Legal Q&A
By Christy Drake-Adams, TML Legal Counsel

Under what authority does a city regulate and provide solid waste service?

The primary authority for a city to regulate and provide solid waste service is found in Chapters 363 and 364 of the Health and Safety Code. Under Chapter 363, a city is:

- authorized to adopt rules for regulating solid waste collection, handling, transportation, storage, processing, and disposal (Tex. Health & Safety Code § 363.111(a));
- authorized to prohibit the processing or disposal of city or industrial solid waste in certain areas (*Id.* § 363.112);
- required to ensure that solid waste management services are provided to all persons in its jurisdiction by a public agency or private person (*Id.* § 363.113);
- authorized to offer recycling service to persons in its jurisdictional boundaries and may charge fees for that service (*Id.* § 363.114);
- authorized to enter into contracts to enable it to furnish or receive solid waste management services on the terms considered appropriate by the city council (*Id.* §§ 363.116(a), 363.117 [setting out the various things a city may provide for in a solid waste management service contract]); and
- authorized to fund solid waste management services by various means (*Id.* § 363.119).

Under Chapter 364, a city is:

- authorized to contract with certain other public entities or a private contractor to furnish solid waste collection, transportation, handling, storage, or disposal services (Tex. Health & Safety Code § 364.033);
- authorized to offer solid waste disposal service to persons in its territory, require the use of the service by those persons, charge fees for the service, and establish the service as a separate utility (*Id.* § 364.034); and
- authorized to enter into an agreement for the collection of unpaid solid waste disposal services fees (*Id.* § 364.037).

May a city award an exclusive franchise to a solid waste disposal company?

Citing cases such as *Browning-Ferris, Inc. v. Leon Valley*, 590 S.W.2d 729 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.), the Texas Municipal League has traditionally advised that the answer to this question is "yes," except in relation to grease or grit trap waste (see Health and Safety Code Section 364.034(f)). But a recent court case construing Health and Safety Code Section 364.034(e) may cast doubt on that advice.

Section 364.034(e) currently provides:

> Except as provided by Subsections (f), (g), and (h), this section does not apply to a person who provides the public or private entity, public agency, or county with written documentation that the person is receiving solid waste disposal services from another entity. Nothing in this section shall limit the authority of a public

> agency, including a county or a municipality, to enforce its grant of a franchise or contract for solid waste collection and transportation services within its territory. Except as provided by Subsection (f), the governing body of a municipality may provide that a franchise it grants or a contract it enters into for solid waste collection and transportation services under this subchapter or under other law supersedes inside of the municipality's boundaries any other franchise granted or contract entered into under this subchapter.

Adams v. City of Weslaco, a Corpus Christi Court of Appeals opinion, is the most recent reported case construing Section 364.034(e). *Adams v. City of Weslaco*, No. 13-16-00697-CV, 2009 WL 1089442 (Tex. App.—Corpus Christi Apr. 23, 2009). In *City of Weslaco*, the court reads the first two sentences of subsection (e) together "to allow an opt-out and still allow enforcement of a duly authorized franchise, which by the very statutory limitation of its legislative grant, may not disallow an opt-out." *Id*. at *8. In this way, the court attempts to alleviate the tension between the constitutional prohibition against monopolies and the police power of a city to regulate garbage collection.

Because the factual background of *City of Weslaco* involves an exclusive franchise to collect grease and grit, the implications of the case for other areas of municipal solid waste collection is unclear. Moreover, the court did not explain whether the opt-out provision is operative in a small window of time. In other words, the facts in the City of Weslaco case involved the city's initial adoption of an exclusive franchise. The court also failed to reconcile its construction with Section 364.034(a)(2), which expressly authorizes a city to require the use of its service. Finally, the court did not examine other authority under which a city may enter into an exclusive franchise agreement for solid waste disposal services. For example, Chapter 363 broadly authorizes a city to enter into contracts to furnish or receive solid waste management services on the terms considered appropriate by the city council.

Cities that are seeking to implement an exclusive franchise for the collection and disposal of solid waste should consult with local legal counsel regarding the implications of the *City of Weslaco* opinion.

Is a city required to follow competitive procurement procedures in order to contract for solid waste disposal services with a value of greater than $50,000?

No. Texas cities must *generally* follow competitive bidding or proposal procedures if the city enters into a contract requiring the expenditure of more than $50,000 in city funds. Tex. Loc. Gov't Code § 252.021. However, Local Government Code Section 252.022(a)(2) provides that a purchase necessary to preserve or protect the public health or safety of the city's residents is excepted from the competitive purchasing requirements. Though the statute does not expressly provide that the provision of solid waste disposal services falls within the Section 252.022(a)(2) exception, Texas courts have construed the provision in this manner. *See, e.g., Browning-Ferris, Inc. v. City of Leon Valley*, 590 S.W.2d 729 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.) (construing statutory predecessor). For example, in the *City of Weslaco* case discussed above, the court held "that a competitive bid for the franchise in question was not required."

Adams v. City of Weslaco, No. 13-16-00697-CV, 2009 WL 1089442, at *6 (Tex. App.—Corpus Christi Apr. 23, 2009) (citing 252.022(a)(2)).

Despite the fact that a city is not required by law to use competitive purchasing procedures to obtain solid waste disposal services, many cities choose to do so as one means of securing the best service at the lowest cost. Ultimately, the decision is left to each individual city as to the best manner to acquire these services.

If a city ordinance provides for mandatory trash pickup, does a person still have the option to use outdoor burning as a method to dispose of domestic waste?

Maybe. Texas Commission on Environmental Quality's (TCEQ) rules provide that burning must be outside the corporate limits of a city, except where the city has enacted an ordinance that permits burning consistent with the Texas Clean Air Act, Subchapter E, Authority of Local Governments. 30 Tex. Admin. Code § 111.219. Thus, a city has—within the bounds of the Clean Air Act—discretionary authority to allow outdoor burning in the city limits. However, where a city does not provide for or authorize solid waste collection service, certain domestic waste may be burned on the property where the waste is generated. 30 Tex. Admin. Code § 111.209.

For more information about outdoor burning, download TCEQ's publication *Outdoor Burning in Texas* at www.tceq.state.tx.us/goto/burning or call TCEQ at 888-777-3186.