Interlocal Agreements, Cooperative Contracting, and Innovative City-University Research Collaborations

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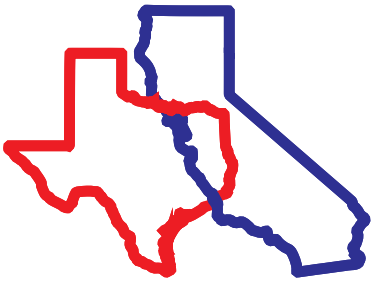

INTRODUCTION

What do you do if you need a quick contract in the following situations: your city council passes a resolution to work collaboratively with your neighboring county on a pandemic response; your city has been hit by a flood or winter storm and needs to immediately purchase supplies without competitive bidding or extended contract negotiations; or a local university wants to set up a long-term research relationship with your city?

Well, if you work for a local government entity and you need solutions for cooperating with other local government entities to perform government functions, you should consider whether an interlocal agreement, cooperative purchasing program, or master research agreement is permitted under your state's laws. Such an agreement can help a city not only respond to a crisis, but also establish a long-term collaboration with a fellow governmental entity. In particular, a master research agreement can be a way for a city and a public university to establish a relationship that facilitates cutting-edge policy research, which can be used to inform city decision-making and improve city operations.

1. Interlocal Agreements.

Local government contracting is governed by the laws of each individual state. These laws are generally concerned with the processes and procedures by which taxpayer money is spent to procure goods and services for the local government. In many cases, a competitive solicitation will be required as a part of the procurement process. The goals of competitive procurement laws can include ensuring that the municipality: receives the most appropriate goods on the market (for the price the municipality is willing to pay); hires a reliable contractor; and contracts with minority- and women-owned businesses, when possible.

Many state legislatures have also recognized that competitive solicitation requirements are often unnecessary when a municipality desires to enter a contract with another government entity. When both government entities are empowered to perform the same function, there becomes little practical difference between the government entity performing the function for itself and the government entity contracting with another government entity to perform the function on its behalf.

Sometimes these agreements are referred to as interlocal agreements. Interlocal agreements are intended to serve as a means of increasing cooperation among government entities for the performance of governmental functions. In Texas, the types of governmental functions that a municipality performs are listed in the context of tort claims liability.[1] This list includes police and fire protection, animal control, bridge construction and street maintenance, and water and sewer service. While this list is not exhaustive, it serves as a good basis for understanding the

nature of governmental functions.

In Texas, interlocal agreements are governed by Texas Government Code Chapter 791, also known as the Interlocal Cooperation Act. Chapter 791 includes its own list of governmental functions, which is shorter than the list found in the Texas Civil Practice and Remedies Code.[2] However, there is substantial overlap in the way that these Texas laws classify governmental functions. The stated purpose of the Interlocal Cooperation Act is "to increase the efficiency and effectiveness of local governments by authorizing them to contract, to the greatest possible extent, with one another and with agencies of the state."[3]

Local government entities are broadly defined to include counties, municipalities, special districts, and political subdivisions of Texas and other states. The City of Austin has entered into interlocal agreements with the State of Texas, its surrounding counties, and even other states. Over the last few years, our city has even been asked to enter a few interlocal agreements with the State of California and educational institutions, the latter of which will be discussed in the second part of this article.

In the interlocal agreement between the City of Austin and the State of California, the California Department of General Services (DGS) entered into a cooperative purchasing agreement with a company to provide business class Telemetry and Global Positioning System (GPS) equipment for vehicles to the State of California, and participating local government agencies, at contracted pricing in accordance with the requirements of a request for proposals. After researching California's Joint Exercise of Powers Act, California Government Code Chapter 6500, as well as the Texas Interlocal Cooperation Act, it was clear that under both states' laws, a Texas city could take advantage of a California cooperative purchasing agreement through the use of an interlocal agreement. Through the use of an interlocal agreement, the City of Austin was able to "piggyback" onto this contract, and the City of Austin was able to obtain the same volume pricing discounts as the State of California received in their contract with the vendor.

The rules governing interlocal agreements require one or both entities to be a "local government entity," as defined earlier. A local government may contract with another local government, a federally recognized Indian tribe, a Texas state agency, or a similar agency of another state. In addition, the interlocal agreement must be a written contract to: "(1) study the feasibility of the performance of a governmental function or service by an interlocal contract; or (2) provide a governmental function or service that each party to the contract is authorized to perform individually."[4] The first category is especially useful when the local government entity desires to work with a local university or educational institution. The second category is often useful for smaller government entities that do not have the resources to perform the governmental function on their own, or when two government entities could realize a cost savings by having only one entity perform the function on behalf of both entities. An example of this includes agreements in which a larger city performs animal control services on behalf of smaller cities, with each smaller city reimbursing the larger city for the cost of administering such services.

Texas law also requires interlocal agreements to be approved or authorized by the governing body of each government entity, to state the purpose, terms, rights, and duties of the parties, and to specify that payment for the performance of the services under the agreement will be made from current revenues available to the paying party. State law also requires the paying party to fairly compensate the performing party under an interlocal agreement. They may also be renewed, as with any other contract or agreement.

Particularly important is the fact that interlocal agreements do not require a competitive bidding process in order to procure the services. This means that a local government entity could potentially choose the other government entity that it desires to contract with and immediately begin contract negotiations without the need for competing offers. And because government cooperation is not only encouraged by many state laws, but also by geographic circumstance, the cooperation involved in a interlocal agreement can either help form or strengthen ties for future long-range regional planning in response to disasters and emergencies, or to plan new and innovative health and transportation initiatives, among other regional goals.

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The COVID-19 pandemic created many opportunities for local government entities to work together to address this national crisis. For example, the City of Austin entered into an interlocal agreement with Travis County to jointly purchase personal protective equipment for the added benefit of bulk order pricing. The City of Austin and Travis County also entered into an interlocal cooperation agreement under which the County agreed to provide a grant to City, as a subrecipient, for CARES Act funds allocated to the County. Travis County desired to provide these funds to reimburse the City for COVID-19-related City services that benefited or were made available to residents of unincorporated areas of Travis County, including expenses for personal protective equipment, the alternate care site for COVID-19 patients at the Austin Convention Center, and the isolation facilities for recuperating patients.

2. Cooperative Agreements.

We would also like to briefly discuss a unique type of interlocal agreement called a cooperative purchasing agreement. A cooperative purchasing agreement is a type of agreement whereby one entity decides to take the lead on issuing a solicitation for a particular good or service, negotiating favorable contract terms and conditions for those goods and services and then allows members of the program to take advantage of those negotiated contracts. This is similar to the interlocal agreement between the City of Austin and California DGS discussed earlier. A cooperative purchasing agreement can be entered among solely government entities, or it may be formed by a private entity that specializes in cooperative contracting.

Texas law allows government entities to participate in cooperative purchasing programs with local governments of Texas and other states.[5] By entering into a cooperative purchasing program managed by another entity from the same state, a local government can be almost certain that the other entity has followed all processes required to competitively solicit the contract under the laws of that state. However, before your government entity joins a cooperative purchasing program, especially a cooperative program that is either located out of state or contains many out-of-state members, you should check the processes and procedures that the cooperative requires for competitive solicitations to ensure that each participating entity is bound to follow practices for competition that match your own state's requirements. Otherwise, if the out-of-state entity does not comply with your state's laws for competition, your award of the contract could be challenged for not complying with your state law. Similarly, if the lead entity that negotiated a stand-alone cooperative contract is from another state, it is important to determine whether the competitive process that was used to solicit that contract is comparable to what is required under your state's laws.

Under Texas law, a cooperative program must designate the lead person or agency to act on behalf of the program, the participating local government entity using the cooperative must be responsible for vendor payments for the goods and services it orders using the cooperative contract, and the participating local government entity must pursue any contract compliance issues directly with the vendor. In exchange for negotiating and managing the cooperative program and contracts, the cooperative program managing agency is usually entitled to a fee based on a percentage of the goods and services ordered using the cooperative. The vendor is usually responsible for paying this fee, not the local government entity, and therefore the administrative cost for managing a cooperative program is generally not borne by the participating government entities but may be passed on as part of the overall price.

One of the downsides to cooperative contracts is that vendors often push back on accepting terms and conditions established by local ordinances or policies. Vendors reason that all orders should conform exactly to the terms they negotiated with the cooperative program. When a government entity publishes its own solicitation, vendors are made aware of these local terms and conditions up front. However, in a cooperative program, the vendor is not made aware of each government entity's local requirements until the government entity executes a purchase order using the cooperative program. Another potential downside to cooperative contracts is that the purchaser is limited to a certain subset of vendors who have participated in the cooperative program and they may not be able to find a local vendor on the cooperative program. Many cities have local and small and minority business preferences which may be subverted by the use of cooperative contracts if these businesses do not participate in cooperative programs.

However, the benefit of cooperative contracts is that the local government entity does not have to competitively solicit its own contracts for the goods and services provided in a cooperative contract. As an example, by using cooperative contracts, the City of Austin was able to procure disaster planning consultant contracts and purchase many items used as personal protective equipment in a matter of days rather than weeks during the COVID-19 pandemic. If the cooperative program has an already competed, already negotiated

contract for the goods or services that your entity seeks to procure, you can simply contact the vendor for a quote through the cooperative program and enter a contract directly with the vendor. While you may need to add a few references to local laws to satisfy your jurisdiction's requirements, the bulk of the negotiating should already be complete, which dramatically streamlines the procurement process. That is the beauty of cooperative agreements.

3. Using Interlocals for City-Focused University Research.

Interlocal agreements also offer a path for facilitating stronger relationships and collaboration between cities and universities. Such agreements are generally a mutually beneficial arrangement for both parties. Cities can benefit from the innovative research performed by universities under an interlocal agreement, while the university is provided with the opportunity to perform research on matters that can be used to improve performance of the city's governmental functions and opportunities for students to gain real-world research experience. A university might, for example, conduct research that helps a city make data-informed decisions about how to improve public safety, reduce traffic congestion at rush hour, promote water conservation, or reduce wildfire risks. Likewise, an interlocal agreement gives a university the opportunity to conduct externally funded research that directly benefits the public, enabling university faculty and students to build bridges with a community and perform research that will have a positive, meaningful impact on their community. Both the city and university benefit from collaboration that enables them to identify how emerging technological innovations, such as artificial intelligence, can be used to improve public life in ways that are consistent with community values and goals. (It should be noted that under the Texas Interlocal Cooperation Act, a city can form an interlocal agreement with a public institution of higher education or public university system, but not with a private institution of higher education. Other procurement and contracting solutions are needed if a city desires to form a similar research agreement with a private university.)

[B]efore your government entity joins a cooperative purchasing program, especially a cooperative program that is either located out of state or contains many out-of-state members, you should check the processes and procedures that the cooperative requires for competitive solicitations to ensure that each participating entity is bound to follow practices for competition that match your own state's requirements.

When it comes to research agreements, under Texas Government Code § 791.035, competitive procurement requirements do not apply to an agreement between a local government and a higher education institution or university system, as long as the agreement is funded on a cost-recovery basis. This compensation system is generally satisfactory to a university as well, as the university's primary mission is to contribute to knowledge advancement, and the interlocal agreement provides an avenue for funding university research on a reimbursement basis.

In 2020, the City of Austin and the University of Texas at Austin (UT Austin) entered into a five-year, $7.5 million master interlocal agreement for research. Under this agreement with UT Austin, City staff are authorized to enter into work orders for research projects valued at up to $7.5 million over five years, divided among the projects.[6] The master agreement streamlines the process of contracting for research, as the City of Austin and UT Austin have agreed upon a common set of contract terms, and the parties only need to negotiate a scope of work for each individual research project. (Previously existing interlocal agreements between the parties were not affected). Each work order receives legal review to ensure compliance with Chapter 791 of the Texas Government Code and the terms of the master agreement. Now, the parties can prepare and negotiate work orders within weeks, in contrast to the sometimes months-long process for negotiating and receiving governing body approval for individual interlocal agreements for research.

This master research agreement was inspired by a similar agreement between the City of Minneapolis and the University of Minnesota, which also enabled municipal staff and university researchers to enter into work orders for research, subject to the terms and conditions of a master agreement that governed all work orders.

In order to make use of the master agreement with UT Austin, City of Austin departments must have funding available in their budgets that can be allocated to fund research. Alternatively, your city staff could ask their council to specifically appropriate city-wide funding for a city-university research agreement. This is especially useful for smaller city departments that receive less budgetary funding and/or do not generate revenue, as smaller

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departments may not otherwise have enough funding to make use of the agreement.

Recognizing that data sharing would be an important part of an agreement for research, the City of Austin and UT Austin worked together to develop comprehensive data security terms for the master research agreement. The terms govern how UT Austin handles the City of Austin's confidential and sensitive data. This ensures that the parties are in agreement about the technical standards that UT Austin will maintain in order to protect the City's data.

Under the City of Austin process, first the City department interested in the research fills out a statement of interest with the university to see if the university would be interested in the project. If UT Austin agrees to accept the project, the university will designate a professor and team to negotiate the terms of the work order. In preparing and reviewing each work order, the City Law Department works with City of Austin staff to assess whether any City information shared for a particular project falls under certain data categories that trigger the need for UT Austin to observe heightened security and confidentiality protocols established in the contract. City of Austin staff must indicate on each work order whether any City data falls into such a category; this creates a shared understanding of when UT Austin needs to observe these security and confidentiality requirements. Because much of the information that the City shares is public information, these heightened data security obligations are expected to arise only in limited circumstances.

We recommend the following practice tips to any municipal attorney advising their city on establishing and managing a master interlocal agreement for university research:

Cities can benefit from the innovative research performed by universities under an interlocal agreement, while the university is provided with the opportunity to perform research on matters that can be used to improve performance of the city's governmental functions and opportunities for students to gain real-world research experience.

- As discussed above, an agreement formed under your state's interlocal cooperation laws might require either the performance of a governmental function or research on performance of a governmental function. A municipal attorney should review each proposed research project to confirm that the project meets this requirement. A municipal attorney should also confirm that each research project has a public purpose.

- Master agreements involving a work order process are most appropriate for facilitating research projects that are in line with the direction that a city council has previously given to city staff. In approving a master agreement that authorizes staff to issue work orders for university research, a city council provides city staff with broad discretion to determine what research will be performed (within the boundaries set by the contract terms). A city council may object to this type of agreement if city staff use their authorization to pursue controversial projects without prior council approval. City staff should provide a concrete plan to their council when they seek approval of a master interlocal agreement, so that the council is aware of the parameters of the contract, and the approval of a master agreement is not simply a blanket authorization. Clearly articulated contract boundaries also help guide city staff, reducing the risk that they will overstep into areas where the city council desires to be more closely involved in setting the city's policy direction. For this reason, we also recommend that city employees prepare separate agreements and seek council approval before pursuing projects that may be politically nuanced or where there is a significant need for advance public input. By taking a thoughtful approach in determining which projects are appropriate or inappropriate for a master research agreement, you will protect and respect your city council's role, as an elected body, of setting city policy.

- If a city and university decide to establish individual research projects via a work order system, each work order should clearly state the responsibilities that will be undertaken by each party, and the deliverables that are expected. (In general, the university will produce deliverables, such as reports, source code, analysis, research findings, or monthly project updates, that are submitted to the city.) The parties should also set deadlines by which each deliverable must be provided.

- City and university staff may wish to transition research currently performed under an existing agreement to the new master research agreement. This can be done, but staff should take care to ensure that the prior agreement is completely closed out before the transition is made to the new agreement, so there is no conflict or uncertainty about which aspects of the research are funded by the old agreement and governed by its terms. This will facilitate a smooth transition of the research from the old research agreement to the new master research agreement.

- Attorneys should draft and negotiate data security and confidentiality terms to ensure that the parties' data and ownership interests in data are thoroughly protected. If a city is providing confidential or sensitive data to the university for the purpose of performing research, the city may wish to stipulate that the data cannot be used for any purpose outside the scope of the city's approved work order. The city may also want to require the university to return or destroy confidential or sensitive city data at the conclusion of the project, as another means of guaranteeing that the data will not be used for purposes other than those intended by the city.

An interlocal agreement between a city and a public university can be a valuable mechanism for facilitating innovative research and greater collaboration between two government entities that both desire to understand how a city can improve public life and address local challenges. Entering into a master research agreement, where work orders are used to establish individual research projects, can streamline the contracting process. All work orders issued under a master interlocal agreement are governed by a common set of terms, eliminating the need to negotiate a new agreement and obtain governing body approval every time the parties wish to pursue a research project together. A master research agreement can also promote consistency and predictability in how a city and a university work together on research projects, since a master agreement necessitates the development of common administrative processes. Without a master agreement, such joint research projects are often handled on an ad hoc basis.

CONCLUSION

In summary, interlocal agreements and cooperative contracts provide local governments with an alternative mechanism for compliance with procurement laws, and can have particular value when responding to emergency situations. In particular, one type of such agreements—the interlocal master research agreement—allows municipalities and academic institutions to take their collaborations to new heights by enabling research that helps solve the unique challenges that local governments face.

NOTES

1. Texas Civil Practice and Remedies Code Section 101.0215(a).
2. Texas Government Code Section 791.003(3).
3. Texas Government Code Section 791.001.
4. Texas Government Code Section 791.011(c).
5. Texas Local Government Code Chapter 271, Subchapter F.
6. Link to city council approval action: https://www.austintexas.gov/edims/document.cfm?id=345144; for additional information visit: https://research.utexas.edu/find-a-researcher/coa/