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The Honorable Kelly Hancock
Chair, Committee on Business & Commerce
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

Opinion No. KP-0225

Re: Applicability of Education Code section 44.043 to a school district's consideration of a vendor's or person's relationship with a charter school (RQ-0227-KP)

Dear Senator Hancock:

Expressing concern about possible contracting practices by some Texas schools, you ask several questions about the meaning and scope of section 44.043 of the Education Code.¹ You state that you are “concerned that some school districts in Texas may be requiring vendors to agree not to work with Texas charter schools as a requirement to either contract with or continue to contract with such school districts.”² Request Letter at 1. You also state that “school districts may be diminishing the ability of a vendor to work with a school district based on a relationship with an organization such as a charter school.” *Id.*

Education Code, chapter 44, subchapter B, governs school district contracts and purchases. *See* TEX. EDUC. CODE §§ 44.031–.047. Your questions concern section 44.043, which provides:

- (a) This section applies to a school district while the school district is engaged in:
- (1) procuring goods or services;
 - (2) awarding a contract; or
 - (3) overseeing procurement or construction for a public work or public improvement.

¹Letter from Honorable Kelly Hancock, Chair, Senate Comm. on Bus. & Commerce, to Honorable Ken Paxton, Tex. Att’y Gen. at 1–2 (May 1, 2018), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

²You do not ask about, and we do not opine on, the application of section 39.02 of the Penal Code, which governs abuse of official capacity. *See* TEX. PENAL CODE § 39.02.

(b) Notwithstanding any other provision of this chapter, a school district:

(1) may not consider whether a vendor is a member of or has another relationship with any organization; and

(2) shall ensure that its bid specifications and any subsequent contract or other agreement do not deny or diminish the right of a person to work because of the person's membership or other relationship status with respect to any organization.

Id. § 44.043.

You first ask whether the terms “consider” in Education Code subsection 44.043(b)(1) and “deny or diminish” in subsection 44.043(b)(2) “mean that a school district cannot give any effect to a vendor or [other] person’s relationship with an organization in its procurement practices.” Request Letter at 1. Chapter 44 does not define these terms, so we look to their common meaning. *See Harris Cty. Appraisal Dist. v. Tex. Workforce Comm’n*, 519 S.W.3d 113, 128 (Tex. 2017) (“In the absence of a statutory definition, we must determine a term’s plain or ordinary meaning” (quotation marks omitted)). “Consider” means to “to take (something) into account when making an assessment or judgment.” NEW OXFORD AM. DICTIONARY 370 (3d ed. 2010). Thus, under subsection 44.043(b)(1), a school district may not take into account a vendor’s relationship with any organization while engaged in contracting and procurement as provided by subsection 44.043(a). The word “deny” means to “refuse access to (someone)” or to “refuse to give or grant (something requested or desired).” *Id.* at 465. “Diminish” means “make or become less” or “make (someone or something) seem less impressive or valuable.” *Id.* at 487. Under the plain meaning of these terms, a school district may not use its bid specifications or any subsequent contract or agreement to refuse a person work with the school district or to lessen a person’s ability to work with the school district because of the person’s membership or other relationship status with respect to any organization. Accordingly, a court would likely conclude that section 44.043 prohibits a school district, in its procurement efforts, from taking into account a vendor’s or person’s relationship with another organization.

You next ask whether section 44.043 “appl[ies] to all aspects of the procurement process from the beginning of the process to any subsequent contracts or agreements.” Request Letter at 1. The plain language of subsection 44.043(a) states that the subsection applies “while the school district is engaged in: (1) procuring goods or services; (2) awarding a contract; or (3) overseeing procurement or construction for a public work or public improvement.”³ TEX. EDUC. CODE

³Briefing submitted to this office argues that the term “overseeing” in subsection 44.043(a)(3) works as a catch-all phrase indicating a legislative intent to apply to every aspect of the procurement process. *See* Brief from Lindsey Gordon, Gen. Counsel, Tex. Charter Schs. Ass’n at 3 (June 4, 2018). Under the plain language of subsection 44.043(a)(3), “overseeing” applies to only the “procurement or construction for a public work or public improvement.” TEX. EDUC. CODE § 44.043(a)(3). To the extent “overseeing” involves the entirety of a project, from beginning to end, it does so only with respect to a public work or improvement. Overseeing does not apply to the activities in subsections 44.043(a)(1) or (a)(2), and no other language suggests a continuing role of a school district once a good or service has been procured or a contract entered into.

§ 44.043(a). To the extent a procurement or contract involves subsequent agreements, the subsequent agreement is within the scope of subsections 44.043(a)(1) and (a)(2) if it is a procurement for goods and services or an award of a contract. Thus, with respect to a procurement or construction for a public work or public improvement under subsection (a)(3), a court would likely determine that section 44.043 applies to all aspects of the procurement process from the beginning of the process to any subsequent contracts or agreements. Outside of subsection (a)(3), a court would likely also find that section 44.043 applies to each procurement of goods or services or award of contract.

In your third question, you ask whether section 44.043 “appl[ies] to all types of school district procurements, including those governed by” Education Code subchapter B, chapter 44, Government Code section 2254.003, and Government Code chapter 2269. Request Letter at 2. By its terms, section 44.043 applies when a school district procures goods or services, awards a contract, or oversees procurement or construction for a public work or improvement. *See* TEX. EDUC. CODE § 44.043. In specifying the activities to which section 44.043 applies, the Legislature did not place a limitation or otherwise qualify the activity. A similar right-to-work provision in Government Code section 2269.054 contains an identical list of activities but with each activity qualified by the language “under this chapter.” TEX. GOV’T CODE § 2269.054. So, section 2269.054’s right-to-work provision applies to only procuring, contracting, and overseeing public works contracts undertaken under the authority of chapter 2269. *See id.* In contrast, section 44.043 does not limit its applicability to procurements under certain authority. *See FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 885 (Tex. 2000) (relying on principle of statutory construction that the Legislature knows how to enact laws effectuating its intent). Thus, a court would likely conclude that Education Code section 44.043 applies when a school district engages in procurement activities under any statute authorizing a school district’s procurement activities.

Fourth, you ask whether Education Code subsection 44.043(b) “appl[ies] to a business relationship between a person or vendor and an organization.” Request Letter at 2. The common meaning of “relationship” is “the way in which two or more concepts, objects, or people are connected; or the state of being connected.” NEW OXFORD AM. DICTIONARY 1473 (3d ed. 2010). Subsection 44.043(b) therefore means that a school district may not consider a vendor’s connection with any organization. Additionally, subsection 44.043(b) does not specify a type of relationship. *See* TEX. EDUC. CODE § 44.043(b). Lastly, by using the term vendor, which is typically used in a commercial context, subsection 44.043(b) contemplates the relationship to include a business one. *See* NEW OXFORD AM. DICTIONARY 1919 (3d ed. 2010) (defining “vendor” to mean “a person or company offering something for sale”). For these reasons, a court would likely conclude that subsection 44.043(b) includes a business relationship between a vendor and an organization.

You finally ask whether the reference in subsection 44.043(b) to “organizations” includes charter schools. Request Letter at 2. “Organization” is commonly defined to mean “an organized body of people with a particular purpose, esp. a business, society, association, etc.” NEW OXFORD AM. DICTIONARY 1236 (3d ed. 2010). Generally, a charter school is one that operates under Education Code chapter 12. *See* TEX. EDUC. CODE § 12.0011 (“[a]n independent school district, a school campus, or an educational program *may choose* to operate under a charter” (emphasis added)). Chapter 12 identifies five purposes, including improving student learning, increasing choice of learning opportunities, and encouraging different and innovative learning methods. *See*

id. § 12.001(a). An entity operating as a charter school is an organized body of people. And each charter school serves the common purposes set out in section 12.001. *See id.* A court would likely conclude that the term “organization” in subsection 44.043(b) includes charter schools.

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A court would likely conclude that Education Code section 44.043 prohibits a school district, in its procurement efforts, from taking into account a vendor's or person's relationship with an organization. The scope of subsection 44.043(b) includes a business relationship between a vendor and an organization, and the term "organization" in subsection 44.043(b) includes charter schools.

With respect to a procurement or construction for a public work or public improvement, a court would likely determine that section 44.043 applies to all aspects of the procurement process from the beginning of the process to any subsequent contracts or agreements. Outside of the public work or improvement project, a court would likely find that section 44.043 applies to each procurement of goods or services or award of contract.

Section 44.043 applies to procurement activities authorized by any statute authorizing a school district's procurement.

Very truly yours,



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