

LAW OFFICES OF ROBERT E. LUNA, P.C.

ATTORNEYS AND COUNSELORS AT LAW
4411 NORTH CENTRAL EXPRESSWAY
DALLAS, TEXAS 75205

ROBERT E. LUNA
RANDEL B. GIBBS
DANIEL K. BEARDEN, JR.
GEORGE C. SCHERER
LYDIA L. PERRY
JOSEPH K. BALL
ANDREA SHEEHAN
AMANDA R. ZERANGUE
MERIDITH L. HAYES
DANIEL D. BOHMER
J. DAVID GIDDENS

TELEPHONE (214) 521-8000
FACSIMILE (214) 521-1738 • TOLL FREE (888) 219-2197
www.txschoolaw.com

EARL LUNA
OF COUNSEL
(1922 – 1996)

May 8, 2007

VIA E-MAIL

Mr. Rick Coulter
Executive Director of Purchasing
Lewisville I.S.D.
1565 W. Main Street, Room 220
Lewisville, Texas 75067

Re: Educational Purchasing
Cooperative of North Texas

Dear Mr. Coulter:

Pursuant to your request, our office has examined the documents that you provided regarding the Educational Purchasing Cooperative of North Texas (“EPCNT”). You have asked our office to ensure that the EPCNT is meeting the legal requirements imposed upon a cooperative.

It is our legal opinion that the EPCNT, as set forth in the documents, includes the components required of a cooperative purchasing program. We recommend that two paragraphs be added to clarify the payment arrangements, enforcement duties, and fiscal administrative issues. These recommended paragraphs are included in the attached revised Master Agreement, and in the attached proposed Amendment, which can be used in lieu of revising the Master Agreement itself.

A. Legal Requirements

The legal requirements of a cooperative purchasing program are fairly short. They are set forth in Texas Local Government Code §272.102 as follows:

A local government that is participating in a cooperative purchasing program may sign an agreement with another participating local government or a local cooperative organization stating that the signing local government 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.

In the case of the EPCNT, these *legal* requirements are met as follows:

- a. Section II of the Resolution template includes a place for each participating district to designate a person to act on behalf of the participating school district in all matters relating to the program.
- b. Section 4.1 of the Master Agreement states that all contracts will be between the participating members and the vendors, and not with the EPCNT. Further, section 15.2 of the Master Agreement explains that each participating entity will have the option to enter into individual contracts with participating vendors. This means that payments will be made directly from the individual entities to the participating vendors. This could be stated more directly, as set forth in item c below.
- c. Although it is implied in section 4.1, Purchasing Authority, section 10, Disclaimer of Warranties, Section 12, Limitations of Liability, and Section 15.2 that all issues of the resulting contracts for goods and services will be addressed between the vendor and the individual entities, this could also be specifically stated in a new section 15.3, to read as follows:

15.3 Each individual party will be responsible for ensuring the participating vendor's compliance with all provisions of any

contract between that individual party and the vendor, including but not limited to, quality of items, terms of delivery, and warranty issues. In addition, each individual party will make payments directly to the participating vendor, and will be solely responsible for its own debts in connection with the contract for goods or services.

This new section is included in the attached “revised” version of the Master Agreement.

B. Procedural requirements

The *procedural* requirements for a school district to follow when determining when to enter into such a contract were set forth in more detail in Attorney General opinion JC-00037 (1999), which confirmed that school districts could participate in cooperative purchasing programs. Specifically, the A.G. recommended the following procedures be used:

[T]he 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.

Id.

C. Recommended Contract Terms

Issues pointed out in the “Friday Facts” that you provided to our office for review include the tendering of contracts that include limitations on liability and damages, indemnity provisions, and change of governing law. In order to avoid these issues, the originating school district (i.e., the participant that originally advertises for the goods or services and negotiates the contract) should ensure that the following terms are either published in the RFP/RFB/RFQ instrument, and/or negotiated in the final contract. These terms include:

- a. No provisions are to be included that require indemnity on the part of the school district.
- b. Texas law should govern the agreement, and venue should be set “in the county where the school district’s administration office is located.” (using this language instead of specifying the county will help other school districts that are located in different counties.)
- c. There should be no waiver of a right to trial, nor any requirement to submit to binding arbitration.
- d. There should be no waiver of claims of any kind required by the school district.
- e. Ideally, there should be no limitations on liability or disclaimers of warranties. If this is not possible, then these provisions should be as narrowly drawn as can be negotiated with the vendor, with the maximum dollar amount possible used for limitation of liability, and the minimum amount of disclaimers.
- f. The contract should not require the school district to pay or reimburse any taxes from which it is exempt.

D. Administrative Issues

Finally, the “Friday Facts” bulletin also warns against using “small under-funded volunteer purchasing pools” and recommends assigning “a few serious dedicated professional employees devoted to the co op’s purposes.” In the case of the ECPNT, you have been designated as the “Authorized Representative” of EPCNT for the purposes of executing the separate Interlocal Participation Agreements with Participants. In addition, annual fees in the amount of \$100 are assessed to each member of the EPCNT. The Agreement itself does not specify how the fees are to be spent, or who has the authority to make decisions regarding the payment of expenses. In your e-mail, you explain that “the coop collects revenue (\$100/district annually) to pay miscellaneous expenses LISD incurs for being the fiscal agent.” Some language regarding this issue may be helpful in clarifying the expectations of the parties involved. The following recommended language has been added into section 6, Fees and Expenses:

Lewisville I.S.D. is hereby named as the fiscal agent for purposes of administering the EPCNT, and will have responsibility and authority to accomplish the following tasks and duties:

- a. Coordinate meetings of the EPCNT member groups;
- b. Facilitate information sharing regarding contracts, specifications, software, procedures and related issues;

- c. Receive, hold, and account for annual fees paid by the EPCNT member districts; and
- d. Use the annual fees to pay reasonable expenses incurred in the process of administering the EPCNT.

Finally, if you would prefer to amend the EPCNT Master Agreement, rather than revising this existing one, I have attached a proposed Amendment to Master Agreement for your consideration and use as well.

If you have any questions regarding any of the above matters, please do not hesitate to contact me.

Yours very truly,

Lydia L. Perry