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RECEIVED

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OPINION COMMITTEE

RQ-0030-GA

FILE # ML-43034-03
I.D. # 43034

The Honorable Greg Abbott
Attorney General for the State of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RE: REQUEST FOR OPINION -- APPLICABILITY OF SECTION 44.901 OF THE TEXAS EDUCATION CODE

Dear General Abbott:

Section 44.901 of the Texas Education Code imposes several requirements regarding a school district entering into a contract for energy or water conservation measures to reduce energy or water consumption or operating costs of school facilities. The Ysleta Independent School District wishes to purchase certain energy conservation services. I have enclosed a copy of a draft letter agreement that describes the desired energy conservation services. At the request of the Ysleta I.S.D., I am seeking your opinion as to whether or not Section 44.901 of the Education Code applies to the energy conservation services described in the enclosed draft agreement.

I have also enclosed a letter from the successful vendor as well as a legal opinion from their counsel which sets forth factual and legal justification that Section 44.901 does not apply to a contract for these specific energy conservation services. I adopt these arguments as my own.

Respectfully submitted,

José R. Rodríguez
El Paso County Attorney

Xc: Mr. Anthony S. Safi
Mounce Green Myers Safi & Galatzan
Attorney for Ysleta Independent School District

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August 24, 2001

William S. Spears, President
Energy Education, Inc.
P. O. Box 780
Wichita Falls, Texas 76307

Via Federal Express

Re: Ysleta Independent School District ("District") Request for Proposal 21-829-128 ("RFP"); Texas Education Code Section 44.901, concerning energy conservation measures for public school districts ("Section 44.901") and House Bill 2277 of the 77th Texas Legislature modifying Section 44.901 (and other Code sections), to be effective September 1, 2001 ("HB 2277"); Energy Education, Inc., a Texas corporation ("Energy Education"); Our File No. 01174

Dear Bill:

Thank you for asking us to respond to the following inquiry for Energy Education:

"Whether Texas Education Code Section 44.901, as amended by House Bill 2277 of the 77th Texas Legislature requires Energy Education's contracts to be entered into in accordance with Section 44.901?"

It is our opinion that Energy Education's contracts to provide its people oriented energy use management program ("Program") to public school districts in the state of Texas are not governed by nor are they subject to Section 44.901 as amended by HB 2277. Our analysis and information supporting this determination is described more fully below.

I.
HISTORY

It is my understanding that Energy Education has never offered or entered into a contract for their services and Program under the auspices of Section 44.901.

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**II.
DETERMINATION**

We have rendered our opinion and have advised Energy Education that its contracts to provide its people oriented energy use management program to public school districts in the state of Texas are not governed by nor are they subject to Section 44.901.

A Unique Program: Based on People And Not Retrofits.

The determination described herein is based on our understanding that the Program offered by Energy Education does not require or involve any installation or retrofit of equipment, systems or other tangible, physical energy conservation improvements, devices or objects. In fact, it is my understanding that a key strength of the Program is its emphasis and reliance on changing or modifying people's behavior and actions related to energy conservation without requiring or involving any retrofits or other mechanical changes.

**III.
SECTION 44.901**

Section 44.901: Relevant Background Information.

Section 44.901 expressly permits the board of trustees of a school district to "enter into a contract for energy conservation measures to reduce energy consumption or operating costs of school facilities." The more specific and limited nature of the energy conservation measures which are governed by and subject to Section 44.901 is described in subparagraph (b) of Section 44.901, as follows:

- "(b) A contract to which this section applies includes a contract for the installation of:
- (1) insulation of the building structures and systems within the building;
 - (2) storm windows or doors, caulking or weatherstripping, multiglazed windows or doors, heat absorbing or heat reflective glazed and coated window or door systems, or other window or door system modifications that reduce energy consumption;
 - (3) automatic energy control systems, including computer software and technical data licenses;
 - (4) heating, ventilating, or air-conditioning system modifications or replacements;
 - (5) lighting fixtures that increase energy efficiency;
 - (6) energy recovery systems;

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- (7) electric systems improvements; or
- (8) other energy conservation-related improvements or equipment (including improvements or equipment relating to renewable energy)."

Everything listed above in items (1) through (8) of subparagraph (b) (the "Physical Improvements List"), involve tangible and physical improvements. The introductory language illustrates the tangible and physical nature of the items identified in the Physical Improvements List by referring to the "installation of" items (1) through (8).

Because the Program does not involve the installation of any tangible or physical improvements, a contract for the Program is not subject to Section 44.901.

**IV.
AMENDED SECTION 44.901**

Modification of Section 44.901: HB 2277.

As you are aware, Section 44.901 was modified by HB 2277, passed in the last legislative session. HB 2277, which becomes effective September 1, 2001, modifies subparagraph (b) of Section 44.901 to include the language **emphasized** below ("Amended Section 44.901"):

"(b) A contract to which this section applies includes a contract for the installation **or implementation** of: [the Physical Improvements List]."

(Emphasis added).

This additional "or implementation" language of Amended Section 44.901 specifically broadens the scope of Section 44.901 to include contracts for the implementation, in addition to the installation, of the same items represented on the Physical Improvements List. Although the scope of Amended Section 44.901 is broader than its predecessor, it does not apply to or otherwise govern Energy Education's contracts for the Program, because the Program does not involve, relate to, or concern the installation or implementation of any tangible, physical improvements, such as those specifically represented in the Physical Improvements List.

It should be noted that HB 2277 modifies not only Section 44.901 of the Education Code, but also the nearly identical provisions for energy conservation measures found in the Government Code and Local Government Code. The modifications set forth in HB 2277 impact not only public school districts, but also higher education institutions, state agencies and local governmental entities.

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As stated in the Bill Analysis for HB 2277, the purpose of the amendments was to encourage more governmental entities, specifically including state agencies, to take advantage of the specified contracting "to finance energy efficiency retrofits." In fact, the motivation for the amendments may have been primarily to encourage state agencies to take advantage of the energy conservation measures provisions of the Government Code, and the modifications to the Education Code were just simply incidental thereto. According to the background information offered in the Bill Analysis for HB 2277,

"Prior to the 77th Legislature, no state agency had taken advantage of this mechanism to finance energy efficiency retrofits."

Apparently the Legislature was attempting to foster greater participation by state agencies in the Master Equipment Lease Purchase Program administered through the Texas Public Finance Authority. Modifications to Section 44.901 in HB 2277 reportedly were merely made for the sake of consistency, rather than in reaction to any concern or issue specific to public school districts. In modifying the energy conservation measures provisions of the Government Code affecting state agencies, it certainly made sense to make the same, or very similar, modifications to similar statutes affecting other governmental entities.

**V.
OUR REVIEW**

On behalf of Energy Education, we have:

1. Reviewed the specific language of Section 44.901 in effect as of the date of this letter;
2. Reviewed the specific language of Section 44.901 as amended by HB 2277 to be effective September 1, 2001 ("Amended Section 44.901"); and,
3. Reviewed the bill analysis for HB 2277 ("Bill Analysis for HB 2277").
- 4.

Additionally, we have interviewed the appropriate legislative staff with State Representative Bill Carter's office and State Senator Troy Fraser's office, as well as other persons with relevant knowledge of HB 2277, Section 44.901 and its predecessor statute (Texas Education Code Section 21.9012 originally adopted to be effective September 1, 1990). Representative Carter was the author of HB 2277 and Senator Fraser was the Senate sponsor for HB 2277.

Although we have not reviewed the entire legislative record related to HB 2277's journey through the House and Senate (e.g. audiotapes or transcripts of committee hearings or floor discussions), we reasonably expect that such a review would verify our determination.

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Relevant Authorities.

For your information and reference, copies of relevant authorities are attached hereto as follows:

Attachment "A", Section 44.901
Attachment "B", HB 2277
Attachment "C", Bill Analysis for HB 2277

**VI.
CONCLUSION**

Our opinion and advice to Energy Education is that its contracts to provide the Program are not governed by nor are they subject to Section 44.901 or Amended Section 44.901.

If the District has any questions or wants to discuss this issues further, either I or Neal W. Adams can be reached at the office phone number displayed on the top of the first page. If you have any questions, or if I can be of any assistance, please do not hesitate to contact me.

Sincerely,

ADAMS, LYNCH & LOFTIN, P.C.



Jon A. McCormick

cc: Neal W. Adams, Esq.