



The Senate of
The State of Texas
Austin 78711

RQ 870

KEN ARMBRISTER
District 18

November 23, 1995

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Opinion Committee

FILE # ML-3746395
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The Honorable Dan Morales
Attorney General
P.O. Box 12548
Austin, Texas 78701-2548

Dear General Morales:

As you are aware, Senate Bill 1 was a comprehensive and ambitious project undertaken this past session by members of the Texas Senate and the Texas House of Representatives. The complete overhaul of the Education Code posed challenges to the Legislature and touched every facet of Texas education. In our desire to give school districts more flexibility in purchasing methods, it appears that some confusion has arisen concerning provisions governing purchasing. We understand that the staff of the Texas Education Agency, together with school district professional purchasing personnel and other state agency personnel, are currently revising TEA's handbook on competitive procurement. As members of the Senate Education Committee and the subsequent conference committee, we participated in rewriting the sections addressing competitive procurement. The purpose of the letter is to ask for an official opinion from your office regarding procurement changes effected by the passage of Senate Bill 1.

Prior to the adoption of Senate Bill 1, Sections 21.901-21.9013 of the Education Code constituted the basic purchasing statutes for school districts. Competitive bidding was, with few exceptions, the only method of purchasing personal property that exceeded \$25,000, in the aggregate, during a 12-month period. Except in emergencies, school districts were required under Section 21.901(b) to submit all construction contracts valued greater than \$15,000 to competitive bidding. Responding to requests to expand allowable competitive purchasing methods, the Legislature amended these statutes.

Section 44.031, Education Code, now covers all contracts, with few exceptions, not just personal property and construction contracts. The trigger amount remains \$25,000, in the aggregate, for each 12-month period. School districts are now allowed to choose from any of the methods listed in Section 44.031(a), as long as the selected method provides the best value to the school district. It is in this list of allowable methods that drafting issues appear to have created confusion. Subsection (a), Section 44.031 reads:

. . . all school district contracts. . . valued at \$25,000 or more in the aggregate for each 12-month period shall be made by the method, of the

following methods, that provides the best value to the district:

- (1) competitive bidding;
- (2) competitive sealed proposals;
- (3) a request for proposals;
- (4) a catalogue purchase as provided by Subchapter B, Chapter 2157, Government Code;
- (5) an interlocal contract; or
- (6) a design/build contract.

Subdivisions (1), (2), and (3) represent the Legislature's intent to expand competitive purchasing methods for school districts. Under Section 44.031(a), school districts have an obligation to determine which of these methods provides the "best value" to the district. Certainly, a competitive proposal will provide the "best value" for some types of purchases. Section 44.031 leaves these types of decisions to local school districts. Competitive bidding, competitive sealed proposals, and requests for proposals provide an equal opportunity for all vendors to compete and assure accountability for expenditures. When making purchases, each school district must determine the method "that provides the best value to the district."

Subdivision (4), "a catalogue purchase as provided by Subchapter B, Chapter 2157, Government Code" clarifies that school districts that are members of the General Services Commission's cooperative purchasing program, like state agencies, may use the catalogue purchase procedure. Although the question has now been answered in Attorney General DM-350, when Senate Bill 1 passed, there was uncertainty among school district purchasing personnel about whether the catalogue purchase procedure met competitive bidding requirements. Senate Bill 1 and DM-350 concur on this issue: school districts that are members of the General Services Commission's cooperative purchasing program satisfy competitive procurement requirements when they use this particular catalogue purchase procedure. Chapter 2157 of the Government Code even allows additional terms and conditions to be negotiated between the parties. By specifically listing "catalogue purchase. . ." the Legislature intended to emphasize that local school districts must determine if a catalogue purchase provides the "best value" to the district.

We also added Subdivision (5), "an interlocal contract," as one of the methods school districts may use. Chapter 791 of the Government Code authorized certain public entities, including school districts, to participate in interlocal agreements. In hindsight, the listing of interlocal contracts was probably unnecessary, since this type of contractual arrangement is already authorized by Chapter 791. However, by specifically listing "interlocal contract" the Legislature intended to emphasize that local school districts must determine whether purchases made pursuant to an interlocal contract provide the "best value" to the district. Participation in an interlocal contract, whereby the members of a cooperative experience the efficiencies associated with the buying power of a larger group, is merely one of the competitive methods available to school districts. Similarly, Subchapter F, Chapter 271 of the Local Government Code authorizes local governments, including school districts, to participate in cooperative purchasing programs.

The listing of “a design/build contract” under Subdivision (6) of Section 44.031(a) has caused confusion. Section 44.031(a)(6) specifically authorizes a school district to enter into a design/build contract if the school district determines that the contract will provide the “best value” to the school district. Thus, participation in a design/build contract is one of the contracting methods available to school districts. However, the Legislature never intended for school districts to simply enter into these contracts without some form of competitive procurement procedure. Nor did the Legislature intend for design/build contracts to be a purchasing method that would allow school districts to circumvent the Professional Services Procurement Act (Chapter 2254, Tex. Gov’t Code).

As with all of the authorized methods listed in Section 44.031(a), a local school district must determine if a “design/build contract” provides the “best value.” The Legislature intended that when a school district contracts on a design/build basis, the school district must use competitive procurement procedures to ensure that the school district will be provided the “best value.”

Additional confusion may have resulted from Subsection (f) of Section 44.031 of the Education Code. Subsection (f) states that “[t]his section does not apply to fees received for professional services rendered, including architect’s fees, attorney’s fees, and fees for fiscal agents”; it tracks the language found in the Section 21.901(c) of the Education Code before the enactment of Senate Bill 1. Section 21.901(c), Education Code, read “[n]othing in this section shall apply to fees received for professional services rendered, including but not limited to architect’s fees, attorney’s fees, and fees for fiscal agents.” Because Section 21.901 only allowed for competitive bidding, and competitive bidding is prohibited under the Professional Services Procurement Act, Tex. Gov’t. Code Section 2254.003(a)(1), the Attorney General previously determined that governmental bodies subject to a statutory requirement of competitive bidding for construction contracts could not enter into design/build projects because architects may not be hired on the basis of competitive bids (JM-1189). While we specifically intended to create new legislation that allows school districts to enter into design/build projects, we never intended for districts to do so without any type of competitive process. As stated above, a local school district must determine if “a design/build contract” provides the “best value” for the district. A competitive proposal or request for proposal should be used when contracting on a design/build basis.

A question has also arisen about the applicability of Chapter 271 of the Local Government Code to school district construction contracts. Section 271.024, entitled “Competitive Bidding Procedure Applicable to Contracts”, states in pertinent part:

If a governmental entity is required by statute to award a contract for the construction, repair, or renovation of a structure . . . on the basis of competitive bids, and if the contract requires the expenditure of more than \$15,000 . . . the bidding on the contract must be accomplished in the manner provided by this subchapter.

In enacting Senate Bill 1, the Legislature intended that in cases where a school district determines that it should use competitive bidding for a construction project in order to achieve the "best value" to the district, the provisions of Chapter 271 apply. As a conflict in dollar amounts exist between Section 271.024 (\$15,000) and Section 44.031 of the Education Code (\$25,000), the higher dollar amount contained in the Education Code controls pursuant to Section 44.031(e) of the Education Code ("to the extent of any conflict, this section prevails over any other law relating to this purchasing of goods and services. . ."). Among other specific requirements, Section 271.026 of the Local Government Code requires schools to open bids in public. The Legislature never intended to permit school districts to open construction bids behind closed doors.

Because of confusion about the proper construction of these provisions, we hereby request an official opinion from your office on the following questions:

1. If school districts enter into interlocal agreements pursuant to Chapter 791, Government Code, for purchasing purposes, are they exempt from the requirements of Section 44.031, Education Code? In other words, does someone have to follow the competitive procurement requirements on behalf of the school district interlocal members?
2. If a school district participates in a cooperative purchasing program pursuant to Subchapter F, Chapter 271 of the Local Government Code, must the school district follow competitive procurement procedures in order to satisfy the "best value" requirements imposed by Section 44.031(a) of the Education Code? Does Section 271.102(c) of the Local Government Code exempt a school district that participates in a cooperative purchasing program from competitive procurement requirements?
3. Does Chapter 271, Local Government Code, still apply to school districts for construction purposes?
4. Design/build contracts are now specifically allowed under Section 44.031 of the Education Code. How does a school district enter into one of these contracts given the fact that a design/build contract is a type of contract and not a method of procurement? In order to determine that a design/build contract provides "best value" as required by the statute, wouldn't a school district have to use competitive procurement in one of the following ways:
 - A. Owner selection of Architect/Engineer (A/E) through request for proposals (RFP) for professional services in conjunction with owner selection of contractors and subcontractors through competitive bidding.
 - B. Owner selection of A/E through RFP for professional services. Owner selection of General Contractor (GC) or Construction Manager (CM) by publicly bidding fee and general conditions. All subcontractors procured through competitive bidding, requiring clearly defined initial scope.

C. Owner selection of Project Manager (PM) or Construction Manager (CM) through RFP for professional services or consultant services. PM/CM assumes full responsibility as agent of Owner. PM/CM selection of A/E through RFP for professional services. PM/CM selection of contractors and subcontractors through competitive bidding.

Our staff has researched these issues and has found no controlling precedent. We appreciate your attention to these important issues and we hope these clarifications will assist all, including those revising the procurement handbook.

Sincerely,

A handwritten signature in black ink that reads "Ken Armbrister". The signature is fluid and cursive, with a large initial "K" and "A".

Ken Armbrister
State Senator

A handwritten signature in black ink that reads "Bill Ratliff". The signature is cursive and stylized, with a large initial "B".

Bill Ratliff
State Senator