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ADMINISTRATIVE HEARINGS  
April Bermea , CLERK

**SOAH DOCKET NO. 701-23-20179**  
**TEA DOCKET NO. 039-R8-05-2023**

ACCEPTED  
701-23-20179  
9/8/2023 4:12:20 pm  
STATE OFFICE OF  
ADMINISTRATIVE HEARINGS  
April Bermea , CLERK

<b>LA JOYA INDEPENDENT SCHOOL DISTRICT</b>	§	<b>BEFORE THE STATE</b>
<b>Petitioner,</b>	§	
	§	
	§	<b>OFFICE OF</b>
<b>v.</b>	§	
	§	
<b>TEXAS EDUCATION AGENCY,</b>	§	<b>ADMINISTRATIVE HEARINGS</b>
<b>Respondent.</b>	§	

**LA JOYA INDEPENDENT SCHOOL DISTRICT'S**  
**CLOSING ARGUMENT**

Petitioner, La Joya Independent School District (“La Joya”), files this Closing Argument to the Hearing held on August 28, 2023 and in support thereof shows the following:

**BACKGROUND**

In 2018, Texas Education Agency (“TEA”) first opened its investigation after receiving an internal complaint from TEA employees.

On March 21, 2022, TEA sent La Joya its Notice of Special Investigation for alleged violations of the Texas Education Code and the Texas Local Government Code. TEA Exhibit 1 at 107.

After over a year of document requests and interviews, TEA issued its Final Report on May 9, 2023, recommending the appointment of a Board of Managers to supplant La Joya’s elected Board of Trustees (“Trustees”).

La Joya timely filed its request for a hearing in accordance with Tex. Educ. Code § 39.005(b), which instituted the underlying proceeding.

## **FACTUAL BACKGROUND**

TEA's Final Report contains two allegations: first, La Joya failed to oversee the management of the district by not having proper controls in place to catch fraud committed with respect to a contract with Performance Services, Inc. ("PSI"), and second, La Joya Trustees and administrators failed to file conflict of interest forms.

Allegation One centers on criminal acts committed by individuals who are former La Joya Trustees and employees dating back to over five (5) years ago, all of whom have since either been indicted or convicted for the crimes they committed. None of those individuals are currently affiliated with La Joya. No other individuals have been identified as co-conspirators. And TEA has offered no evidence of any other co-conspirators.

Allegation Two involves some of the same Trustees and administrators engaged in the conduct at-issue in Allegation One as well as Mr. Alex Cantu, a current La Joya Trustee, and centers on the alleged duty to file conflict-of-interest disclosures.

As Mr. Cantu testified at the Hearing, he received legal advice as well as advice from then-superintendent Dr. Alda Benavides in 2017 that he was not required to file a conflict-of-interest disclosure statement because there was no business relationship between RGV Read and Feed and La Joya. Hearing Transcript 215:16–215:24.

In 2019, Mr. Cantu was informed by his attorneys to file a conflict-of-interest disclosure statement and he immediately did so within seven days. *Id.* at 239:2–239:5.

## **STANDARD OF REVIEW**

The hearing in this matter is a "contested case under Chapter 2001, Government Code." Tex. Educ. Code EC 39.005(e); *see also* 19 Tex. Admin. Code § 157.1131–.1135. Thus, the Texas Education Agency is required to provide notice of, and ultimately prove, the factual

matters asserted and statutes and rules that are involved. Tex. Gov't Code § 2001.052(a) (requiring a hearing notice that includes all of the following information: (1) the time, place, and nature of the hearing; (2) the legal authority and jurisdiction under which the hearing is held; (3) the “particular sections of the statutes and rules involved”; and (4) a plain statement of the factual matters asserted). In any subsequent suit for judicial review of a final decision or order of a state agency in a contested case, “the state agency’s failure to comply with Subsection (a) (3) or (b) shall constitute prejudice to the substantial rights of the appellant under Section 2001.174 (2) unless the court finds that the failure did not unfairly surprise and prejudice the appellant or that the appellant waived the appellant’s rights.” Tex. Gov't Code § 2001.052(c). The Texas Education Agency has the burden of proof by a preponderance of the evidence.

### **SUMMARY OF THE ARGUMENT**

TEA should not install a Board of Managers to replace the existing La Joya Board of Trustees (“La Joya Board”) because TEA has not established by a preponderance of the evidence that the La Joya Board acted as a body corporate in violation of Texas Education Code §§ 11.051 and 11.1511 nor has TEA established that there was a contractual relationship that would give rise to an obligation to file a conflict-of-interest disclosure. All of the acts committed by former La Joya administrators and trustees were *ultra vires* acts done so with no knowing approval by the La Trustees. The requirement to file a conflict-of-interest statement under Chapter 176 of the Texas Local Government Code is predicated on the existence of a valid contract between a vendor and the school district.

**A. TEA's argument and evidence presented at the Hearing is limited to the allegations as contained in the Final Report.**

TEA's special investigation was conducted under the authority of Tex. Educ. Code § 39.003(a)(3), (4) and (17). TEA Exhibit 1 at 108. Nothing in the Texas Education Code allows for TEA to introduce evidence outside of that included with its Final Report. *See* Tex. Educ. Code § 39.005(b) ("a board of trustees of a school district to which this section applies may request a hearing if the board of trustees disagrees with the final report or a sanction or intervention recommended by the agency in the report."). TEA's Final Report was admitted into evidence during the Hearing as TEA Exhibit 1. Thus, the entirety of TEA's argument at the Hearing was limited to proving by a preponderance of the evidence the factual and legal bases for its recommendation of the appointment of a Board of Managers to replace the La Joya's sitting Board of Trustees, as contained in the Final Report.

**B. The evidence does not establish that the La Joya Trustees failed to make effective use of community resources to serve the needs of the public and students of the community.**

TEA alleges that the La Joya Trustees violated Tex. Educ. Code § 11.051 and Tex. Educ. Code § 11.1511 by 1) failing to oversee the management of the district and 2) failing to make effective use of community resources to serve the needs of the public and students of the community. TEA Exhibit 1 at 5. In support of these allegations, at the Hearing, TEA offered as a witness Bradley Brown ("Brown"), the lead investigator for TEA in the Special Investigation of La Joya. Brown testified that federal indictments and guilty pleas by former members of the La Joya Board of Trustees instigated the investigation into La Joya. Hearing Transcript 27:10–29:2. Indeed, Brown was asked numerous questions about information contained in the criminal

indictments and plea agreements of former La Joya board members that were included as exhibits to the TEA's Final Report. Hearing Transcript 34:2–46:8.

Brown's testimony is belied by the fact that he did not participate in the criminal investigations of the former La Joya board members. *Id.* at 39:11–39:15. And by his own admission, he has never conducted a criminal investigation. *Id.* at 39:8–39:10. He essentially read into the record the results of the criminal investigations and indictments prepared by a third-party without any personal knowledge of the findings thereof nor bothering to interview the former La Joya Trustees.

What's worse is that the only evidence TEA provides in support of Allegation One comes from the court records of the former Trustees. To be sure, TEA alleges in Allegation One that La Joya's procurement policies and procedures were inadequate, so the board was the vessel for the former trustees' criminal wrongdoings to occur. TEA Exhibit 1 at 22. TEA also claims that La Joya should have considered other vendors regarding the energy savings contract but provides no legal citation to support this assertion. TEA Exhibit 1 at 24. Yet both claims were contradicted by the testimony of TEA's own team members who participated in the drafting of the Final Report.

Prior to the start of the Hearing, La Joya requested that the Presiding Officer take Official Notice, to which TEA did not object, that "there is no requirement for a school district, such as La Joya, to engage in a competitive procurement process when purchasing goods or services under an interlocal contract."<sup>1</sup> Brown testified that the Region VIII Education Service Center ("ESC")—where the PSI contract made the basis of TEA's Final Report was procured—utilizes a buy board for school districts, such as La Joya, to make purchases through an interlocal arrangement. Hearing Transcript 99:8–100:10. And Brown acknowledged that the benefit of an interlocal agreement like

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<sup>1</sup> Exhibit A.

those with ESCs is that school districts do not have to conduct any further procurement activities but are advised to follow district policies and procedures on procurement. *Id.* at 100:4–100:10.

Moreover, the testimony of Dr. Benthall, the TEA’s Director of Special Investigations, further undercut the assertion made in the Final Report that La Joya’s procurement manual was inadequate. Specifically, Dr. Benthall asked TEA’s Financial Compliance Division (“FCD”) to conduct a formal analysis of La Joya’s procurement processes three days before the Final Report was issued. Hearing Transcript at 245:11–246:10. FCD found that La Joya’s procurement manual used in 2017—the same time La Joya allegedly had inadequate procurement practices to allow the PSI contract to proceed—was the same as the model distributed by the Texas Association of School Boards (“TASB”). *Id.* 246:2 – 247:15. According to Dr. Benthall, the TASB model policies and procedures are considered “best practices.” *Id.* at 247:16–247:19.

Lastly, TEA never evaluated other vendors’ pricing on the TIPS buy board for the same services that PSI provided to La Joya. *Id.* at 105:23–106:15. Nor did TEA evaluate whether the price paid for sporting goods from Xizaka, LLC was more or less than it would have been from other vendors. *Id.* at 105:9–105:22. The failure by TEA to undertake a financial analysis of the PSI work done for LJISD leaves TEA with no basis by which it can argue that La Joya failed to make effective use of community resources without knowing if, in fact, the PSI or Xizaka contracts ultimately cost La Joya more money than the offerings of other vendors.

**C. The evidence does not establish that the former La Joya board members’ conduct constituted the conduct of the Board as a body corporate.**

It is well-settled in Texas law that a member of the board of trustees may not, individually, act on behalf of the board unless authorized by the board. Tex. Educ. Code § 11.051(a-1). Nowhere during the Hearing does TEA acknowledge that the actions of former board members were done

so without authority of the board as a whole— commonly referred to as ultra vires acts. Instead, the Final Report, and Mr. Brown during his testimony, simply point to the La Joya Trustees’ votes in 2017 and 2019 approving the energy savings projects with PSI as indicative of the body corporate’s failure to safeguard the district from fraud. TEA Exhibit 1 at 22; Hearing Transcript at 49:22–50:5.

TEA’s narrow focus on the La Joya procurement processes in 2017 and 2019, and ultimate action by the board, as evidence of inadequate policies and procedures is puzzling considering TEA’s Financial Compliance Division’s analysis that La Joya’s procurement processes are and were in line with TASB. Hearing Transcript at 246:2–247:15. However, perhaps more puzzling is TEA’s clear familiarity with ultra vires acts but omission of any reference to its existence in the Final Report. Indeed, Brown’s supervisor, David Rodriguez, understood that when an employee or trustee commits a criminal act, that would constitute an ultra vires act, as such action would be done outside of the authority of the board of trustees. *Id.* at 140:10–141:21. And so did Mr. Rodriguez’s supervisor, Ashley Jernigan, who testified that sometimes individuals take matters into their own hands and take action, and that the La Joya’s boards acts are not, in and of themselves, violations but rather speak to the board’s conduct. *Id.* at 184:7 – 185:4. Hence TEA is attempting to gloss over the ultra vires acts of former trustees from five years ago and instead place blame on the newly elected La Joya board for following its TASB-approved procurement policy.

**D. The evidence does not establish that La Joya entered a contract with RGV Read and Feed.**

TEA alleges that La Joya entered a written contract with RGV Read and Feed (“RGV”), which precipitated the filing of a conflict-of-interest form by certain La Joya employees and board members, including Alex Cantu. TEA Exhibit 1 at 28. However, when pressed and presented with

the Memorandum of Understanding (“MOU”) included in TEA’s Final Report, Brown could not identify which campuses were to be served. Hearing Transcript at 96:13–96:21. Nor is the price to be paid by anyone to RGV included in the MOU. *Id.* at 96:22–96:25. Nor were the types of meals specified in the MOU. *Id.* at 97:1–97:12. Nor were specific dates included in the MOU. *Id.* at 97:13–97:17. Without these essential terms, the MOU is clearly not a contract.

Even if there were a contract, the rates for the RGV Read and Feed program are published publicly through the Texas Department of Agriculture as well as the United States Department of Agriculture. Hearing Transcript at 82:4–82:8. Yet TEA never identified in its Final Report the federal and state program through which RGV Read and Feed was serving children in the community and how RGV Read and Feed was being reimbursed. Had TEA done so, it would have become evident that RGV Read and Feed’s program fell under the exception from being defined as a “business relationship” for transactions that are subject to rates by a federal or state entity. Tex. Loc. Gov’t Code § 176.001(1-a)(A).

Further, TEA never addresses the impact of the lack of a contract on Mr. Cantu’s Chapter 176 disclosure obligation. Last, TEA fails to provide any proof as to how Texas Local Government Code § 176.003(b) does not invalidate some of its arguments in Allegation Two, despite evidence and testimony demonstrating that Mr. Cantu timely filed a conflict-of-interest form within seven days of becoming aware of the need to do so.

**E. TEA has improperly imputed a fiduciary duty onto school district Board of Trustees.**

In its Final Report, TEA claims that, “Tex. Educ. Code § 11.051(a) states that school districts are governed by a board of *trustees* who owe fiduciary duties to the school district (the beneficiary).” TEA Exhibit 1 at 21. TEA has improperly inserted the concept of fiduciary duty into Section 11.051. To be sure, Tex. Educ. Code § 11.051(a) actually states the following:

- (a) An independent school district is governed by a board of trustees who, as a body corporate, shall:
- (1) oversee the management of the district; and
  - (2) ensure that the superintendent implements and monitors plans, procedures, programs, and systems to achieve appropriate, clearly defined, and desired results in the major areas of district operations.

Nowhere in Sections 11.051 or 11.1511 of the Education Code is there mention of the board of trustees' fiduciary duty to a school district. Nevertheless, assuming arguendo that the Texas Education Code had adopted the Uniform Prudent Investor Act provisions, "investments must be made in accordance with written policies approved by the board." *See* Tex. Gov't Code § 2256.005(b). As the TEA's Dr. Benthall testified, at the time of the approval of the PSI contract in 2017, La Joya's procurement processes were the same as that promulgated by the Texas Association of School Boards ("TASB"), which is considered "best practices." Hearing Transcript at 246:2 – 247:19. And TEA has not offered—either in the Final Report or through direct testimony—a single excerpt of La Joya's policy that TEA alleges has been violated.

### **CONCLUSION**

For the foregoing reasons, La Joya requests that the Presiding Officer issue proposed findings of fact and conclusions of law recommending the denial of the appointment of a Board of Managers. TEA did not meet their burden of proof by a preponderance of the evidence and testimony to establish either of the allegations contained in their Final Report.

Respectfully submitted,

SCOTT & SCOTT, PLLC

*/s/ John B. Scott*

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John B. Scott

State Bar No. 17901500  
J. Andrew Scott  
State Bar No. 24106410  
316 W 12<sup>th</sup> St  
Austin, Texas 78701  
(817) 975-2165  
[John.scott@scottpllc.net](mailto:John.scott@scottpllc.net)  
[Andrew.scott@scottpllc.net](mailto:Andrew.scott@scottpllc.net)  
**ATTORNEYS FOR LA JOYA  
INDEPENDENT SCHOOL DISTRICT**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following attorneys of record on the 8th day of September 2023:

Matthew Tiffiee  
State Bar No. 24070745  
[Matthew.tiffiee@tea.texas.gov](mailto:Matthew.tiffiee@tea.texas.gov)  
Melissa Tico Evans  
State Bar No. 24121863  
[Melissa.ticoevans@tea.texas.gov](mailto:Melissa.ticoevans@tea.texas.gov)  
Texas Education Agency  
1701 North Congress Avenue  
Austin, TX 78701  
Phone: (512) 463-9720  
Fax: (512) 463-6027

*/s/ J. Andrew Scott*  
J. ANDREW SCOTT  
**ATTORNEYS FOR LA JOYA  
INDEPENDENT SCHOOL DISTRICT**

# **EXHIBIT A**

**SOAH DOCKET NO. 701-23-20179  
TEA DOCKET NO. 039-R8-05-2023**

<b>LA JOYA INDEPENDENT SCHOOL DISTRICT</b>	§	<b>BEFORE THE STATE</b>
<b>Petitioner,</b>	§	
	§	
<b>v.</b>	§	<b>OFFICE OF</b>
	§	
<b>TEXAS EDUCATION AGENCY,</b>	§	<b>ADMINISTRATIVE HEARINGS</b>
<b>Respondent.</b>	§	

**LA JOYA INDEPENDENT SCHOOL DISTRICT'S  
REQUEST FOR OFFICIAL NOTICE**

Petitioner La Joya Independent School District (“La Joya”) hereby requests the Administrative Law Judge take official notice of the following excerpts from the Texas Government Code § 791.025(c) and Texas Attorney General Opinion JC-37 (1999):

1. “A local government that purchases goods and services under this section satisfies the requirement of the local government to seek competitive bids for the purchase of the goods and services.” Tex. Gov’t Code § 791.025(c), attached hereto as **Exhibit A**.
2. “You first ask whether an interlocal contract entered on behalf of a school district must be competitively bid. We conclude that neither the Education Code nor the Interlocal Cooperation Act, chapter 791 of the Government Code, require it.

Nothing in section 44.031 of the Education Code mandates that a school district require a representative contracting on the district’s behalf to competitively procure the contract. Subsection 44.031(a) lists an interlocal contract as a purchasing method a school district may select as an alternative to a contract made by the competitive procurement methods listed. In addition, while section 44.031(b) lists factors a school district may consider in selecting the vendor to whom to award a particular contract, the list is optional and does not necessarily apply to the individual or entity purchasing goods or services on the school district’s behalf in an interlocal contract. We find nothing else in the Education Code that obligates a school district to insist that goods or services purchased for the district through an interlocal cooperation contract be competitively procured.

Nor does the Interlocal Cooperation Act, which allows a school district to contract with another local government, the state, or a state agency to purchase goods or services, require competitive bidding. See TEX. GOV’T CODE ANN. § 4.791.025(a) (Vernon Supp. 1999). The Interlocal Cooperation Act does not require a local government to impose competitive

procurement methods on the local government's representative who purchases goods or services on the local government's behalf. To the contrary, the Interlocal Cooperation Act could be construed to permit parties to choose not to competitively bid a contract for the purchase of services if one of the local governments that was a party to the contract was not required to competitively bid such a contract. *See id.* § 791.012 (Vernon Supp. 1999) ("Local governments that are parties to an interlocal contract for the performance of a service may, in performing the service, apply the law applicable to a party as agreed by the parties.").

A school district may, of course, direct its agent to competitively procure the contract, but state law does not require it to do so. A school district also may require its agent to evaluate the vendors' submissions using the criteria listed in section 44.031(b) of the Education Code, but the school district again is not required to do so. Finally, we note that federal law may impose competitive procedures on the purchase in certain circumstances. See 34 C.F.R. § 80.36(d) (1998) (setting policies and procedures for procurement made with federal funds). State law, however, does not."

Tex. Op. Att'y Gen JC-37, at 8–9 (1997), attached hereto as **Exhibit B**.

Therefore, there is no requirement for a school district, such as La Joya, to engage in a competitive procurement process when purchasing goods or services under an interlocal contract.

Tex. Gov't Code § 791.025(c), Tex. Op. Att'y Gen JC-37, at 8–9 (1997).

### **PRAYER**

La Joya prays that the Administrative Law Judge grant its Request for Official Notice, in whole or in part, and grant it such other and further relief to which it may show itself justly entitled, both at law and in equity.

Respectfully submitted,

SCOTT & SCOTT, PLLC

*/s/ John B. Scott*

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John B. Scott

State Bar No. 17901500

J. Andrew Scott

State Bar No. 24106410

316 W 12<sup>th</sup> St  
Austin, Texas 78701  
(817) 975-2165  
[John.scott@scottpllc.net](mailto:John.scott@scottpllc.net)  
[Andrew.scott@scottpllc.net](mailto:Andrew.scott@scottpllc.net)  
**ATTORNEYS FOR LA JOYA  
INDEPENDENT SCHOOL DISTRICT**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following attorneys of record on the 21<sup>st</sup> day of August 2023:

Matthew Tiffie  
State Bar No. 24070745  
[Matthew.tiffie@tea.texas.gov](mailto:Matthew.tiffie@tea.texas.gov)  
Melissa Tico Evans  
State Bar No. 24121863  
[Melissa.ticoevans@tea.texas.gov](mailto:Melissa.ticoevans@tea.texas.gov)  
Texas Education Agency  
1701 North Congress Avenue  
Austin, TX 78701  
Phone: (512) 463-9720  
Fax: (512) 463-6027

*/s/ J. Andrew Scott*  
J. ANDREW SCOTT  
**ATTORNEYS FOR LA JOYA  
INDEPENDENT SCHOOL DISTRICT**

# **EXHIBIT A**

Vernon's Texas Statutes and Codes Annotated  
Government Code (Refs & Annos)  
Title 7. Intergovernmental Relations (Refs & Annos)  
Chapter 791. Interlocal Cooperation Contracts (Refs & Annos)  
Subchapter C. Specific Interlocal Contracting Authority

V.T.C.A., Government Code § 791.025

§ 791.025. Contracts for Purchases

Effective: September 1, 2007

[Currentness](#)

(a) A local government, including a council of governments, may agree with another local government or with the state or a state agency, including the comptroller, to purchase goods and services.

(b) A local government, including a council of governments, may agree with another local government, including a nonprofit corporation that is created and operated to provide one or more governmental functions and services, or with the state or a state agency, including the comptroller, to purchase goods and any services reasonably required for the installation, operation, or maintenance of the goods. This subsection does not apply to services provided by firefighters, police officers, or emergency medical personnel.

(c) A local government that purchases goods and services under this section satisfies the requirement of the local government to seek competitive bids for the purchase of the goods and services.

(d) In this section, “council of governments” means a regional planning commission created under Chapter 391, Local Government Code.

#### **Credits**

Added by Acts 1991, 72nd Leg., ch. 38, § 1, eff. Sept. 1, 1991. Amended by Acts 1995, 74th Leg., ch. 28, § 1, eff. April 27, 1995; Acts 1997, 75th Leg., ch. 826, § 1, eff. June 18, 1997; Acts 2007, 80th Leg., ch. 937, § 1.62, eff. Sept. 1, 2007.

#### [Notes of Decisions \(1\)](#)

V. T. C. A., Government Code § 791.025, TX GOVT § 791.025

Current through legislation effective July 1, 2023, of the 2023 Regular Session of the 88th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

# **EXHIBIT B**



April 28, 1999

The Honorable Ken Armbrister  
Chair, Criminal Justice Committee  
Texas State Senate  
P.O. Box 12068  
Austin, Texas 78711

The Honorable Bill Ratliff  
Chair, Finance Committee  
Texas State Senate  
P.O. Box 12068  
Austin, Texas 78711

Opinion No. JC-0037

Re: How a school district should determine that a design/build contract will provide the school district with the best value for purposes of Education Code section 44.031(a), and related questions (RQ-870)

Dear Gentlemen:

You ask a series of questions concerning competitive bidding or procurement requirements, if any, that may apply to school district contracts under chapter 44, subchapter B of the Education Code. Section 44.031, part of subchapter B, generally requires a school district to contract for all purchases valued at \$25,000 or more in the aggregate for a twelve-month period using the purchasing method, of eight listed in the statute, that provides the best value to the school district. You raise the following issues:

1. How does a school district determine that a design/build contract provides the "best value" to the school district and must it follow competitive procurement requirements to let a design/build contract?
2. With respect to a construction contract valued at more than \$15,000, must a school district comply with Local Government Code sections 271.021 through 271.030, which provide for competitive bidding on certain public-work contracts, in addition to any requirements in Education Code sections 44.031 through 44.051, which pertain to school district purchases and contracts?

3. Must an interlocal contract entered on behalf of a school district be competitively bid?
4. If a school district participates in a cooperative purchasing program, as provided in Local Government Code sections 271.081 through 271.083, must the school district follow competitive procurement procedures?

Chapter 44, subchapter B of the Education Code governs a school district's purchases and contracts. Section 44.031 particularly regulates a school district's purchasing contracts "valued at \$25,000 or more in the aggregate for each 12-month period," unless the contract is for the purchase of produce or vehicle fuel. TEX. EDUC. CODE ANN. § 44.031(a) (Vernon Supp. 1999). In general, a school district must enter such a contract using the method, of eight listed methods, that provides the district with the "best value":

(a) Except as provided by this subchapter, all school district contracts, except contracts for the purchase of produce or vehicle fuel, 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;
- (6) a design/build contract;
- (7) a contract to construct, rehabilitate, alter, or repair facilities that involves using a construction manager; or
- (8) a job order contract for the minor repair, rehabilitation, or alteration of a facility.

*Id.* (footnotes omitted).

Section 44.031 establishes a bifurcated process for letting a contract, separating the selection of a purchasing method from the ultimate award of a contract using the chosen method. Under subsection (a), a district first must evaluate which of the eight listed purchasing methods will provide the best value. Then, after the district has chosen the purchasing method it will use, it is to adhere to the procedures applicable to that purchasing method. *Accord* Tex. Att’y Gen. Op. No. DM-387 (1996) at 3 (stating that once school district has determined that competitive bidding will provide best value, school district then must begin competitive bidding process). Subsequent provisions in chapter 44, subchapter B provide some procedures for procurement and criteria for selecting a vendor with respect to particular purchasing procedures. *See* TEX. EDUC. CODE ANN. §§ 44.031(b), .035, .037, .038, .039, .040, .041 (Vernon Supp. 1999). In the absence of specific procurement procedures or evaluation criteria, the district may evaluate vendors’ submissions using the criteria listed in section 44.031(b):

- (1) the purchase price;
- (2) the reputation of the vendor and of the vendor’s goods or services;
- (3) the quality of the vendor’s goods or services;
- (4) the extent to which the goods or services meet the district’s needs;
- (5) the vendor’s past relationship with the district;
- (6) the impact on the ability of the district to comply with laws and rules relating to historically underutilized businesses;
- (7) the total long-term cost to the district to acquire the vendor’s goods or services; and
- (8) any other relevant factor that a private business entity would consider in selecting a vendor.

With this background, we turn to your specific questions.

**I. Determining that a design/build contract constitutes the “best value” under Education Code section 44.031(a)(6) and awarding design/build contracts**

You ask how a school district determines that a design/build contract provides the “best value.” Section 44.031 does not define the term “best value.” Nor does it or any other provision in chapter 44, subchapter B of the Education Code prescribe the method by which a school district is to determine which purchasing method will afford the district the best value. Section 44.031(b) expressly lists factors for “determining *to whom* to award a contract.” TEX. EDUC. CODE ANN. § 44.031(b) (Vernon Supp. 1999) (emphasis added). Determining to whom to award a contract is

different than determining which type of contract will afford the best value. Accordingly, section 44.031(b) does not purport to define how a school district is to determine which purchasing method affords it the best value, although these factors indeed may be relevant.

Because nothing in the statutes expressly defines or directs a school district in determining best value, we conclude that a school district should establish, by rule, its own procedure and criteria to determine the purchasing method that will provide the best value in a particular instance. Section 44.031(d), authorizing a school district to adopt rules and procedures for the acquisition of goods or services, encompasses the power to adopt rules governing the procedure by which a school district will evaluate the eight possible purchasing methods. *See id.* § 44.031(d) (Vernon 1996). The criteria listed in section 44.031(b) may be relevant to determining the purchasing method that will provide the best value and could inform a district's decision in choosing one type of contract over another. *See id.* § 44.040(c) (Vernon Supp. 1999) (stating that criteria established by school district for determining bidder offering best value to school district may include criteria in section 44.031(b)).

Assuming that a school district properly has determined that a design/build contract will provide the best value, you also ask whether a school district must competitively procure a design/build contract. *See id.* § 44.031(a)(6). You suggest that a school district should use a combination of competitive bidding with requests for proposal on professional services when awarding a design/build contract so as not to circumvent the Professional Services Procurement Act, TEX. GOV'T CODE ANN. ch. 2254, subch. A (Vernon 1999); *see id.* § 2254.001 (naming act), which prohibits competitive bidding on professional services contracts. We conclude that a school district selecting the design/build purchasing method must comply with section 44.036 of the Education Code, which effectively adopts a mechanism for competitive procurement—but not competitive bidding—of design/build contracts, and that compliance with section 44.036 does not conflict with the Professional Services Procurement Act.

The Professional Services Procurement Act forbids a school district to competitively bid a contract for “professional services,” which term is defined as the following services: (1) accounting; (2) architecture; (3) land surveying; (4) medicine; (5) optometry; (6) professional engineering; or (7) real-estate appraising. *See id.* §§ 2254.002(2)(A) (Vernon 1999) (defining “professional services”), 2254.003(a) (forbidding competitive bidding for professional services); *see also* Tex. Att’y Gen. LO-96-117, at 1 (noting that contract for professional services may not be competitively bid). With respect to a contract for the professional services of an architect, professional engineer, or land surveyor—three professions we imagine are most likely involved in a design/build contract—a school district must:

- (1) first select the most highly qualified provider of those services on the basis of demonstrated competence and qualifications; and
- (2) then attempt to negotiate with that provider a contract at a fair and reasonable price.

TEX. GOV'T CODE ANN. § 2254.004(a) (Vernon 1999). A professional-services contract entered in contravention of the Professional Services Procurement Act is "void as against public policy." *Id.* § 2254.005. Prior attorney general opinions have concluded that, under the Professional Services Procurement Act, a contract for the construction of a public work may not be awarded on the basis of competitive bids if architectural or engineering services comprise part of the contract. *See* Tex. Att'y Gen. Op. No. JM-1189 (1990) at 4, 5; Tex. Att'y Gen. LO-98-060, at 10-11; LO-96-117, at 1.

Section 44.036 of the Education Code effects a competitive procurement scheme for design/build contracts that differs from competitive bidding. Section 44.036 requires a school district to prepare two items in connection with each project: a request for qualifications and a design criteria package. *See* TEX. EDUC. CODE ANN. § 44.036(d) (Vernon Supp. 1999); *see also id.* § 44.036(a)(3) (defining "design criteria package"). The request for qualifications must contain information to assist a design/build firm that wishes to submit a proposal for the project, such as "general information on the project site [and] . . . scope, budget, special systems, [and] selection criteria . . ." *See id.* § 44.036(d). The design criteria package includes more detailed information about the project, *see id.*, such as a legal description and survey of the site; requirements for interior space, special materials, special equipment, quality assurance, site development, and parking; material quality standards; time schedules, applicable codes and ordinances; and provisions for utilities. *See id.* § 44.036(a)(3). The district or its representative, using a two-phased process, must first narrow the list of finalist-offerors to no more than five and then select the proposal that will provide the best value to the district:

(1) In phase one, the district shall evaluate each offeror's experience, technical competence, and capability to perform, the past performance of the offeror's team and members of the team, and other appropriate factors submitted by the team or firm in response to the request for qualifications, except that cost-related or price-related evaluation factors are not permitted. . . . The district shall qualify a maximum of five potential offerors to submit additional information regarding technical proposals, implementation, and costing methodologies in response to a formal request for proposals based on the design criteria package.

(2) In phase two, the district shall evaluate offerors on the basis of demonstrated competence and qualifications, considerations of the safety and long-term durability of the project, the feasibility of implementing the project as proposed, the ability of the offeror to meet schedules, costing methodology, or other factors as appropriate. . . . The district shall select the design-build firm that submits the proposal offering the best value for the district.

*Id.* § 44.036(e). Once the district has selected a design/build firm, section 44.036(f) requires the “winning” firm’s engineers or architects to complete the design and, prior to or concurrently with beginning construction, to submit all design elements “for review and determination of scope compliance by the district’s engineer or architect.”

The requisites of section 44.036(e) of the Education Code are not inconsistent with the requisites of the Professional Services Procurement Act, sections 2254.001 - .005 of the Government Code. The two phases of the evaluation process established in section 44.036(e) both are relevant to weighing the qualifications of the various offerors, which a public entity must do under section 2254.004(a)(1) of the Government Code. Section 44.036(e) of the Education Code therefore instructs a school district how it must fulfill section 2254.004(a)(1) of the Government Code. After the school district has completed the two-phased analysis section 44.036(e) of the Education Code sets forth and thereby selected, “on the basis of demonstrated competence and qualifications,” TEX. GOV’T CODE ANN. § 2254.004(a)(1) (Vernon 1999), the design/build firm submitting the proposal offering the best value to the district, the school district must “attempt to negotiate with that provider a contract at a fair and reasonable price,” *id.* § 2254.004(a)(2). Should the negotiations fail, the school district should attempt to negotiate with the second most highly qualified offeror selected under section 44.036(e) of the Education Code. *See id.* § 2254.004(c). Given this construction harmonizing section 44.036 of the Education Code and the Professional Services Procurement Act, it is our opinion that a school district opting to proceed with a design/build contract can and must comply with both statutes.

## **II. Competitive bidding on construction contract**

You next ask whether, when a school district lets a construction contract, it must comply with sections 271.021 through 271.030 of the Local Government Code (“chapter 271, subchapter B”), which prescribe competitive bidding for a contract requiring an expenditure greater than \$15,000 to construct, repair, or renovate a structure, road, highway, or other improvement or addition to real property. *See* TEX. LOCAL GOV’T CODE ANN. § 271.024 (Vernon Supp. 1999). This office has concluded that a school district deciding under section 44.031 to competitively bid a contract governed by chapter 271, subchapter B of the Local Government Code must comply with the competitive bidding procedures articulated there. *See* Tex. Att’y Gen. Op. No. DM-387 (1996) at 3.

Although we believe Attorney General Opinion DM-387 correctly interpreted the law as it existed at the time the opinion was issued, its conclusion has been superseded by the 1997 adoption of section 44.040 of the Education Code. *See* Act of May 29, 1997, 75th Leg., R.S., ch. 1179, sec. 2, § 44.040, 1997 Tex. Gen. Laws 4533, 4538. Under section 44.040, a school district *may* competitively bid a contract to construct, rehabilitate, alter, or repair a facility, and if it chooses to

do so, may bid the contract without complying with Local Government Code chapter 271, subchapter B in its entirety:

(a) Except to the extent prohibited by other law and to the extent consistent with this subchapter, a school district *may use competitive bidding* to select a contractor to perform construction, rehabilitation, alteration, or repair services for a facility.

(b) Sections 271.021, 271.022, 271.026, 271.027(a), and 271.0275-271.030, Local Government Code, apply to a competitive bidding process under this section.

(c) A school district shall award a competitively bid contract at the bid amount to the bidder offering the best value to the district according to the selection criteria that were established by the district. The selection criteria may include the factors listed in Section 44.031(b).

TEX. EDUC. CODE ANN. § 44.040 (Vernon Supp. 1999) (emphasis added).

Section 44.040 does two things. First, it permits, but does not require, a school district to competitively bid a contract for construction services. Second, if a school district chooses to competitively bid the contract, section 44.040 directs which sections of the Local Government Code apply to the bid process. Because subsection (b) explicitly lists those sections of Local Government Code chapter 271, subchapter B that “apply to a competitive bidding process under” section 44.040, the sections not listed—*i.e.*, sections 271.024, 271.025, and 271.027(b)—do not apply. Where the competitive bidding statutes would require compliance with all provisions of chapter 271, subchapter B, section 44.040 of the Education Code would not. If the procedures mandated by chapter 271, subchapter B conflict with chapter 44, subchapter B of the Education Code, the Education Code prevails. *See id.* (citing Educ. Code § 44.031(e)).

With the enactment of section 44.040, Attorney General Opinion DM-387 has been superseded by statute to the extent the opinion is inconsistent with the current section 44.040. We now conclude that a school district may competitively bid a contract to construct, rehabilitate, alter, or repair a facility, but it is not required to do so under section 44.040. When choosing to competitively bid a construction contract, a school district must comply with all provisions of chapter 271, subchapter B of the Local Government Code except sections 271.024, 271.025, and 271.027(b).

### **III. Interlocal Cooperation Contracts**

Your last two questions concern cooperative purchasing methods. You first ask whether an interlocal contract entered on behalf of a school district must be competitively bid. We conclude that

neither the Education Code nor the Interlocal Cooperation Act, chapter 791 of the Government Code, require it.

Nothing in section 44.031 of the Education Code mandates that a school district require a representative contracting on the district's behalf to competitively procure the contract. Subsection 44.031(a) lists an interlocal contract as a purchasing method a school district may select as an alternative to a contract made by the competitive procurement methods listed. In addition, while section 44.031(b) lists factors a school district may consider in selecting the vendor to whom to award a particular contract, the list is optional and does not necessarily apply to the individual or entity purchasing goods or services on the school district's behalf in an interlocal contract. We find nothing else in the Education Code that obligates a school district to insist that goods or services purchased for the district through an interlocal cooperation contract be competitively procured.

Nor does the Interlocal Cooperation Act, which allows a school district to contract with another local government, the state, or a state agency to purchase goods or services, require competitive bidding. *See* TEX. GOV'T CODE ANN. § 791.025(a) (Vernon Supp. 1999). The Interlocal Cooperation Act does not require a local government to impose competitive procurement methods on the local government's representative who purchases goods or services on the local government's behalf. To the contrary, the Interlocal Cooperation Act could be construed to permit parties to choose not to competitively bid a contract for the purchase of services if one of the local governments that was a party to the contract was not required to competitively bid such a contract. *See id.* § 791.012 (Vernon Supp. 1999) ("Local governments that are parties to an interlocal contract for the performance of a service may, in performing the service, apply the law applicable to a party as agreed by the parties.").

A school district may, of course, direct its agent to competitively procure the contract, but state law does not require it to do so. A school district also may require its agent to evaluate the vendors' submissions using the criteria listed in section 44.031(b) of the Education Code, but the school district again is not required to do so. Finally, we note that federal law may impose competitive procedures on the purchase in certain circumstances. *See* 34 C.F.R. § 80.36(d) (1998) (setting policies and procedures for procurement made with federal funds). State law, however, does not.

#### **IV. Cooperative purchasing program**

Lastly, you ask whether a school district that participates in a cooperative purchasing program under chapter 271, subchapter F of the Local Government Code must follow competitive procurement procedures to satisfy the "best value" requirements section 44.031(a) of the Education Code imposes.

At the outset, we note that it is not clear that school district purchases under a local cooperative purchasing program are subject to section 44.031 of the Education Code. A school district's contract under chapter 271, subchapter F of the Local Government Code is not squarely

a contract “valued at \$25,000 or more in the aggregate” for purposes of section 44.031(a) of the Education Code. Instead, a contract under chapter 271, subchapter F of the Local Government Code is a contract with other local governments or a local cooperative organization, whereby a school district (or other local government) agrees to participate in a cooperative purchasing program. *See* TEX. LOC. GOV’T CODE ANN. § 271.101(1), (2) (Vernon Supp. 1999) (defining “local cooperative organization” and “local government,” respectively). Under section 271.102(a) of the Local Government Code, a school district may participate in a cooperative purchasing program by “sign[ing] an agreement with another participating local government or local cooperative organization” that the school district will:

(1) designate a person to act under the direction of, and on behalf of, that local government in all matters relating to the program;

(2) make payments to another participating local government or a local cooperative organization or directly to a vendor under a contract made under this subchapter, as provided in the agreement between the participating local governments or between a local government and a local cooperative organization; and

(3) be responsible for a vendor’s compliance with provisions relating to the quality of items and terms of delivery, to the extent provided in the agreement between the participating local governments or between a local government and a local cooperative organization.

*Id.* § 271.102(b). Accordingly, the nature of the agreement contemplated under the local cooperative purchasing program does not obviously fall within the scope of section 44.031 of the Education Code.

While it is not obvious that a local cooperative purchasing program agreement falls under section 44.031, there is practical and intuitive logic that such agreements are covered by section 44.031. As local cooperative purchasing programs have as their sole function procuring goods and services, such agreements may be “school district contracts” subject to section 44.031. Construed in this light, cooperative purchasing programs are a kind of interlocal contract, which section 44.031(a)(5) explicitly permits a school district to enter if it represents the best value. Given the ambiguity in the law, the safest course for school districts to follow is to adhere to section 44.031 when evaluating whether to purchase goods and services through a local cooperative purchasing program.

Once a school district has determined that a local cooperative purchasing program will afford the district the best value, it need not follow any specific competitive procurement process. Section 271.102(c) of the Local Government Code declares that a local government that purchases items through a cooperative purchasing program “satisfies any state law requiring the local government

to seek competitive bids for the purchase of the goods or services.” Accordingly, any purchases made through a cooperative purchasing program necessarily are deemed to be the result of competitive procurement.

Your questions and our answers demonstrate the complexity of the law relating to school district contracts. It is our opinion that section 44.031 of the Education Code does not require competitive procurement methods for all school district contracts. To the extent that you, as active participants in the Seventy-fourth Legislature’s efforts to overhaul the Education Code, intended something different, we hope this opinion helps you determine whether the current language accomplishes your goals.

### S U M M A R Y

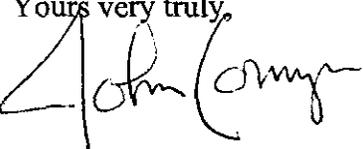
Under section 44.031 of the Education Code, a school district may establish by rule a procedure to select the one purchasing method, of the eight listed in that subsection, that will provide the best value to the school district. The district should use the procedure it adopts to determine when a design/build contract will provide it with the best value. When a district determines that a design/build contract will provide the best value to a school district, the district must award the contract in accordance with both section 44.036 of the Education Code and section 2254.004(a) of the Government Code.

Attorney General Opinion DM-387 (1996) has been superseded to the extent it is inconsistent with section 44.040 of the Education Code. With respect to a contract to construct, rehabilitate, alter, or repair a facility, a school district may, but is not required to, competitively bid the contract. If it competitively bids the contract, the school district must comply with all provisions of the competitive bidding statutes in chapter 271, subchapter B of the Local Government Code except sections 271.024, 271.025, and 271.027(b).

An interlocal contract executed on behalf of a school district need not be awarded on the basis of competitive procurement methods unless the school district requires it.

A school district may use the cooperative purchasing method, provided in chapter 271, subchapter D of the Local Government Code, to purchase items. Contracts made through a cooperative purchasing program are deemed to comply with state laws requiring

competitive bidding so that a school district need not undertake separate competitive purchasing procedures.

Yours very truly,  
  
JOHN CORNYN  
Attorney General of Texas

ANDY TAYLOR  
First Assistant Attorney General

CLARK KENT ERVIN  
Deputy Attorney General - General Counsel

ELIZABETH ROBINSON  
Chair, Opinion Committee

Prepared by Kymberly K. Oltrogge  
Assistant Attorney General

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Associated Case Party: La Joya Independent School District

Name	BarNumber	Email	TimestampSubmitted	Status
John B. Scott		john.scott@scottpllc.net	9/8/2023 4:08:00 PM	SENT
Andrew Scott		andrew.scott@scottpllc.net	9/8/2023 4:08:00 PM	SENT

Associated Case Party: Texas Education Agency

Name	BarNumber	Email	TimestampSubmitted	Status
Eric Marin		eric.marin@tea.texas.gov	9/8/2023 4:08:00 PM	SENT
Melissa Tico Evans		melissa.ticoevans@tea.texas.gov	9/8/2023 4:08:00 PM	SENT
Renee Keese		renee.keese@tea.texas.gov	9/8/2023 4:08:00 PM	SENT
Matthew Tiffie		matthew.tiffie@tea.texas.gov	9/8/2023 4:08:00 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Vasu Behara		vasu.behara@soah.texas.gov	9/8/2023 4:08:00 PM	SENT
Pratibha Shenoy		pratibha.shenoy@soah.texas.gov	9/8/2023 4:08:00 PM	SENT