, particularly amendments regarding ethical standards for board members, contract requirements of the CNA, and the provision of legal, clerical, administrative, and other necessary support to the Council by GSC.⁸⁰ The new rules adopted by the Council in April 1997, however, did not include the value added section from the prior administrative rules, an important component of the program to ensure that persons with disabilities are contributing to the provision of goods and services offered through the program in a meaningful and appreciable manner. The previous value added section required the following:

- CRPs should purchase raw materials or components through competitive bidding whenever possible;
- workshops should make an appreciable contribution to reforming raw materials, assembling of components, or packaging of other products manufactured at rehabilitation facilities;

⁷⁶ TIBH response to SAO Report, pages 44-62.

⁷⁷ Texas Council on Purchasing from People with Disabilities response to SAO Report, pages 34-43.

⁷⁸ General Services Commission response to SAO Report, pages 63-73.

⁷⁹ Lyndal Remmert, President, and Fred Weber, Executive Vice President, TIBH, in a personal interview, September 26, 2000.

⁸⁰ *Texas Register*, January 14, 1997.

- workshops may not act merely as receiving and shipping facilities; and
- workshops must establish and maintain at least 75 percent handicapped direct labor hours in their operation.⁸¹

In July 1998, the Council filed a plan to review its rules in accordance with the Appropriations Act.⁸² In August 1999, the Council proposed new and amended rules, specifically relating to the selection of and contracting with a CNA as well as clearly defined performance standards for the CNA to meet.⁸³ The proposed rules still did not include a reinstatement of the value added guidelines. In January 2000, the Council withdrew its proposed rules from adoption.⁸⁴

In the three years since the value added guidelines were repealed, the Council has continued to operate under the value added goal of 75 percent direct disabled labor within each CRP's operation. A lack of formal rules or policies outlining the criteria used for approving new products or services, however, has left the Council vulnerable to criticism. As a result, the Council is in the process of approving new administrative rules, including a value added statement, with a December 2000 deadline for formalizing its rules.⁸⁵

Findings

The Texas State Use Program provides employment opportunities not otherwise available to disabled Texans. The program employed more than 5,700 disabled

⁸¹ Ibid.

⁸² Rule Review Plan, submitted by the Texas Council on Purchasing from People with Disabilities, in accordance with the General Appropriations Act, Article IX, Section 167, July 1998.

⁸³ *Texas Register*, August 6, 1999.

⁸⁴ Dr. Robert Swerdlow, Member, Texas Council on Purchasing from People with Disabilities, in a letter to Elton Bomer, Secretary of State, January 19, 2000.

⁸⁵ Bob Templeton, Member, Texas Council on Purchasing from People with Disabilities, testimony presented to the Joint Hearing of the Senate Committee on State Affairs and the House Committee on General Investigating, April 25, 2000.

workers in 1999. Despite the program's success in providing useful and productive employment opportunities for disabled workers, problems and disputes have plagued the program in recent years and highlighted the program's shortcomings. Saving the program from further disintegration requires statutory changes and the promulgation of administrative rules.

The relationship between the Council and TIBH has diminished in recent years but may be aided by changes in statute to more fully address the rights and limitations of each party in relation to each other and the program. The Code's lack of clarity has resulted in conflicts between the parties regarding all aspects of their relationship. If not clarified, the Code will likely provide continued validity to the disagreements between the Council and TIBH.

The Council has failed to provide guidance to TIBH and CRPs in the program's administrative rules, resulting in the Council's inability to ensure the program remains successful. Without guidance, CRPs run the risk of investing substantial efforts and resources in developing products or services that do not further the goal of the program to provide useful and productive employment activities to persons with disabilities. More clearly defined administrative rules would allow TIBH and the CRPs to expand the program within recognized bounds without jeopardizing the program's purpose.

The Council lacks the ability to effectively administer the program. Effective administration requires the Council undertake several duties, including developing and implementing policy, overseeing the performance of the CNA, and establishing criteria for recognition of CRPs. The Council's inability to fully perform these duties is partially the result of a lack of staff. To fulfill its statutory responsibilities, the Council must rely heavily on information and advice from TIBH, creating the potential for conflicts of interest between the two entities and adding to the inadequacy of support given to the Council during periods when the relationship is contentious.

TIBH has been the only CNA designated to run the day-to-day operations of the program and has been responsible for the growth of the program and the expansion of job opportunities for disabled persons. At the same time though, TIBH has been criticized for its internal business practices and has come under

scrutiny for its operation of the program. TIBH has been unreceptive to the state's supervision of its activities. Legal conflicts have arisen in the past out of attempts by the Council and other state agencies to review information maintained by TIBH. To what extent the state, or the public, has access to TIBH's records has yet to be fully resolved. Such conflicts have contributed to TIBH's expenditure of funds earned from the program on items unrelated to the provision of jobs to disabled persons.

Although GSC is statutorily required to provide administrative, clerical, and legal support, GSC has made no significant effort to provide oversight, policy guidelines, or administrative support to the Council. GSC is also statutorily required to provide the Council with a monthly list of all items purchased under the exception procedure provided in the Code. GSC has never performed this duty.

While the program has continually provided employment opportunities for many disabled persons, ambiguous statutory language and the lack of administrative rules render the program difficult to administer, diminishing the program's integrity and leaving the Council, the CNA, and CRPs vulnerable to undue criticism and litigation. The Council's failure to adopt meaningful rules, TIBH's use of funds earned through its management of the program for purposes that do not benefit persons with disabilities, and GSC's reluctance to provide the Council with staff and support, have all contributed to the recent unfavorable scrutiny.

Recommendations

- (1) The Council should have clear statutory authority to select a CNA through generally accepted competitive bidding procedures, as found in Chapter 2156, Government Code. The Council should have clear statutory authority to clarify the procedures used in selecting a CNA.
- (2) The Council should have clear statutory authority to select a CNA for periods not to exceed five years. After the initial contract period, the Council should have clear statutory authority to renegotiate another contract for a period not to exceed five years or terminate the contract and seek

another CNA through the competitive bid process. A CNA contract should include terms allowing the Council to terminate the contract at any time upon providing at least 30 days notice and proof of a CNA's failure to fulfill its obligations under the contract.

- (3) The Council should have statutory authority to employ its own minimal staff, housed in GSC, to oversee the selection of a CNA, provide contract oversight, act on violations of rules and standards, oversee CRPs, research appropriateness and legal ramifications of proposed products and services, assess applications submitted by a CNA on behalf of CRPs, recommend to the Council certification of products and services, and research policy.
- (4) The statute should allow the governor greater flexibility when appointing members to the Council. The statute should allow the governor to select the nine-member council from a list that includes persons with disabilities, private citizens conversant with the employment needs of persons with disabilities, representatives from CRPs that represent different disabilities, and representatives from state agencies or political subdivisions that purchase significant amounts of products or services sold through the program. The governor should be required to include at least one representative from each category and should make every effort to ensure that each category is proportionately represented on the Council.
- (5) The legislature should require GSC to assign an employee (preferably at the deputy executive director level) to ensure its responsibilities to the program are met and to ensure the program's policies and initiatives are coordinated with GSC's statewide procurement function.
- (6) The Council should have statutory authority, as required in Section 2110.001, Government Code, to establish advisory committees to assist the Council in various areas, including reviews of the program's effectiveness and recommendations of innovative ideas for program expansion.
- (7) Funding for the additional staff should come from the management fee charged to CRPs by the CNA. The shifting of responsibilities from the CNA to the newly-dedicated staff should reduce the amount of any

increases in the management fees assessed to CRPs. Also, efficiencies associated with improved management and marketing efforts should help maintain management fees at reasonable levels.

- (8) The Council should have statutory authority to receive from a CNA and CRPs financial disclosures and other pertinent information that directly relate to the program. Records from a CNA or CRPs should respect privacy interests recognized by law of any employee of a CNA or CRPs except that a compensation package of a CNA employee or subcontractor is relevant to the program and should not be protected from disclosure.
- (9) The Council should continue to have statutory authority to review on an annual basis the management fee charged by a CNA. The fee should be reasonable and based on actual services provided by a CNA. The Council should be statutorily authorized to request an audit from the State Auditor's Office to review the financial condition of a CNA.
- (10) The Council should have statutory authority to adopt conflicts of interest rules that apply to the Council, the CNA and CRPs to avoid possible confusion and abuses of the program.
- (11) The Council should have statutory authority to adopt rules outlining the criteria CRPs must meet to participate in the program.
- (12) The Council should have statutory authority to adopt rules for certification of services and products offered by CRPs.
- (13) Any dispute between or amongst the Council, a CNA, or CRPs should be statutorily required to proceed under Alternative Dispute Resolution before access to the courts is permitted. This requirement is not an authorization to initiate a lawsuit and does not modify the remedies already available and recognized under the law. Moreover, this does not limit the Council's ability to request opinions of the Attorney General as permitted by law.
- (14) GSC must statutorily be required to include the program in state agency procurement policy manuals.

- (15) State agencies must statutorily be required to designate a staff member to ensure that mandatory provisions of the program are followed. Each agency should be required to report to GSC purchases of products or services made outside the program. Reports should be based on a sampling of purchases performed through post-purchase audits. GSC should be statutorily required to include this information in its exception reports to the Council.
- (16) The Council should have statutory authority to expand or limit the definition of “disability” to meet the changing needs of the disabled community. In defining “disability,” the Council should seek recommendations from the Texas Rehabilitation Commission, Texas Commission for the Blind, and Mental Health and Mental Retardation.
- (17) The Council should have statutory authority to define the percentage of disabled labor that a CRP must employ for acceptance of a product or service on set aside and ensure compliance.
- (18) The legislature should require the Council’s annual report to include information from CRPs participating in the program regarding the number of disabled and non-disabled workers employed; and average and range of weekly earnings for disabled and non-disabled workers. A CNA should statutorily be required to provide current information on earnings of people with disabilities by product or service, by facility, and overall total average.
- (19) The Council should have clear statutory authority to adopt rules defining “value added” and “direct labor” for products manufactured or services provided for sale through the program.