



LEGAL ADVISORY & MEMORANDUM

TO: TCSA Member Schools
FR: TCSA Division Of Legal and Policy Services
RE: State and Federal Purchasing Laws Governing
Open Enrollment Charter Schools
DATE: February 12, 2015

TCSA members frequently ask for clarity regarding the state and federal laws that govern purchasing decisions by open-enrollment charter schools. Please accept this Legal Advisory as general guidance concerning applicable federal and state laws. This Legal Advisory also addresses the governing law concerning conflicts of interest in purchasing.

Consult a private attorney about how each of these laws or rules might apply to a specific contract or school purchase. TCSA's Financial Operations model board policy is also a good resource for additional guidance.

Purchasing with State Funds

When using state funds, [Texas Education Code §12.1053](#) governs purchasing and contracting for open-enrollment charter schools. The required purchasing procedure depends on the nature of the goods or services being purchased and on the terms of a charter school's charter contract. If a charter school's approved charter contract

includes specific purchasing procedures, those procedures will always prevail (whether for public works, professional services, or other goods and services) against any state law generally applicable to all open-enrollment charter schools.

Public Works Contracts

Unless the charter school's charter contract says otherwise, a particular purchasing process is required when a charter school engages in a public works contract (i.e., a contract for improvements to real property, such as the construction, repair or renovation of a building) that requires expenditures over \$50,000. For public works contracts, charter schools must follow the specific competitive bidding procedures set forth in [Texas Local Government Code, Chapter 271, Subchapter B](#). This subchapter requires timely newspaper advertisements, sealed bids, a public bid opening, and an award to the lowest responsible bidder. To be on the safe side, TCSA recommends that member schools follow this process for any public works contract potentially worth over \$45,000.

¹ 19 Tex. Admin. Code §100.103

² Public works contracts are "construction services" under Tex. Educ. Code 44.031(a)(5).

In lieu of the procedures under Chapter 271, Subchapter B of the Texas Local Government Code, open-enrollment charter schools may choose to adopt the provisions of [Chapter 44, Subchapter B of the Texas Education Code](#) as the charter holder's process for awarding public works contracts requiring expenditures over \$50,000.¹ This can be done by including a statement in the charter application or by submitting a charter amendment request to TEA. Again, in the absence of this adoption, the charter would statutorily (by default) be required to follow the competitive bidding process set out in Subchapter B of Chapter 271 of the Local Government Code discussed above.

For public works contracts,² Chapter 44 adopts by reference the procurement methods provided in Chapter 2269 of the Texas Government Code. Thus, if a charter school has adopted the procedures under Chapter 44 as the charter holder's process for awarding public works contracts, it may select one of several delivery methods and procedures under [Chapter 2269 of the Texas Government Code](#). These methods include competitive bidding (*i.e.* the lowest responsible bidder"),³ competitive sealed proposals,⁴ construction-manager-agent,⁵ construction-manager at-risk,⁶ design-build contracts,⁷ and job order contracts.⁸ If an open-enrollment charter school is going to use a method of procurement other than the "competitive bidding" method, the Board of Directors must first determine which construction method provides the best value to the charter school. The Board of Directors may delegate the authority for this determination and any other decision or action regarding the procurement to a designee (*i.e.* the superintendent or chief operations officer) at a meeting held in compliance with the Open Meetings Act.

Professional Services Contracts

Section 12.1053 of the Education Code also re-

quires open-enrollment charter schools to comply with the Professional Services Procurement Act ([Texas Government Code, Chapter 2254](#)). This Act applies when an open enrollment charter school seeks a contract for professional services. Under Chapter 2254, a contract for professional services cannot be awarded on the basis of competitive bids. A provider of professional services to the school must be selected on the basis of demonstrated competence, demonstrated qualifications, and a fair and reasonable price. Professional services include accounting, architecture, landscape architecture, land surveying, medicine, optometry, professional engineering, real estate appraising, and professional nursing.

Purchasing Other Goods and Services

Note that unless a school's charter contract requires it, there is no state statute that requires an open-enrollment charter school to engage in a specific purchasing process for goods and services purchased with state funds other than for public works contracts and professional services. Consequently, charter schools are not required to competitively bid purchases of school supplies, furniture, equipment, software, hardware, legal services, outside training, consultants, and the like. While competitive processes are encouraged so that schools ensure the best value for the goods and services that are purchased, these processes are not required by state law for purchases with state funds. TCSA's model purchasing policy encourages each charter board to require appropriate value and purchase orders as well as to identify competitive process thresholds and circumstances under which board approval is required.

TCSA very often receives questions about the proper purchasing methods for acquiring insurance and for acquiring portable classroom buildings. Regarding insurance, it is neither a public works contract

³ Tex. Gov't Code §§ 2269.101-106

⁴ Tex. Gov't Code §§ 2269.151-155

⁵ Tex. Gov't Code §§ 2269.201-208

⁶ Tex. Gov't Code §§ 2269.251-258

⁷ Tex. Gov't Code §§ 2269.301-311

⁸ Tex. Gov't Code §§ 2269.401-411

nor a professional service specified in the Professional Services Procurement Act. Consequently, no particular purchasing method is required by law to select an insurance broker or to select particular insurance coverage. Similarly, there is no particular purchasing method required by law for acquiring portable classroom buildings, as the purchase of portable classrooms is considered personal property, not a public works contract (so long as the installation of the portable classroom buildings does not require construction or real property improvement expenditures over \$50,000). Again, for these and other purchases that are not governed by state law, we encourage charter schools to determine a purchasing process that will yield best value and demonstrate proper stewardship of public funds.

One final note on purchasing with state funds: Some open-enrollment charter schools have adopted Chapter 44 of the Texas Education Code, which governs traditional school districts in the purchase of any goods and services. Under Section 44.031, schools are required to make any contract award valued at \$50,000 or more in a 12-month period based on a method that provides the best value to the district. However, as noted above, charter schools are not required by law to comply with these procurement requirements. We recommend that you double check your school's charter to determine whether your school has adopted these provisions of Chapter 44 or another procedure when using state funds to purchase day goods and services.

Purchasing with Federal Funds

When using federal funds, open enrollment charter schools are now subject to procurement standards generally applicable to local education agencies (LEAs). Consequently, charter schools are subject to [OMB A-87](#) and federal regulations published in

34 [CFR Part 80](#). Previously, open enrollment charter schools had been categorized with non-profit entities for purposes of federal procurement and were required to follow OMB A-122 and the federal regulations published 34 CFR Sections 74.40 through 74.48. Our treatment of federal requirements is more detailed in this Legal Advisory given the recent change in TEA policy.

Required Procedures

Charter schools must establish written procurement procedures that accomplish several objectives:

- Establish a contract administration system for contracts and purchase orders that ensures that contractors comply with the terms and conditions and specifications of each contract or purchase order.⁹
- Ensure that contracts are made only with responsible contractors able to perform successfully under the terms and conditions of the proposed procurement. Consideration should be given to a contractor's integrity, compliance with public policy, record of past performance, financial resources and technical capabilities.¹⁰
- Specify how records of a procurement will be maintained. Records must include the rationale for the procurement method, selection of contract type, contractor selection or rejection, and the basis for the contract price.¹¹
- Guide review of proposed procurements to avoid unnecessary or duplicative purchases.¹²
- Provide for avoidance of time and material type contracts.¹³

Principles of Competition

Additionally, charter schools must manage procurements in a way that provides full and open competition in compliance with federal procure-

9 34 CFR Section 80.36(b)(2)

10 34 CFR §80.36(b)(8)

11 80 CFR §36(b)(9)

12 80 CFR§36(b)(10)

13 80 CFR §36(c)(1)

ment standards in [34 CFR §80.36](#). The following are examples of situations that improperly restrict competition:

- Placing unreasonable requirements on firms to qualify them to do business; and
- Requiring unnecessary experience and excessive bonding;
- Noncompetitive pricing practices between firms or between affiliated companies (e.g. price fixing);
- Noncompetitive awards to consultants that are on retainer contracts;
- Organizational conflicts of interest;
- Specifying only a “brand name” product instead of allowing an equal product to be offered and describing the performance or other relevant requirements of the procurement; and
- Any arbitrary action in the procurement process. All steps in the process need to be reasonable and justifiable.¹⁴

The remaining requirements concerning competitive procurement are identified in the federal regulations set forth in [34 CFR Section §80.36](#).

Methods of Procurement

There are four methods by which grantees may procure goods and services *with federal grant funds*: 1) small purchase procedures; 2) sealed bids; 3) competitive proposals and 4) non-competitive proposals. Whether a particular method may be used depends on the monetary size and nature of the procurement.

Small Purchase Procedures

Small purchase procedures are relatively simple and informal methods for obtaining services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41

U.S.C. 403(11), which is currently set at \$100,000. If these procedures are used, the grantee must obtain price or rate quotations from an adequate number of qualified sources.¹⁶ The federal standards do not provide specific procedures to be followed when using the small purchase procedures for acquisitions under \$100,000. Therefore, charter schools must develop their own procedures that provide for full and open competition. Thus, a charter school’s small purchase procedures should require quotations from multiple sources and should establish objective factors to be evaluated when comparing quotations (price, quality, etc.) for small purchases.

Sealed Bids

This procurement method involves publicly soliciting bids and awarding a firm-fixed-price contract (lump sum or unit price) to the responsible bidder whose bid is the lowest in price and complies with the terms and conditions of the invitation for bids.¹⁷

Procurement by Competitive (Negotiated) Proposals

This formal method is used when price is not the primary factor in procurement decisions. The competitive proposal method is typically used when more than one source is submitting an offer, and either a fixed price contract or a cost reimbursement type contract. When using this method, a charter school issues an RFP and makes an award to the responsible proposer whose proposal is most advantageous to the program based on price as well as other factors.¹⁸

Non-Competitive Proposals (Sole Source)

This procedure may only be used when none of the other methods identified above are feasible AND one of the following situations is present: (1) the

14. 80 CFR §36(c)(1)

15. 80 CFR §36(d)

16. 80 CFR Section 36(d)(1)

17. 80 CFR Section 36(d)(2)

18. 80 CFR Section 36(d)(3)

19. 80 CFR Section 36(d)(4)

item is only available from a single source; (2) the procurement is needed to address an urgent need; (3) the relevant state or federal authority authorizes noncompetitive proposals; or (4) after soliciting bids or proposals from a number of sources, there is a documented basis for determining that competition produced insufficient results.¹⁹ When using this method, a charter school solicits a proposal from only one source. The method is also used when, after requesting bids or proposals from a number of sources, competition is determined to be inadequate.

The requirements above apply *only* to procurements for which federal funds are used. Otherwise, the less onerous state purchasing requirements described at the beginning of this memo apply.

Conflicts of Interest

Open-enrollment charter schools must avoid apparent and actual conflicts of interest when using state and federal funds to purchase goods or services. Charter schools must comply with both state and federal regulations concerning conflicts of interest regardless of whether federal or state funds are used in the procurement, and when using federal funds, additional regulations apply.

State Law: Affidavit and Abstention Procedure

Board members of both the charter holder and the charter school, as well as officers of the school are considered “local public officials” under Chapter 171 of the Texas Local Government Code and must comply with that chapter’s conflicts of interest provisions in the manner set forth in [19 Tex. Administrative Code §§100.1131-1135](#). The general rule is that if a local public official has a property, the official must file an affidavit and abstain from further participation in the matter pertaining to the

business entity or to the real property. An affected person effectively abstains from participation in the matter if the person recuses himself or herself from deliberation and voting on the particular agenda items that pertain to the matter in which the individual has an interest.

The affidavit must state the nature and extent of the interest and must be filed with the official record-keeper of the charter holder *before* a vote, decision or other action on any matter involving the business entity or real property. A board member or officer is considered to have a substantial interest in a business entity or in real estate if a person related within the third degree by blood or by marriage to the board member has a substantial interest.

In addition, the governing body of a charter holder must take a separate vote on any budget item specifically dedicated to a contract with a business entity in which a member of the board has a substantial interest.²⁰ The affected board member may not participate in that separate vote unless a majority of board members are likewise required to file affidavits and abstain from the vote, and the member may vote on the final budget if the member has complied with the affidavit and abstention requirements and the matter in which the member is concerned has been resolved. Any financial transaction between a charter school and a member of the governing body of the charter school or charter holder must be discretely and clearly recorded in the accounting, auditing, budgeting, reporting and recordkeeping systems for the management and operation of the charter school.²¹

State Law: CIS and CIQ Filings

In addition to these requirements, state law requires board members of the charter school, the charter holder, and chief executive officers of the charter school to comply with the conflicts of inter-

19. 80 CFR Section 36(d)(4)

20. 19 Tex. Admin. Code §100.1134.

21. 19 Tex. Admin. Code §100.1047(f)(2).

22. Tex. Local Gov’t Code §176.003(a)(2)(A).

est provisions in Chapter 176 of the Texas Local Government Code. Chapter 176 requires the filing of a conflicts disclosure statement with respect to any person or entity (or agent thereof) that enters, or seeks to enter, into a contract with the charter school if the person or entity has an employment or other business relationship, with the local government officer or family member of the officer that results in the officer or family member receiving taxable income, other than investment income, that exceeds \$2,500, during the 12-month period preceding the date that the officer becomes aware that a contract with the person or entity has been executed or becomes aware that the charter school is considering entering into a contract with that person or entity.²² [The Conflicts Disclosure Statement \(CIS Form\)](#) is promulgated by the Texas Ethics Commission. The form must be filed with the records administrator of the charter school and the form must be made available on the charter school's website.²³

Conversely, any person (or agent thereof) who enters or seeks to enter a contract with the charter school must file a completed [Conflict of Interest Questionnaire \(CIQ Form\)](#) if the person has a business relationship with the charter school, and (1) has an employment or other business relationship with an officer of that charter school or a family member of the officer; or (2) has given an officer of the charter school or a family member of the officer one or more gifts that have an aggregate value of more than \$250 in the 12-month period.²⁴ The CIQ Form is promulgated by the Texas Ethics Commission. Like the CIS Form, the CIQ Form must be filed with the records administrator of the charter school and the form must be made available on the charter school's website.²⁵

Federal Law

When using federal funds, open enrollment charter schools must also comply with the federal pro-

curement regulations regarding conflicts of interest. Nevertheless, if a charter school adopts and complies with policies and procedures concerning state law regarding conflicts of interest, it has also demonstrated compliance with the federal regulations concerning procurement with federal funds. The federal regulations require that open-enrollment charter schools, as LEAs, adopt and maintain a written code of standards of conduct that governs the performance of employees engaged in the administration of contracts. No employee, officer or agent of the open-enrollment charter school shall participate in the selection, or in the award or administration of a contract supported by federal funds if a conflict of interest, real or apparent, would be involved.²⁶ Such a conflict arises when the employee, officer or agent or any member of his or her immediate family (or an organization which employs, or is about to employ any of the above) has a financial or other interest in the contractor selected for the award.²⁷

Whether using federal or state funds, open enrollment charter schools, as 501(c)(3) tax-exempt nonprofit corporations, are also subject to IRS regulations known as the intermediate sanction rules regarding excess benefit transaction regulations under Section 4958 of the Internal Revenue Code. Simply put, the IRS regulations provide that a "disqualified person" (defined broadly as any person who is a position to exert substantial influence over the organization) may not be paid an economic benefit that exceeds the fair value of the consideration received from the person by the exempt organization. The regulations provide compliance procedures known as "safe harbor procedures", which if followed by the charter school, create a rebuttable presumption that the transaction involving the disqualified person—is fair and reasonable. In essence, the procedures require three steps:

- i) the Board of Directors of the open-enrollment charter school must approve the transaction

23. Tex. Local Gov't Code §176.009.

24. Tex. Local Gov't Code §176.006(a)

25. Tex. Local Gov't Code §176.009.

26. 34 CFR §80.36(b)(3)

27. 34 CFR §80.36(b)(3)

- in advance without the participation of the disqualified person;
- the Board obtains and relies upon appropriate and contemporary comparability data in making the decision; and
- ii) the decision regarding the transaction is appropriately and contemporaneously documented.²⁸

These safe harbor procedures should be incorporated into a conflict of interest policy adopted by the board of directors to ensure compliance with IRS regulations when engaging in procurement transactions where there may be a potential conflict of interest. In fact, the best way to ensure compliance with all of the laws and regulations concerning conflicts of interest, is for the board of directors of the open-enrollment charter school to adopt a comprehensive conflict of interest policy that incorporates both state and federal requirements. TCSA's Charter School Governance & Organization model board policy is a good resource for such a policy.

Local Purchasing Policies & TCSA Model Board Policies

Open enrollment charter schools must adopt local purchasing policies to ensure compliance with federal and state requirements. TCSA has developed model board policies in the area of procurement and contracting, and conflicts of interest. As a subscriber to the TCSA Model Board Policies, your school will also receive updated policies incorporating changes in the law and applicable regulations. For more information on the TCSA Model Board Policies, please contact the TCSA Legal and Policy Director at lgordon@txcharterschools.org and at (512) 584-8272. You may visit the following link for more information: <http://www.txcharterschools.org/members/training/policy>.

TCSA's Group Purchasing Contracts

TCSA has established [cooperative purchasing contracts](#) with (1) Staples Advantage for office supplies and school furniture, (2) S&S Worldwide for classroom supplies, (3) Hertz Furniture for school furniture and accessories, (3) CDW-G for technology solutions, (4) Microsoft for critical software and licensing, (5) Van Brunt & Associates for TCSA's Electricity Pool, (6) JR3 for WebSmart, a web-based software system for student and finance data management and reporting, and (7) Wortham Insurance for TCSA's Risk Management Program.

In keeping with the Preferred Vendor Endorsement Policy adopted by the TCSA Board of Directors, each of TCSA's group purchasing contracts was created after a well-documented, competitive process. TCSA's contract award process is consistent with both state and federal purchasing laws. Consequently, member schools that use either state funds or federal funds to purchase from TCSA's group purchasing contracts can demonstrate compliance. Documentation concerning all of TCSA's contract awards is available for review by any TCSA member school.

Questions

Feel free to contact Lindsey Gordon, TCSA's Director of Legal and Policy Services, with questions concerning this memorandum.

The Director can be reached at (512) 584-8272, ext: 307 or at lgordon@txcharterschools.org.

28. 26 CFR §53.4958-6T(c)(1)-(3).