
Note: The CU series, including CUA through CUF, should be read in conjunction with CU(LEGAL) and CH.

For additional legal requirements applicable to purchases with federal funds, see CBB.

Board's Authority

An ESC may adopt rules as necessary to implement Government Code Chapter 2269. *Gov't Code 2269.051*

Delegation of Authority

The board may delegate its authority under Government Code Chapter 2269 regarding an action authorized or required by Chapter 2269 to a designated representative, committee, or other person.

The board shall provide notice of the delegation, the limits of the delegation, and the name or title of each designated person by rule or in the request for bids, proposals, or qualifications or in an addendum to the request.

Gov't Code 2269.053

[For information regarding delegation in the event of a catastrophe, emergency, or natural disaster, see CH(LOCAL).]

Contracts Valued at or Above \$50,000

All ESC contracts valued at \$50,000 or more in the aggregate for each 12-month period shall be made by the method that provides the best value for an ESC [see also CH]:

1. An interlocal contract. [See CH]
2. Competitive bidding. [See CUA]
3. Competitive sealed proposals. [See CUB]
4. Construction manager-agent method. [See CUC]
5. Construction manager-at-risk method. [See CUD]
6. Design-build method. [See CUE]
7. Job-order contract. [See CUF]
8. The reverse auction procedure as defined by Government Code 2155.062(d). [See Reverse Auction at CH(LEGAL)]

Education Code 44.031(a); Gov't Code Ch. 2269

[For information on contract-related fees, see CH]

Selecting a Contracting Method

A board that considers a construction contract using a method authorized by Government Code Chapter 2269 other than competitive bidding must, before advertising, determine which method of

	<p>the methods listed above provides the best value for the ESC. <i>Gov't Code 2269.056(a)</i></p>
<p>Exceptions <i>Emergency Damage or Destruction</i></p>	<p>If ESC equipment, an ESC facility, or a part of an ESC facility or personal property is destroyed or severely damaged or, as a result of an unforeseen catastrophe or emergency, undergoes major operational or structural failure, and a board determines that the delay posed by the methods provided for in Education Code 44.031 would prevent or substantially impair the conduct of classes or other essential school activities, then contracts for the replacement or repair of the equipment, school facility, or the part of the school facility may be made by methods other than those required by Education Code 44.031. <i>Education Code 44.031(h)</i></p>
<p><i>Contracts Requiring a Bond</i></p>	<p>A reverse auction procedure, whether the same or similar to that described by Government Code 2155.062, may not be used to obtain services related to a public work contract for which a bond is required under Government Code 2253.021 [see Payment and Performance Bonds, below]. <i>Gov't Code 2253.021(h)</i></p>
<p>Public Notice</p>	<p>Notice of the time by when and place where the bids or proposals, or the responses to a request for qualifications, will be received and opened shall be published in the county in which the ESC's central administrative office is located, once a week for at least two weeks before the deadline for receiving bids, proposals, or responses to a request for qualifications. If there is not a newspaper in that county, the advertising shall be published in a newspaper in the county nearest the county seat of the county in which the ESC's central administrative office is located. 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. <i>Education Code 44.031(g); Gov't Code 2269.052(a)-(b)</i></p>
<p>Contract Selection Criteria</p>	<p>In determining the award of a contract, the ESC shall consider and apply:</p> <ol style="list-style-type: none">1. Any existing laws, including any criteria, related to historically underutilized businesses; and2. Any existing laws, rules, or applicable municipal charters, including laws applicable to local governments, related to the use of women, minority, small, or disadvantaged businesses. <p>In determining the award of a contract, the ESC may consider:</p> <ol style="list-style-type: none">1. Price.2. The offeror's experience and reputation.3. The quality of the offeror's goods or services.

4. The impact on the ability of the ESC to comply with rules relating to historically underutilized businesses.
5. The offeror's safety record.
6. The offeror's proposed personnel.
7. Whether the offeror's financial capability is appropriate to the size and scope of the project.
8. Any other relevant factor specifically listed in the request for bids, proposals, or qualifications.

Gov't Code 2269.055

**Out-of-State
Bidders**

A board shall not award a contract for general construction, improvements, services, or public works projects or for purchase of supplies, materials, or equipment to a bidder whose principal place of business is not in this state, unless the nonresident underbids the lowest bid submitted by a responsible resident bidder by an amount that is not less than the greater of the amount by which a resident bidder would be required to underbid a nonresident bidder to obtain a comparable contract in the state in which the nonresident's principal place of business is located or a state in which a majority of the manufacturing relating to the contract will be performed. *Gov't Code 2252.001-.002*

This requirement shall not apply to a contract involving federal funds. An ESC shall rely on information published by the comptroller in evaluating the bids of a nonresident bidder. *Gov't Code 2252.003-.004*

Publishing Criteria

An ESC shall publish in the request for proposals or qualifications the criteria that will be used to evaluate the offerors and the applicable weighted value for each criterion. *Gov't Code 2269.056(b)*

Submission

A person who submits a bid, proposal, or qualification to a governmental entity shall seal it before delivery. *Gov't Code 2269.059*

Selection

An ESC shall base its selection among offerors on applicable criteria listed for the particular method used. *Gov't Code 2269.056(b)*

**Making Evaluations
Public**

An ESC shall document the basis of its selection and shall make the evaluations public not later than the seventh day after the date the contract is awarded. *Gov't Code 2269.056(c), .105*

**Required Contract
Provisions**

For information on required contract provisions, see CH(LEGAL).

Change Orders

If a change in plans or specifications is necessary after the performance of a contract has begun or if it is necessary to decrease or increase the quantity of work to be performed or of materials, equipment, or supplies to be furnished, the ESC may approve

change orders making the changes. The ESC may grant general authority to an administrative official to approve the change orders.

The total contract price may not be increased because of the changes unless additional money for increased costs is approved for that purpose from available money or is provided for by the authorization of the issuance of time warrants.

A contract with an original contract price of \$1 million or more may not be increased by more than 25 percent. If a change order for a contract with an original contract price of less than \$1 million increases the contract amount to \$1 million or more, the total of the subsequent change orders may not increase the revised contract amount by more than 25 percent of the original contract price.

Education Code 44.0411

**Inspection,
Verification, and
Testing**

Independently of the contractor, construction manager-at-risk, or design-build firm, an ESC shall provide or contract for the construction materials engineering, testing, and inspection services and the verification testing services necessary for acceptance of the facility by the ESC. The ESC shall select the services for which it contracts in accordance with Government Code 2254.004. *Gov't Code 2269.058*

Impact Fees

An ESC is not required to pay impact fees imposed under Government Code Chapter 395 unless the board consents to the payment of the fees by entering a contract with the political subdivision that imposes the fees. The contract may contain terms the board considers advisable to provide for the payment of the fees. *Gov't Code 395.022*

**Energy Savings
Performance
Contracts**

The contracting and delivery procedures for construction projects described at Government Code Chapter 2269 do not apply to energy savings performance contracts described at Education Code 44.901. [See CL] *Education Code 44.901(j)*

**Professional
Services**

Architects and
Engineers

An architect or engineer required to be selected or designated under Government Code Chapter 2269 has full responsibility for complying with Occupations Code Chapter 1051 or 1001, as applicable.

If the selected or designated architect or engineer is not a full-time employee of the ESC, the ESC shall select the architect or engineer on the basis of demonstrated competence and qualifications as provided by Government Code 2254.004 [see Procuring Professional Services, below].

Gov't Code 2269.057

*Registered
Architect*

An architectural plan or specification for any of the following may be prepared only by an architect registered in accordance with Occupations Code, Title 6, Chapter 1051:

1. A new building constructed and owned by an ESC that will be used for education, assembly, or office occupancy when the total projected construction costs at the commencement of construction exceed \$100,000.
2. Any alteration or addition to an existing building owned by an ESC that is, or will be, used for education, assembly, or office occupancy when the total projected construction costs of alteration or addition at the commencement of construction exceed \$50,000 and the alteration or addition requires the removal, relocation, or addition of any walls or partitions or the alteration or addition of an exit.

This section does not prohibit an ESC from choosing a registered architect or a registered professional engineer as the prime design professional for a building construction, alteration, or addition project. Designation as the prime design professional does not expand, limit, or otherwise alter the scope of a design professional's practice nor does it allow a design professional to prepare an architectural plan or specification described above.

Occupations Code 1051.703; 22 TAC 1.212

*Registered
Engineer*

Electrical or mechanical engineering plans, specifications, and estimates for an ESC construction project whose contemplated cost at completion is more than \$8,000 and that involves public health, welfare, or safety must be prepared by a registered professional engineer, and the engineering construction executed under the supervision of such an engineer. *Occupations Code 1001.053; Atty. Gen. Op. C-791 (1966)*

An ESC is not required to secure the services of a registered professional engineer to prepare plans for or supervise a construction project that does not involve electrical or mechanical engineering and for which the contemplated cost does not exceed \$20,000. *Occupations Code 1001.053*

*Certification for
Purchases
Through
Purchasing
Cooperatives*

An ESC may not enter into a contract to purchase construction-related goods or services through a purchasing cooperative in an amount greater than \$50,000 unless a person designated by the ESC certifies in writing that:

1. The project for which the construction-related goods or services are being procured does not require the preparation of plans and specifications under Chapter 1001 or 1051, Occupations Code; or

2. The plans and specifications required under Chapters 1001 and 1051, Occupations Code, have been prepared.

“Purchasing cooperative” means a group purchasing organization that governmental entities join as members and the managing entity of which receives fees from members or vendors.

Gov’t Code 791.011(j)

Procuring
Professional
Services

The purchasing requirements of Education Code 44.031 do not apply to a contract for professional services rendered, including the services of an architect. An ESC may contract for professional services rendered by a financial consultant or a technology consultant in the manner provided by Government Code 2254.003, in lieu of the methods provided by Education Code 44.031. *Education Code 44.031(f)*

Competitive bids shall not be solicited for professional services of any architect, landscape architect, land surveyor, professional engineer, or state-certified or state-licensed real estate appraiser. Contracts for these professional services shall be made on the basis of demonstrated competence and qualifications to perform the services and for a fair and reasonable price. *Gov’t Code 2254.002, .003(a)*

In procuring architectural, engineering, or land-surveying services, an ESC shall:

1. First select the most highly qualified provider on the basis of demonstrated competence and qualifications; and
2. Then attempt to negotiate a contract with that provider at a fair and reasonable price.

If a satisfactory contract cannot be negotiated with the most highly qualified provider of architectural, engineering, or land-surveying services, an ESC shall formally end negotiations with that provider, select the next most highly qualified provider, and attempt to negotiate a contract with that provider at a fair and reasonable price. An ESC shall continue this process until the parties enter into a contract.

Gov’t Code 2254.004

An interlocal contract between an ESC and a purchasing cooperative may not be used to purchase engineering or architectural services. *Gov’t Code 791.011(h)*

Contracts for Engineering or Architectural Services	A covenant or promise in, in connection with, or collateral to a contract for engineering or architectural services to which the ESC is a party is void and unenforceable if the covenant or promise provides that a licensed engineer or registered architect whose work product is the subject of the contract must indemnify or hold harmless the ESC against liability for damage, other than liability for damage to the extent that the damage is caused by or results from an act of negligence, intentional tort, intellectual property infringement, or failure to pay a subcontractor or supplier committed by the indemnitor or the indemnitor's agent, consultant under contract, or another entity over which the indemnitor exercises control.
<i>Indemnification</i>	
<i>Duty to Defend</i>	Except as provided below, a covenant or promise in, in connection with, or collateral to a contract for engineering or architectural services to which the ESC is a party is void and unenforceable if the covenant or promise provides that a licensed engineer or registered architect whose work product is the subject of the contract must defend a party, including a third party, against a claim based wholly or partly on the negligence of, fault of, or breach of contract by the ESC, the ESC's agent, the ESC's employee, or other entity, excluding the engineer or architect or that person's agent, employee, or subconsultant, over which the ESC exercises control. A covenant or promise may provide for the reimbursement of the ESC's reasonable attorney's fees in proportion to the engineer's or architect's liability.
<i>ESC as Additional Insured</i>	The ESC may require in a contract for engineering or architectural services that the engineer or architect name the ESC as an additional insured under the engineer's or architect's general liability insurance policy and provide any defense provided by the policy.
<i>Standard of Care</i>	<p>A contract for engineering or architectural services to which a governmental agency is a party must require a licensed engineer or registered architect to perform services:</p> <ol style="list-style-type: none">1. With the professional skill and care ordinarily provided by competent engineers or architects practicing under the same or similar circumstances and professional license; and2. As expeditiously as is prudent considering the ordinary professional skill and care of a competent engineer or architect. <p>In a contract for engineering or architectural services to which the ESC is a party, a provision establishing a different standard of care than a standard described above is void and unenforceable. If a contract contains a void and unenforceable provision, the standard of care described above applies.</p> <p>Nothing in these provisions prohibits an ESC in a contract for engineering or architectural services to which the ESC is a party from</p>

including and enforcing conditions that relate to the scope, fees, and schedule of a project in the contract.

Local Gov't Code 271.904

Right to Work

While engaged in procuring goods or services, awarding a contract, or overseeing procurement or construction for a public work or public improvement under Government Code Chapter 2269, an ESC:

1. May not consider whether a person 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 an organization.

Gov't Code 2269.054

**Collective
Bargaining**

An ESC awarding a public work contract funded with state money, including the issuance of debt guaranteed by the state, may not:

1. Prohibit, require, discourage, or encourage a person bidding on the public work contract, including a contractor or subcontractor, from entering into or adhering to an agreement with a collective bargaining organization relating to the project; or
2. Discriminate against a person described by item 1 based on the person's involvement in the agreement, including the person's status or lack of status as a party to the agreement or willingness or refusal to enter into the agreement.

Gov't Code 2269.0541

Accessibility

Each facility or part of a facility constructed by, on behalf of, or for the use of an ESC shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities. Alterations of facilities that affect or could affect their usability shall, to the maximum extent feasible, be altered in such manner that the altered portion is readily accessible to and usable by individuals with disabilities.

28 C.F.R. 35.151, 34 C.F.R. 104.23

**Payment and
Performance Bonds**

When a board makes a public work contract for constructing, altering, or repairing a public building or carrying out or completing any public work, it shall require the contractor, before beginning the work, to execute payment and/or performance bonds as specified below. The bonds shall be executed by a corporate surety in accordance with Insurance Code 7.19-1. The bond shall be payable to the board and in a form approved by the board. *Gov't Code 2253.021(a), (d)-(e)*

For a contract in excess of \$100,000, a performance bond shall be executed in the amount of the contract conditioned on the faithful performance of the work according to the plans, specifications, and contract documents. The bond is solely for the protection of an ESC. *Gov't Code 2253.021(b)*

For a contract in excess of \$25,000, a payment bond shall be executed in the amount of the contract solely for the protection and use of payment bond beneficiaries who have a direct contractual relationship with the prime contractor or a subcontractor to supply public work labor or material. *Gov't Code 2253.021(c)*

Failure to Obtain
Payment Bond

If a board fails to obtain a payment bond covering a contract in excess of \$25,000 from the prime contractor, it is subject to the same liability as a surety would be, and a payment bond beneficiary is entitled to a lien on money due to the prime contractor in the same manner and to the same extent as if the contract were subject to Subchapter J, Chapter 53, Property Code. *Gov't Code 2253.027*

No Bond for Design
Services Only

A payment or performance bond is not required and may not provide coverage for the design portion of the design-build contract with the design-build firm. [See CUE for more information on design-build contracts, including bond amounts] *Gov't Code 2269.311(a)*

Bond for Insured
Loss

A board shall ensure that an insurance company that is fulfilling its obligation under a contract of insurance by arranging for the replacement of a loss, rather than by making a cash payment directly to the governmental entity, furnishes or has furnished by a contractor:

1. A performance bond for the benefit of an ESC, as described above; and
2. A payment bond, as described above. If the payment bond is not furnished, an ESC is subject to the same liability that a surety would have if the surety had issued the payment bond and the ESC had required the bond to be provided.

These bonds shall be furnished before the contractor begins work. It is an implied obligation under a contract of insurance for the insurance company to furnish these bonds.

Exception to Bond
Requirement

The requirement that an ESC secure a performance or payment bond from an insurance company, above, does not apply when a surety company is complying with an obligation under a bond that had been issued for the benefit of the ESC.

Gov't Code 2253.022

Prevailing Wage on Public Works

A worker, laborer, or mechanic employed on a public work, exclusive of maintenance work, by or on behalf of an ESC shall be paid not less than the general prevailing rate of per diem wages. The general prevailing rate of per diem wages is the rate of per diem wages for work of a similar character in the locality in which the work is performed, and also includes the rate of per diem wages for legal holiday and overtime work. A worker is employed on a public work if the worker is employed by a contractor or subcontractor in the execution of a contract for public work with an ESC. *Gov't Code 2258.001, .021*

A board shall determine, as a sum certain, the general prevailing rate of per diem wages in an ESC for each craft or type of worker needed to execute the contract and also for legal holiday and overtime work. To ascertain the general prevailing rate of per diem wages, a board shall either conduct a survey of the wages received by classes of workers, laborers, and mechanics employed on projects of a character similar to the contract work in an ESC or adopt the prevailing wage rate as determined by the U.S. Department of Labor. A board shall specify the prevailing rate of per diem wages in the call for bids and in the contract itself. A board's determination of the general prevailing rates of per diem wages shall be final. *Gov't Code 2258.001, .022*

Enforcement

A board, and an agent or officer of the board, shall receive complaints regarding violations of the prevailing wage requirements of Chapter 2258 and withhold money from the contractor as required by statute. Upon receipt of a complaint, a board shall determine, before the 31st day after the date the information is received, whether good cause exists to believe that a contractor or subcontractor has failed to pay the prevailing wage and shall provide written notice of its determination to the contractor or subcontractor and any affected laborer, worker, or mechanic of its initial determination. *Gov't Code 2258.051-.052*

Retainage and Reimbursement

A board shall retain any amounts due under the contract pending a final determination of the violation. Upon a final determination that violations have occurred, a board shall use those retained amounts to pay the laborer, worker, or mechanic the difference between the amount the worker received in wages and the amount the worker would have received at the prevailing rate of per diem wages provided in the arbitrator's award. A board may adopt rules, orders, or ordinances relating to the manner in which the reimbursement is made. *Gov't Code 2258.052(d), .056*

Penalty for Noncompliance

The contractor to whom the contract is awarded or any subcontractors of the contractor shall pay not less than the specified rates to all laborers, workers, and mechanics employed in the execution of

the contract. A contractor or subcontractor who fails to pay the specified rates as required shall pay to an ESC \$60 for each worker, laborer, or mechanic employed for each calendar day or part of a calendar day the worker is paid less than the wage rates specified in the contract. A board must specify this penalty in the contract. If an ESC does not determine the prevailing wage rates and specify them in the contract, the contractor or subcontractor may not be fined. A board shall use any penalty money collected to offset the costs incurred in administering Government Code Chapter 2258. *Gov't Code 2258.023*

**Required Workers'
Compensation
Coverage**

An ESC that enters into a building or construction contract shall require the contractor to certify in writing that the contractor provides workers' compensation insurance coverage for each employee of the contractor employed on the public project. Each subcontractor shall provide such a certificate relating to coverage of the subcontractor's employees to the general contractor, who shall provide the subcontractor's certificate to the ESC. *Labor Code 406.096*

"Project" includes the provision of all services related to a building or construction contract for an ESC. An ESC that enters into a building or construction contract on a project shall:

1. Include in the bid specifications all the duties and responsibilities of contractors pertaining to required workers' compensation coverage, using the language required by 28 Administrative Code 110.110(c)(7). [See CU(EXHIBIT)]
2. As part of the contract, using the language required by 28 Administrative Code 110.110(c)(7), require the contractor to perform the duties and responsibilities pertaining to required workers' compensation coverage, as set out in 28 Administrative Code 110.110(d). [See CU(EXHIBIT)]
3. Obtain from the contractor a certificate of coverage for each person providing services on the project, prior to that person beginning work on the project. This provision includes all persons or entities performing all or part of the services the contractor has undertaken to perform on the project, regardless of whether that person contracted directly with the contractor and regardless of whether that person has employees. This includes, but is not limited to, independent contractors, subcontractors, leasing companies, motor carriers, owner-operators, employees of any such entity, or employees of any entity furnishing persons to perform services on the project. "Services" includes, but is not limited to, providing, hauling, or delivering equipment or materials, or providing labor, transportation, or other service related to a project. "Services" does not

include activities unrelated to the project, such as food/beverage vendors, office supply deliveries, and delivery of portable toilets.

4. Obtain from the contractor a new certificate of coverage showing extension of coverage:
 - a. Before the end of the current coverage period, if the contractor's current certificate shows that the coverage period ends during the duration of the project; and
 - b. No later than seven days after the expiration of the coverage for each other person providing services on the project whose current certificate shows that the coverage period ends during the duration of the project.
5. Retain certificates of coverage on file for the duration of the project and for three years thereafter.
6. Provide a copy of the certificate of coverage to the Texas Department of Insurance, Division of Workers' Compensation upon request and to any person entitled to a copy by law.

Use the language contained in 28 Administrative Code 110.110(c)(7) for bid specifications and contracts without any additional words or changes, except those required to accommodate the specific document in which they are contained or to impose stricter standards of documentation. [See CU(EXHIBIT)]

28 TAC 110.110(a)(7), (8), (c)

Exception

This coverage requirement does not apply to sole proprietors or partners of a covered business entity or certain corporate officers, if the sole proprietor, partner, or officer is explicitly excluded from the coverage of their business entity through an endorsement to the insurance policy or certificate of authority to self-insure. *Labor Code 406.097; 28 TAC 110.110(i)*

Criminal History

For provisions pertaining to criminal history record information on contractors, see CH(LEGAL).

Impermissible Practices

A board member, employee, or agent of an ESC who knowingly or with criminal negligence violates the purchasing laws found in Education Code Chapter 44 as described at Education Code 44.032 is subject to criminal penalties. [See CH] *Education Code 44.032*

Enforcement Actions

Government Code Chapter 2269 may be enforced through an action for declaratory or injunctive relief filed not later than the tenth day after the date on which the contract is awarded. *Gov't Code 2269.452*

FACILITIES CONSTRUCTION

CU
(LEGAL)

Attorney Fees	A governmental contract for general construction, an improvement, a service, or a public works project may not provide for the award of attorney's fees to an ESC in a dispute in which the ESC prevails unless the contract provides for the award of attorney's fees to each other party to the contract if that party prevails in the dispute. <i>Gov't Code 2252.904</i>
Construction Liability Claims	To assert a claim against a contractor, subcontractor, supplier, or design professional for damages arising from damage to or loss of real or personal property caused by an alleged construction defect in an improvement to real property that is a public building or public work in which the ESC has an interest, the ESC must comply with Government Code Chapter 2272. <i>Gov't Code 2272.002(a)</i>
Prohibited Contracts	An ESC may not enter into a governmental contract with a company identified on a list prepared and maintained under Government Code 806.051 (now Government Code 2270.0201) (companies with business operations in Sudan), 807.051 (now Government Code 2270.0201) (companies with business operations in Iran), and 2252.153 (companies known to have contracts with or provide supplies or services to foreign terrorist organization). <i>Gov't Code 2252.152</i>
	"Governmental contract" means a contract awarded by a governmental entity for general construction, an improvement, a service, or a public works project or for a purchase of supplies, materials, or equipment. The term includes a contract to obtain professional services subject to Government Code 2254. <i>Gov't Code 2252.151(3)</i>
	[For other prohibitions, see CH(LEGAL).]