



**Texas Association of School Boards**

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## **School Board Member’s Guide to Purchasing**

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School district purchasing, or *procurement*, can be a complex subject for administrators and trustees alike because of the numerous statutes, regulations, policies, and procedures that must be followed. From day to day, a district may enter into a variety of contracts for the purchase of goods and services, and each contract may be subject to different requirements. Depending on the nature of the goods or services and/or the source of funding, the purchase may be governed by the Texas Education Code, other state law, federal law, or a combination. This article provides an overview of school district procurement of goods and services under state law using state and/or local funds. Procurement with federal funds is discussed briefly at the end of the article.

Several TASB Policies address procurement. For instance, TASB Policy CH addresses procurement under state law; TASB Policy CBB addresses procurement with federal funds; TASB Policy COA addresses school nutrition procurement; and TASB Policy CV series addresses construction. Other policies address the purchase of buses, real estate, and other specific items. The Texas Education Agency (TEA) provides purchasing guidance on its website and in the [Financial Accountability System Resource Guide \(FASRG\)](#).

### **I. Board Authority**

Texas Education Code chapter 44, subchapter B (Chapter 44) governs school district purchasing generally. Texas Government Code chapter 2269 (Chapter 2269) addresses construction projects. The law specifically authorizes the board to adopt rules and procedures for the acquisition of goods and services. Tex. Educ. Code § 44.031(d); Tex. Gov’t Code § 2269.051. The board’s role is to set objectives for the district, determine the policies that will govern the district, approve plans to implement those policies, and budget funds to carry out those plans. The management and execution of the purchasing program require planning and cooperation between the board and district staff.

#### **A. Delegation Generally**

Under Chapter 44, a school board may delegate its authority regarding actions authorized or required to be taken by the *school district* to a designated person, representative, or committee. The board may not delegate its authority when the law requires the action to be taken by the *board*. Tex. Educ. Code § 44.0312.

For example, a district may receive bids or proposals by electronic transmission if the board adopts rules to ensure the identification, security, and confidentiality of electronic bids or proposals and to ensure that the electronic bids or proposals remain effectively unopened until the proper time. Tex. Educ. Code § 44.0313(a). Typically, the superintendent and district staff develop purchasing procedures that are not adopted by the board. In this instance, however, because the statute states that the *board* must adopt rules related to electronic bids and proposals, this authority is not delegable. Thus, the district may not accept electronic bids and proposals unless the board adopts appropriate rules.

Delegation of purchasing authority is typically found in board policy CH(LOCAL). Most boards have adopted a policy similar to the TASB model policy:

The Board delegates to the Superintendent the authority to make budgeted purchases for goods or services. However, any single, budgeted purchase of goods or services that costs [dollar amount] or more, regardless of whether the goods or services are competitively purchased, shall require Board approval before a transaction may take place.

Under this provision, the superintendent need not seek board approval for budgeted purchases of goods or services at a cost below the dollar amount set by the board. The dollar amount of the delegation varies from district to district.

#### **B. Delegation for Construction Projects**

Under Chapter 2269, the board may delegate its authority regarding *any* action authorized or required by that chapter to a designated representative, committee, or other person. The board must provide notice of any delegation, the limits of the delegation, and the name or title of each designated person by rule or in the request for bids, proposals, or qualifications. Tex. Gov't. Code § 2269.053. If the district fails to provide notice, a ranking, selection, or evaluation of bids, proposals, or qualifications for construction services other than by the board in an open public meeting is advisory only. Tex. Educ. Code § 44.0312(a).

#### **C. Delegation in Emergencies**

In the event of a catastrophe, emergency, or natural disaster affecting a district, the board may delegate to the superintendent or designated person the authority to contract for the replacement, construction, or repair of school equipment or facilities under Chapter 44 if emergency replacement, construction, or repair is necessary for the health and safety of district students and staff. Tex. Educ. Code § 44.0312(c). A board may make this delegation in its CH(LOCAL) policy.

## II. Procurement Requirements under State Law

### A. Methods

Other than contracts for the purchase of produce or vehicle fuel, Texas Education Code section 44.031 requires that all school district contracts for the purchase of goods and services valued at \$50,000 or more in the aggregate for each 12-month period be made by the method from the following options that provides the best value for the district:

1. Competitive bidding for services other than construction services;
2. Competitive sealed proposals for services other than construction services;
3. Request for proposals, for services other than construction services;
4. Interlocal contract;
5. A method provided by Chapter 2269 for construction services;
6. Reverse auction; or
7. Formation of a political subdivision corporation for purchase of electricity.

Tex. Educ. Code § 44.031(a).

Chapter 2269 provides six methods for procuring construction services:

1. Competitive Bidding;
2. Competitive Sealed Proposals;
3. Construction Manager-Agent;
4. Construction Manager-at-Risk;
5. Design-Build; and
6. Job Order Contracting

Tex. Gov't Code §§ 2269.101, .151, .201, .251, .301, .401.

If the district uses a construction procurement method other than competitive bidding, the board of trustees must, before advertising, determine which method provides the best value for the district. Tex. Gov't Code § 2269.056(a). To facilitate this determination, most boards have adopted a policy similar to the TASB Policy CV(LOCAL):

Prior to advertising, the Board shall determine the project delivery/contract award method to be used for each construction contract valued at or above \$50,000. To assist the Board, the Superintendent shall recommend the project delivery/contract award method that he or she determines provides the best value to the District.

## **B. Factors to Consider When Awarding the Contract**

In awarding a contract for goods and services under Chapter 44, the district must consider these statutory factors:

1. Purchase price;
2. Reputation of the vendor and of the vendor's goods or services;
3. 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. Total long-term cost to the district to acquire the vendor's goods or services;
8. For a contract for goods and services, other than goods and services related to telecommunications and information services, building construction and maintenance, or instructional materials, whether the vendor or the vendor's ultimate parent company or majority owner has its principal place of business in Texas or employs at least 500 persons in Texas; and
9. Any other relevant factor specifically listed in the request for bids or proposals.

Tex. Educ. Code § 44.031(b).

In awarding a construction contract under Chapter 2269, the district must consider and apply any existing laws related to historically underutilized businesses and the use of women, minority, small, or disadvantaged businesses. Tex. Gov't Code § 2269.055(b). The district *may* also consider the following criteria:

1. Price;
2. Offeror's experience and reputation;
3. Quality of the offeror's goods or services;
4. Impact on the ability of the school district to comply with rules relating to historically underutilized businesses;
5. Offeror's safety record;
6. Offeror's proposed personnel;
7. Whether the offeror's financial capability is appropriate to the size and scope of the project; and
8. Any other relevant factor specifically listed in the request for bids, proposals, or qualifications.

Tex. Gov't Code § 2269.055.

Under Chapter 2269, the district must base its selection among offerors on the criteria listed for the method used. The district must publish the following in its request for proposals or qualifications:

1. the criteria that will be used to evaluate the offerors;
2. the applicable weighted value for each criterion; and
3. a detailed methodology for scoring each criterion.

The district must document the basis of its selection and make the evaluations public not later than seven days after the contract is awarded.

Tex. Gov't Code § 2269.056(b)-(c).

After a contract is awarded, an offeror who submits a bid, proposal, or response to a request for qualifications under Chapter 2269 may make a written request to the district for documents related to the evaluation of the offeror's submission. Not later than the 30th day after the request is made, the district must deliver the documents relating to the evaluation of the offeror's submission including, if applicable, the submission's ranking. Tex. Gov't Code § 2269.060.

### **C. Notice and Publication**

After the district chooses the purchasing method and develops its solicitation documents, it must publish notice of the time and place where bids or proposals will be received and opened once a week for at least two weeks before the deadline in a newspaper in the county in which the district's central administrative office is located. Tex. Educ. Code § 44.031(g); Tex. Gov't Code § 2269.052.

As discussed above, Chapter 44 allows a district to receive bids or proposals electronically if the board adopts the required rules ensuring the identification, security, and confidentiality of electronic bids or proposals and that the bids or proposals remain effectively unopened until the proper time. An electronic bid or proposal is not required to be sealed. A provision of Chapter 44 that applies to a sealed bid or proposal applies to a bid or proposal received electronically in accordance with the rules adopted by the board. Tex. Educ. Code § 44.0313.

Unlike Chapter 44, Chapter 2269 does not permit a district to receive bids or proposals for construction services through electronic transmission. On the contrary, a person who submits a bid, proposal, or qualifications to a district under Chapter 2269 must seal it before delivery. Tex. Gov't Code § 2269.059. Consequently, districts do not have authority to accept bids or proposals for construction-related contracts that are transmitted electronically.

### **III. Procurement Methods for Goods and Services**

#### **A. Competitive Bidding**

A district using competitive bidding must award a contract at the bid amount to the bidder offering the best value for the district. In determining the best value, the district is not restricted to considering price alone but may consider other factors stated in the selection criteria, which may include the factors listed above. Tex. Educ. Code § 44.0351. The board may consider a bidder's safety record under certain circumstances. Tex. Loc. Gov't Code 271.0275.

Bids may be opened only by the board in a public meeting or by a district employee in a district office. A bid that has been opened may not be changed to correct an error in the bid price, but a bidder may withdraw a bid due to a material mistake. Tex. Loc. Gov't Code 271.026. The district may reject any and all bids. Tex. Loc. Gov't Code 271.027(a).

#### **B. Competitive Sealed Proposals**

A request for competitive sealed proposals must include information vendors may need to respond to the request and must state the selection criteria that will be used in selecting the successful offeror. The district must receive, publicly open, and read aloud the names of the offerors and all prices required to be stated in each proposal. Not later than the 45th day after the proposals are opened, the district must evaluate and rank each proposal in relation to the published selection criteria. Tex. Educ. Code § 44.0352(a)-(c).

The district must select the offeror that offers the best value for the district based on the published selection criteria and the district's ranking. In determining the best value, the district is not restricted to considering price alone but may consider any other factors stated in the selection criteria. The district must first attempt to negotiate a contract with the selected offeror and may discuss options for a scope or time modification and any price change associated with the modification. If the district cannot negotiate a satisfactory contract with the selected offeror, the district must, formally and in writing, end negotiations with that offeror and proceed to the next offeror in the order of the selection ranking until a contract is reached or all proposals are rejected. Tex. Educ. Code § 44.0352(d)-(e).

#### **C. Request for Proposals**

Texas Education Code section 44.031(a) lists competitive sealed proposals and request for proposals as two distinct purchasing methods, but Chapter 44 only provides statutory procedures for competitive sealed proposals. Both processes use the request for proposals (RFP) as the mechanism for soliciting proposals, but competitive sealed proposals are more formal. For example, a request for proposal is not required to be sealed and may be discussed with the proposer upon receipt by the district.

#### **D. Interlocal Contract**

Interlocal contracts are governed by the Interlocal Cooperation Act, Texas Government Code chapter 791, which authorizes local governments to contract with other local governments or state agencies to perform governmental services or functions, including administrative functions such as purchasing. Tex. Gov't Code §§ 791.001, .003(1), (3), .011, .025. An interlocal contract must contain certain terms and be approved by the board. Tex. Gov't Code § 791.011(d).

A common type of interlocal contract is a cooperative purchasing program. A district that participates in a cooperative purchasing program satisfies any requirement to seek competitive bids. Tex. Loc. Gov't Code § 271.102(c); Tex. Gov't Code § 791.025(c).

A district that enters a purchasing contract valued at \$25,000 or more under a cooperative purchasing program must document the amount, purpose, and disposition of a contract-related fee, including a management fee, paid by or to the district in a written report submitted annually in an open board meeting. The written report must appear as an agenda item, and the commissioner of education may audit the report. Tex. Educ. Code § 44.0331.

### **IV. Procurement Methods for Construction Services**

#### **A. Competitive Bidding**

Competitive bidding under Chapter 2269 is a procurement method by which a district contracts with a contractor for the construction, alteration, rehabilitation, or repair of a facility by awarding the contract to the lowest responsible bidder. The district must select or designate an architect or engineer to prepare the construction documents. To award a construction contract by competitive bidding, a district must satisfy several requirements:

1. Prepare a request that includes construction documents, estimated budget, project scope, estimated project completion date, and other information that a contractor may need to submit a bid;
2. Receive, publicly open, and read aloud the names of the offerors and their bids; and
3. Document the basis of its selection and make the evaluations public not later than the seventh day after the contract is awarded.

Tex. Gov't Code §§ 2269.101-.106.

## **B. Competitive Sealed Proposals**

Competitive sealed proposal under Chapter 2269 is a procurement method by which a district requests proposals, ranks the offerors, negotiates, and then contracts with a general contractor for the construction, rehabilitation, alteration, or repair of a facility. The district must select or designate an architect or engineer to prepare the construction documents. To award a construction contract by competitive sealed proposals, a district must satisfy several requirements:

1. Prepare a request that includes construction documents, selection criteria and the weighted value for each criterion, estimated budget, project scope, estimated project completion date, and other information that a contractor may need to respond to the request;
2. Receive, publicly open, and read aloud the names of the offerors and any monetary proposals;
3. Evaluate and rank each proposal in relation to the published criteria not later than the 45th day after the proposals are opened;
4. Select the offeror that submits the proposal that offers the best value for the district based on the published criteria, the weighted value, and the ranking evaluation. The district first attempts to negotiate a contract with the selected offeror. If the district is unable to negotiate a satisfactory contract, the district, formally and in writing, ends negotiations with that offeror and proceeds to the next offeror in the order of the selection ranking until a contract is reached or all proposals are rejected.
5. Make the evaluations, including any scores, public and provide them to all offerors no later than the seventh business day after the contract is awarded.

Tex. Gov't Code §§ 2269.151-.155.

## **C. Construction Manager-Agent**

Construction manager-agent (CMA) is a delivery method by which a district contracts with a CMA to provide consultation or administrative services during the design and construction phase and to manage multiple contracts with various construction prime contractors. Tex. Gov't Code § 2269.201. On or before selecting a CMA, a district must select or designate an architect or engineer to prepare the construction documents. Tex. Gov't Code § 2269.205(a). A district selects a CMA on the basis of demonstrated competence and qualifications in the same manner that an architect or engineer is selected under the Professional Services Procurement Act (PSPA). Tex. Gov't Code § 2269.207. The CMA serves as the district's agent in a fiduciary capacity during the

construction, rehabilitation, alteration, or repair of a facility by providing construction administration and management services. Tex. Gov't Code §§ 2269.201, .204. The CMA must maintain professional liability or errors and omissions insurance in the amount of at least \$1 million for each occurrence. Tex. Gov't Code § 2269.208.

Because the CMA is only a consultant, the district itself enters into separate contracts with multiple prime contractors for specific portions of the work. The district must follow all procurement laws when awarding these contracts. Tex. Gov't Code § 2269.206. Although the CMA manages these contracts, a CMA is not permitted to perform any aspect of the construction, be a party to a subcontract, or provide performance and payment bonds. Tex. Gov't Code § 2269.203. Each prime contractor must provide payment and performance bonds for their portion of the work in accordance with applicable laws. Tex. Gov't Code § 2269.206.

#### **D. Construction Manager-At-Risk**

Construction manager-at-risk (CMAR) is a delivery method by which a district contracts with an architect or engineer for design and construction phase services and contracts separately with a CMAR to serve as the general contractor and to provide consultation during the design and construction, rehabilitation, or repair of a facility. The CMAR assumes the risk for construction of a facility at a contracted price as a general contractor and provides consultation to the district regarding construction during and after the design of the facility. The contracted price may be a guaranteed maximum price. Tex. Gov't Code § 2269.251.

On or before selecting a CMAR, a district must select or designate an architect or engineer to prepare the construction documents. Tex. Gov't Code § 2269.252(a). The district selects a CMAR in either a one-step or two-step process. If a one-step process is used, the district may request proposed fees and prices as part of the CMAR's proposal. If a two-step process is used, the district first narrows the offerors to five or fewer solely on the basis of qualifications during step one and can consider the CMAR's proposed fee and prices in step two. Tex. Gov't Code § 2269.253. Texas Government Code sections 2269.253 and 2269.254 prescribe additional requirements related to the selection and negotiation process.

As the general contractor, the CMAR publicly advertises for and receives bids or proposals from trade contractors or subcontractors for the performance of all major elements of the work. Tex. Gov't Code § 2269.255(a). Texas Government Code sections 2269.255 and 2269.256 address the review process and the CMAR's ability to perform portions of the work. The CMAR must provide performance and payment bonds in accordance with Texas Government Code section 2269.258.

## **E. Design-Build**

Design-build is a project delivery method by which a district contracts with a single entity to provide both design and construction services for the construction, rehabilitation, alteration, or repair of a facility. Tex. Gov't Code § 2269.301. A design-build firm will include an engineer or architect and a construction contractor qualified to engage in building construction in Texas. Tex. Gov't Code § 2269.304. The district must hire a separate engineer or architect independent of the design-build firm to act as the district's representative for the duration of the project. Tex. Gov't Code § 2269.305.

Texas Government Code sections 2269.306 through 2269.308 prescribes the process to select a design-build firm, which includes the preparation of a request for qualifications and design criteria package, evaluation of responses, and selection based on best value. Tex. Gov't Code §§ 2269.306-.308. Design-build firms must provide performance and payment bonds for the construction portion of the project in accordance with Texas Government Code section 2269.311.

## **F. Job Order Contracts**

Job order contracting (JOC) is a procurement method used for maintenance, repair, alteration, renovation, remediation, or minor construction of a facility when the work is of a recurring nature, but the delivery times, type, and quantities of work required are indefinite. Tex. Gov't Code § 2269.401. A district uses the competitive sealed proposal method for awarding a job order contract and may award contracts to multiple contractors in connection with each solicitation of proposals. Tex. Gov't Code §§ 2269.405-.406. The district must establish the maximum aggregate contract price when it advertises the proposal. The board must approve each job, task, or purchase order that exceeds \$500,000. Tex. Gov't Code § 2269.403.

## **V. Exceptions to State Procurement Requirements**

### **A. Professional Services**

The requirements of Texas Education Code section 44.031 do not apply to a contract for professional services, including services of an architect, attorney, certified public accountant, engineer, or fiscal agent. Tex. Educ. Code § 44.031(f). Contracts for specific professional services are governed by the PSPA. Tex. Gov't Code §§ 2254.001-.007. The PSPA defines *professional services* as services within the scope of the practice of accounting, architecture, landscape architecture, land surveying, medicine, optometry, professional engineering, real estate appraising, professional nursing, or forensic science. The definition also includes services provided by a person lawfully engaged in interior design. Tex. Gov't Code § 2254.002(2).

Under the PSPA, a district may not select a provider or award a contract for professional services on the basis of competitive bids but must make the selection and award based on demonstrated competence and qualifications to perform the services, and for a fair and reasonable price. Tex. Gov't Code § 2254.003(a). For architectural, engineering, or land surveying services, a district must first select the most highly qualified provider based on demonstrated competence and qualifications, and then attempt to negotiate a contract at a fair and reasonable price. Tex. Gov't Code § 2254.004. Although the PSPA does not specify how a professional services provider demonstrates competence and qualifications, districts often use a request for qualifications (RFQ) to evaluate a professional services provider.

For services that are not listed in the PSPA, a district has discretion to determine whether particular services are professional services for purposes of exemption from the requirements of Section 44.031. *See* Tex. Att'y Gen. Op. No. DM-0106 (1992) (city could determine that auctioneering services were not "professional" for purposes of applicable procurement statutes). Professional services may include "members of disciplines requiring special knowledge or attainment and a high order of learning, skill, and intelligence." Professional services involve "labor and skill that is predominately mental or intellectual, rather than physical or manual." Tex. Att'y Gen. Op. No. DM-0106 (1992) (citing Tex. Att'y Gen. Op. No. JM-0940, at 3 (1988)). When entering into a contract for professional services rendered by a financial consultant or a technology consultant, a district can choose whether to follow the PSPA or Section 44.031. Tex. Educ. Code § 44.031(f).

## **B. Emergencies**

If school equipment, a school facility, or personal property is destroyed, severely damaged, or experiences a major operational or structural failure, and the board determines that the delay posed by the procurement methods under Texas Education Code 44.031 would prevent or substantially impair the conduct of classes or other essential school activities, then contracts for the replacement or repair of the equipment or facility may be made by other methods. Tex. Educ. Code § 44.031(h).

## **C. Computers and Computer-Related Equipment**

A district may acquire computers and computer-related equipment, including software, through the Texas Department of Information Resources. Tex. Educ. Code § 44.031(i).

## **D. Sole Source**

A district may purchase an item that is available from only one source without using one of the statutory purchasing methods. Such items include the following:

1. An item for which competition is precluded because of a patent, copyright, secret process, or monopoly;
2. A film, manuscript, or book;
3. A utility service, including electricity, gas, or water; and
4. A captive replacement part or component for equipment

This exception does not apply to mainframe data-processing equipment and peripheral attachments with a single-item purchase price in excess of \$15,000. Tex. Educ. Code § 44.031(j)-(k).

#### **E. School Buses**

Contracts for the purchase or lease of one or more school buses, including a lease with an option to purchase, must be submitted to competitive bidding when the contract is valued at \$20,000 or more. Tex. Educ. Code § 44.031(l). A district also may purchase school motor vehicles through the comptroller. Tex. Educ. Code § 34.001.

### **VI. Penalties for Violating Procurement Laws**

Failure to comply with procurement laws may result in criminal penalties against an individual or an injunction against performance of the contract. An officer, employee, or agent of a school district commits a Class B misdemeanor involving moral turpitude if the person with criminal negligence makes or authorizes *separate, sequential, or component* purchases to avoid the requirements of Texas Education Code section 44.031 or otherwise violates Texas Education Code section 44.031. *Component purchases* are purchases of the component parts of an item that normally would be purchased in one purchase. *Separate purchases* are purchases, made separately, of items that normally would be purchased in one purchase. *Sequential purchases* are purchases, made over a period, of items that normally would be purchased in one purchase. An officer or employee of a district commits a Class C misdemeanor if the person knowingly violates Section 44.031. Tex. Educ. Code § 44.032(a)-(d).

The final conviction of a person other than a trustee for a purchasing offense results in the immediate termination of that person's employment. A trustee who is convicted is considered to have committed official misconduct and is subject to removal from office. For four years after the date of final conviction, the removed person is ineligible to be a candidate for or to be appointed or elected to a public office in this state, is ineligible to be employed by or act as an agent for the state or a political subdivision, and is ineligible to receive any compensation through a contract with the state or a political subdivision. Tex. Educ. Code § 44.032(e).

Finally, a court may enjoin performance of a contract made in violation of Chapter 44. A county or district attorney, a citizen of the county in which the district is located, or any interested party may bring an action for an injunction. A party who prevails in such action is entitled to reasonable attorney's fees. Tex. Educ. Code § 44.032(f).

## VII. Procurement with Federal Funds

Procurement with federal funds is primarily governed by the Office of Management and Budget (OMB) Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards at 2 C.F.R. 200 (often referred to as the Uniform Guidance). Section 200.318 sets out general procurement standards; Section 200.319 addresses competition; and Section 200.320 prescribes procurement methods.

The provisions of the Uniform Guidance are implemented and interpreted by the federal agency awarding funds to a district, such as the U.S. Department of Education (ED), the U.S. Department of Agriculture (USDA), or the Federal Emergency Management Agency (FEMA). The provisions are further applied and enforced by the state agency that administers the funding (often called the pass-through entity), such as TEA, the Texas Department of Agriculture (TDA), or the Texas Division of Emergency Management (TDEM).

**ED/TEA (EDGAR):** The Uniform Guidance as interpreted and applied by ED and TEA is often referred to as EDGAR (Education Department General Administrative Regulations). TEA provides [EDGAR Materials and Resources](#).

**USDA/TDA:** TDA's Food and Nutrition Division administers several federal child nutrition programs, including the School Breakfast Program and the National School Lunch Program. The Uniform Guidance as interpreted and applied by USDA and TDA is set out in TDA's [Administrator's Reference Manual](#) (ARM) Sections 17 (Procurement), 17a (Procurement Procedures), 17b (Buy American), and 17c (Cooperative Purchasing).

**FEMA/TDEM:** FEMA provides [guidance](#) on contracting with federal funds for goods and services before, during, and after disasters.

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