



# TEXAS EDUCATION AGENCY

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Robert Scott  
Commissioner

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**OCT 16 2008**

**OPINION COMMITTEE**

September 30, 2008

Honorable Gregg Abbot  
Attorney General of Texas  
Post Office Box 12548  
Austin, Texas 78711-2548

FILE # ML-45856-08  
I.D. # 45856

**RQ-0751-GA**

Re: Attorney General Opinion Request

Dear General Abbott:

On behalf of the Beeville Independent School District, I am writing to seek your guidance as the ability of a school district to utilize a reverse auction conducted by a private third party to purchase personal property valued at \$10,000 or more. The District's request is attached.

Thank you for your consideration of this request. Should you need any additional information, please feel free to contact me or David Anderson, General Counsel, at (512) 463-9720.

Sincerely,

Robert Scott  
Commissioner of Education

RS/da/ds

# POWELL & LEON<sup>LLP</sup>



CRPS  
→ Legal

Blake G. Powell  
Sara Hardner Leon  
Jamie Cameron Turner  
Andrew D. Clark  
William C. Bednar *of Counsel*

September 24, 2008

*\* please prepare a  
response for Comm.  
Signature.*

Honorable Robert Scott  
Texas Commissioner of Education  
1701 Congress Avenue  
Austin, Texas 78701

Dear Commissioner Scott:

The purpose of this letter is to request clarification as to the authority of a public school district to make purchases of personal property, valued at \$10,000 or more in the aggregate over a twelve-month period, by a reverse auction process if the reverse auction is conducted by a private entity. This request is being made on behalf of the Beeville Independent School District.

The Beeville Independent School District has been asked to participate in a reverse auction procurement program operated by a private entity that performs internet-based reverse auctions on behalf of school districts and other governmental entities nation-wide. While the school district seeks to obtain the best value for the district, including savings that may be obtained through reverse auction procedures, it seeks clarification on its authority to contract with a private third party to perform such auctions on its behalf. The school district has not procured the services of the auctioneer by a competitive process, as there is no cost to the school district for the service.

In this case, the private, third party "auctioneer" receives the specifications for any offer to purchase from the school district. The auctioneer then publishes the offer via the internet to any potential vendors identified by the school district as well as vendors that have existing agreements with the third party auctioneer. In order for any potential vendor to participate in the reverse auction, the vendor must enter an agreement with the third party auctioneer. This agreement includes an agreement to pay a fee to the auctioneer in the event that the vendor is successful in obtaining a contract with the

school district by using the reverse auction procedure. There is no direct charge to the school district for participating in the reverse auction.

Upon the close of the reverse auction, the school district can either select the low price offer or reject all offers, using its own judgment and discretion.

It is clear that a reverse auction is an acceptable method by which a school district can procure goods and services. Section 44.031(a) of the Texas Education Code provides that:

all school district contracts, except contracts for the purchase of produce or vehicle fuel, valued at \$25,000 or more in the aggregate for each 12-month period shall be made by the method, of the following methods, that provides the best value for the district.

TEX. EDUC. CODE §44.031(a). Among those accepted methods is the reverse auction procedure as defined by Section 2155.062(d), Government Code. *Id.* at §44.031(a)(8). Likewise, Texas Education Code Section 44.033(a) provides that a school district may purchase personal property valued between \$10,000 and \$25,000 in accordance with Sections 44.031(a) and (b).

As a practical matter, most public school districts lack the resources, internally, to conduct reverse auctions in a cost-effective manner.

Texas Local Government Code §271.083 expressly authorizes a Texas school district to participate in the purchasing programs administered by the Texas Comptroller, including its reverse auction programs. Section 271.083 outlines specific procedures that a district must follow in order to participate in the Comptroller's purchasing programs. However, there is no similar clear legislative authority for a school district to participate in reverse auction programs conducted by a private entity on its behalf. Section 44.0312 of the Education Code provides that a school board "may not delegate the authority to act regarding an action authorized or required by this subchapter to be taken by the board of trustees of a school district." *Id.* at § 44.0312(b).

Absent express statutory authority, may a public school district delegate authority to conduct reverse auctions to a private entity?

The question of delegation has been considered as it pertains to school district food service management contracts. In DM-14, General Morales held that in the absence of statutory authorization, a public body may not delegate or barter away statutory duties that involve the exercise of judgment and discretion. Op. Tex. Att'y Gen. No. DM-14 (1991).

Attorney General Opinion GA-500 addressed the validity of the holding in DM-14. Tex. Att'y Gen No. GA-500 (2007). In that decision, General Abbott found that the food service management contract at issue did not implicate the delegation doctrine as modified by *Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997) and its progeny. *Id.* at 2. He noted, however, that unlike the situation in DM-14 in which a school district attempted to contract with a food service management company for the company to supervise the purchase of the district's food and supplies, the District in GA-500 had procured the district's food service management contract through the methods provided in § 44.031, Texas Education Code. Moreover, the district was not required under *Boll Weevil* to contract separately for the underlying goods that the food service management company purchased pursuant to its contract. *Id.*

A second issue is raised by the requirement of contractual privity between the third party auctioneer and the potential vendor before a potential vendor may participate in the reverse auction. In Opinion JC-205, General Cornyn found that the procurement requirements for public school and college districts under Chapter 44 of the Texas Education Code prohibited a junior college district from using an designated broker of record to procure bids for insurance valued in excess of \$10,000 in the aggregate in a twelve-month period. Op. Tex. Att'y Gen. JC-205 (2000). There, General Cornyn noted that the agent of record relationship necessarily entailed limiting the number of potential insurance companies from bidding, as the insurance agent would be affiliated with a limited number of insurance companies. Because the pool of insurance companies that could bid for a particular contract was limited, that process was found to limit a district's access to all rates and terms, possibly excluding the most advantageous rates and terms offered by a company that did not have a relationship with the agent of record.

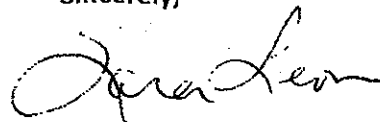
The Beeville Independent School District respectfully requests clarification of its authority in this matter, and specifically seeks guidance on the following question:

- 1- While the reverse auction process does not appear to cede judgment or discretion either in the development of specifications or the selection of successful bidders, it does cede control over the process of conducting the auction to a private, third party. In light of DM-14, may a public school district participate in such a process?
- 2- In a privately operated reverse auction, the private auctioneer in essence controls the pool of bidders that may participate in the auction by requiring each potential bidder to enter a written agreement that governs bidder's participation. The public school district may identify potential vendors that it wants the auctioneer to invite to participate in the vendor pool, but all vendors must agree to pay a fee to the

auctioneer in the event a contract is awarded before being permitted to participate in the reverse auction. Does the requirement of a contract between the auctioneer and potential vendors as a condition precedent to bidding in the reverse auction impermissibly limit the number of vendors and possibly foreclose the district's access to the most advantageous price as discussed in JC-0205?

I appreciate your formal response as to whether using a private entity to conduct reverse auctions on behalf of a school district is a permissible under state law.

Sincerely,



Sara Hardner Leon

cc: Dr. John Hardwick  
Superintendent of Schools  
Beeville Independent School District  
2400 N. St. Mary's  
Beeville, TX 78102

David Anderson  
General Counsel  
Texas Commissioner of Education  
1701 Congress Avenue  
Austin, Texas 78701