

- SUBJECT:** Contracts between school districts and food service providers
- COMMITTEE:** Public Education — favorable, without amendment
- VOTE:** 6 ayes — Eissler, Guillen, Huberty, Shelton, T. Smith, Weber
2 nays — Dutton, Strama
3 absent — Hochberg, Allen, Aycock
- SENATE VOTE:** On final passage, May 6 — 30-0
- WITNESSES:** For — (*Registered, but did not testify:* Amy Beneski, Texas Association of School Administrators; David Holt, Texas Association of Community Schools; Julie Shields, Texas Association of School Boards)
Against — (*Registered, but did not testify:* Jim Grace, ARAMARK)
- BACKGROUND:** Sec. 44.031, Education Code governs the purchases for which a school district must use specific contract procedures. Sec. 44.031(a) states that with few exceptions, a school district must use one of the following contract methods for purchases greater than \$50,000:
- competitive bidding;
 - competitive sealed proposals;
 - a request for proposals, for services other than construction services;
 - an interlocal contract;
 - a design/build contract;
 - a contract to construct, rehabilitate, alter, or repair facilities using a construction manager;
 - a job order contract for the minor construction, repair, rehabilitation, or alteration of a facility;
 - the reverse auction procedure; or
 - the formation of a political subdivision corporation.

According to sec. 44.031(b), in determining to whom to award a contract, a district must consider:

- the purchase price;
- the reputation of the vendor and of the vendor's goods or services;
- the quality of the vendor's goods or services;
- the extent to which the goods or services meet the district's needs;
- the vendor's past relationship with the district;
- the impact on the ability of the district to comply with laws and rules relating to historically underutilized businesses;
- the total long-term cost to the district to acquire the vendor's goods or services; and
- any other relevant factor.

According to sec. 44.031(g), notice of the time when and place where a bid or proposal will be due must be published in the county of the district's central administrative office once weekly for at least two weeks before the deadline for receiving bids, proposals, or responses to a request for qualifications. In a two-step procurement process, the time and place where the second-step bids, proposals, or responses will be received are not required to be published separately.

A Texas attorney general opinion (GA-0500, January 12, 2007) determined that school districts participating in federal school nutrition programs could contract with food service management companies if the district adhered to federal and state regulations controlling such contracts. A school district contracting with a company for services does not have to contract separately for the underlying goods a company may use in providing its services. When a school district contracts competitively with a food service management company that merely permits or requires the company to provide food as part of its services, a school district is not violating a statutory duty or delegating a governmental function under state law.

DIGEST:

SB 1113 would require a school district contract valued at \$50,000 or more in a 12-month period for food service management or provision to:

- adhere to Education Code, sec. 44.031(a) in providing the best value to the entity and school district;
- consider the factors specified under sec. 44.031(b) in determining to whom to award the contract; and
- follow the process specified in sec. 44.031(g).

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2011. It would apply only to contracts entered into on or after the effective date.

**SUPPORTERS
SAY:**

A school district can choose to manage the kitchens of its schools, including the purchasing of food, or the school district can contract with a food service provider to manage the kitchens and purchase the food. Currently, some school districts contract with a provider who does not publicly bid the purchase of the food provided to schools.

SB 1113 would afford transparency by allowing a school district to know the true price of the food purchased and would ensure high-quality food was provided to public schools whose districts contracted with food management services.

Transparency. A food service management provider contracting for the food it provides to a school district should be subject to the same contracting requirements a school district must follow when contracting for food. When a provider is required to publicly bid, the food specifications are detailed in the bid, including brand, fat content, and other important nutrition information found on food labels. When the provider does not publicly bid, the food specifications provided to school districts contain only the descriptors “cheese,” “meat,” or “milk.” Such generalizations permit the food provider to change the product constantly to achieve a lower cost without regard for the quality of the food provided to the schools.

National buying power. The bill would not negatively impact school districts. Food service management providers would retain the benefit of their national buying power—the ability to purchase in bulk. As such, food service providers still would enjoy lower prices on products purchased in bulk.

The bill would address the issue of one food service management provider in Texas that does not publicly bid the purchase of the food. This provider used to publicly bid but then stopped doing so after the 2007 attorney general opinion. There is no reason why this provider could not return to public bidding while remaining competitive and not costing school districts money.

Food retailers reward all food service management providers based on the amount of product purchased. The more a provider charges per unit of product, the greater the rebate the provider receives from the retailer.

When publicly bid, the provider factors the rebate into the front end of the contract to offer the most competitive price and quality of food to the school district. In a public bid, the school district receives all the benefits of the rebates and national buying power. Opposing a requirement to publicly bid the purchase of food only seeks to preserve the food service management provider's profits, which were acquired by inflating the prices.

Guaranteed food service surplus. The bill no longer would permit the questionable use of federal funds because if publicly bid, the "surplus" would be represented in the overall cost of the food service management as a savings. Some say that the bill likely would eliminate the guaranteed food service surplus paid to school districts by some food service management providers, but the surplus represents a possible misuse of federal funds. School districts receive federal appropriations to provide food services to certain students. In contracting with the food service provider, the school district uses a combination of state and federal appropriations. To entice business, a food service provider agrees to pay a surplus at the end of the school year if the school district contracts with that provider. The question arises when the school district uses the surplus to fund nonfood-service-related initiatives because it appears to be an indirect reallocation of federal funds.

OPPONENTS
SAY:

SB 1113 would increase the cost of food services for certain districts, crippling them during these tough economic times. One school district estimates that its food prices would increase by at least \$260,000.

National buying power. The bill would not allow a food service management provider to use its national buying power to provide lower prices.

Guaranteed food service surplus. The bill likely would cause the guaranteed food service surplus paid to a school district by the food management service provider at the end of each school year to be eliminated. School districts use this surplus to reimburse energy and custodial costs and to upgrade kitchen equipment and facilities. Without

the surplus, the districts would have to fund such expenditures through local operating budgets or bond referendums.

NOTES: The companion bill, HB 2233 by Huberty, passed the House by 134-12 on May 12 and was referred to Senate Education Committee on May 13.