INTERLOCAL COOPERATION CONTRACTS

Some Practical Tips for Counties

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INTRODUCTION

With local tax revenues committed toward an ever increasing array of statutory mandates, county governmental officials are hard pressed to maximize the benefits derived from each taxpayer dollar. As a result, interlocal agreements for the performance of certain administrative and governmental functions are being utilized with increasing frequency. Local governments often contract with each other in an effort to provide local services (both administrative and governmental), maximizing economies of scale at an actual or sometimes perceived cost savings to their taxpayers. In many instances, cost savings are realized as a result of pooled resources for shared facilities, equipment and/or training, and personnel costs incident to a particular governmental function or service.

For interlocal agreements, the concept is simple - local governments are able to pool resources to provide governmental functions cooperatively among themselves for the benefit of their residents while avoiding the risk of duplication. Since the passage of the Interlocal Cooperation Act in 1971, many Texas counties have entered into interlocal agreements for the provision of a diverse range of local services including administrative services, tax collection, police and fire protection, public health, insurance, public works, public utilities and solid waste, and human services. Many of these services are capital intensive requiring a pooling of financial resources, while others require a high degree of specialized skill, such as the operation of water and wastewater utility systems.

Interlocal agreements have the potential of increasing the level of services provided by the local government while saving money. However, commensurate with such contracts is the loss of some governmental control over the provision of those services. The loss of control, coupled with a poorly written interlocal agreement may result in significant problems when a dispute or unforeseen circumstance arises. In addition, some contracts contain provisions which are in conflict with the authorized statutory powers of local governments.

This paper is intended to highlight some of the more common issues and potential problems that arise in drafting interlocal agreements for the provision of services.

Chapter 791 of the Texas Government Code

Chapter 791 of the Texas Government Code contains the codified Interlocal Cooperation Act, (formerly art. 4413(32c) Tex. Rev. Civ. Stat.) which forms the statutory basis for interlocal agreements for the provision of administrative and governmental services. "Administrative services" are defined under the Act as being those "functions normally associated with the routine operation of government, including tax assessment and collection, personnel services, purchasing, records management services, data processing, warehousing, equipment repair, and printing." *Tex. Gov't Code §791.003 (Vernon 1994).* "Governmental services" are defined under the Act to include: police protection and detention services; fire protection, streets, roads, and drainage; public health and welfare; parks and recreation; library and museum services; records center services; waste disposal; planning; engineering; administrative functions; public funds investment; comprehensive health care and hospital services; or other governmental functions in which the contracting parties are mutually interested. *Id.*

There exist few cases interpreting the provisions of the Interlocal Cooperation Act, rather most guidance comes from Attorney General Opinions issued since the inception of the Act in 1971.

1. Guidelines prescribed by ch. 791 of the Texas Government Code

The Act specifically allows all local governments to participate in interlocal agreements.[1] *Tex. Gov't Code § 791.011 (Vernon 1994).* Section 791.011 of the Act contains the general guidelines for interlocal agreements and provides, in pertinent part that:

> An interlocal contract must:
>
> (a) be authorized by the governing body of each party to the contract;
>
> (b) state the purpose, terms, rights, and duties of the contracting parties; and
>
> (c) specify that each party paying for the performance of governmental functions or services must make those payments from current revenues available to the paying party.

Tex. Gov't. Code § 791.011(d) (Vernon 1994).

An additional requirement contained in subsection (c) of section 791.0011 is that the interlocal agreement must contemplate the performance of functions or services that each party to the contract is authorized to perform individually. *Tex. Gov't. Code § 791.011(c)(2) (Vernon 1999).*

While these provisions of the Act are fairly simple and straightforward, oftentimes in the drafting of such agreements one or more of these requirements are ignored or omitted from consideration. The failure to comply with these requirements could result in litigation, possibly concluding in the invalidation of the contract; therefore the parties to an interlocal agreement should exercise care in drafting such agreements to specifically reference and comply with the requirements of section 791.011(d).

A. The parties to an interlocal agreement must each be independently authorized to perform those functions or services contemplated by the agreement.

County officials should take advantage of any opportunity to interact and discuss matters of regional concern. Such discussions can lead to agreements that a particular administrative or governmental service be performed on a regionwide basis through the creation of an interlocal agreement among the local governmental participants. Examples include mutual aid agreements, dispatch and other law enforcement services, regional planning functions, water and wastewater treatment facilities,[2] hospital services and healthcare, waste collection and disposal, etc. However, despite the reasonableness of such intentions, the independent statutory authority to enter into such agreements is sometimes overlooked.

For example in *Op. Tex. Att'y Gen. No. JM-932 (1988)*, the Attorney General held that an absence of statutory authority prohibited local governments jointly pooling and investing their surplus funds in an agency created for that purpose. An additional example of the lack of authority to perform the duty prescribed by the agreement may be found in *Op. Tex. Att'y. Gen. LO-88-46 (1988)*, wherein the Attorney General held that Fort Bend County lacked statutory authority to enter into an interlocal agreement with the Greater Harris County 911 Emergency Network (an emergency communication district) even though there were "persuasive practical arguments in favor of the Network providing the service to neighboring

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[1] Section 791.011 also authorizes local governments to contract with state agencies of Texas as well as agencies of neighboring states.

[2] *See*, Tex. Gov't Code 791.026 (allows municipalities, water districts and river authorities to enter into interlocal agreements for water supply and wastewater facilities and treatment. Counties are not included within the statute).

counties."

Perhaps the simplest means for ensuring that the parties to an interlocal agreement have independent statutory authority to perform the duties prescribed in the agreement is to reference each entity's independent statutory authority as introductory recitals in the agreement.

B. The agreement must be approved by the governing bodies of each participating entity.

It should be recognized that an interlocal agreement is ineffective if not approved by the governmental bodies of each jurisdiction participating in the agreement. Again, as simple as this sounds, this requirement is often overlooked in those agreements that are more informal in nature. For example, the Act would render a mutual aid agreement between a county sheriff and municipal police department to be ineffective unless approved by the governing bodies of the city and county participating in the agreement. Of additional importance to counties is section 791.014 which requires "specific written approval" for county contracts involving the construction, improvement or repair of buildings, roads or other facilities. This approval must be demonstrated in a separate written document that describes the type of project to be undertaken and the location of the project.

Another example can be found in *Op. Tex. Att'y Gen. No. JM-892 (1988)* where it was determined that an interlocal agreement for road construction between a municipality and a county commissioner acting as ex-officio road commissioner was invalid due to the fact that the commissioners court had not approved the contract.

Even when duties are statutorily prescribed to a particular officer or employee by statute, order or ordinance, it should be remembered that the governing body of each contracting party must approve the agreement.

C. The agreement must state the purpose, terms, rights, and duties of the contracting parties.

Most interlocal agreements between local governmental entities are fairly straightforward in nature and are rarely more than three or four pages long. Other interlocal agreements involving more significant administrative and/or governmental functions (e.g. water supply or wastewater service agreements, joint construction and/or operation of facilities, etc.) can be complex and are typically lengthy.

As with any contract, the parties should incorporate all material terms of the parties' agreement into the written contract. In addition, recitals evidencing the parties' respective statutory authority, the practical basis for the interlocal agreement, and the parties' intentions are often essential in the event of a subsequent dispute.

Typical provisions of an interlocal contract are set forth in Attachment "A" to this paper.[3] Counties should keep in mind that interlocal agreements will likely be referenced only when questions or disputes among the parties arise.

D. The agreement must expressly specify that each party paying for the performance of governmental services must make those payments from available current revenues.

[3] Exhibit "A" is an excerpt from "The Interlocal Contract In Texas" by David Tees, Richard Cole, Jay G. Stanford; University of Texas at Arlington, Institute of Urban Studies, 1990.

The failure to include this statutorily required provision in the agreement is commonplace, and could lead to an argument that the contract is invalid as being in non-compliance with the statute.[4] Obviously, it is intended to draw the parties' attention to the fact that the parties cannot by such contracts incur long term financial obligations, which are generally prohibited as unconstitutional debts or unconstitutional gifts under Article XI, section 11 (debts) or Article III, section 52 (gifts) of the Texas Constitution.

It is often the case that careful draftsmanship will avoid these problems. The inclusion of provisions for the annual renewal of the agreement conditioned upon appropriations being made therefor is the most practical means for avoiding a challenge that the agreement creates an unconstitutional debt.

[4] No reported Texas cases or Attorney General opinions discuss the effect of the failure to include this statement in an interlocal agreement.

E. Payments under interlocal agreements must be in an amount that fairly compensates the performing party for the services performed.

In 1989, the Act was amended to add a provision that payments under interlocal agreements "must be in an amount that fairly compensates the performing party for the services or functions performed under the contract." *Tex. Gov't Code § 791.011(e) (Vernon 1994).* Therefore, local governments cannot use interlocal agreements as a vehicle for providing charitable funding to another local governmental board or entity.

2. Other concerns when drafting interlocal agreements.

F. Interlocal agreements do not act as a bar to legislative action by third-party agencies.

Although from a county official's perspective it would be nice if it were to the contrary, the parties to an interlocal agreement remain subject to the legislative authority of state and federal agencies regarding the subject matter of the interlocal agreement. For example, in *Texas Water Commission v. City of Fort Worth*, 875 S.W.2d 332 (Tex. App.–Austin 1994, writ denied), the Third Court of Appeals held that the Texas Water Commission had jurisdiction to review and alter wholesale water rates established between the cities of Fort Worth and Arlington in an interlocal agreement. Specifically, the Court held the provisions of the Act that provide that the Act prevails "over a limitation in any other law" refers only to other statutes and charter provisions that would otherwise prohibit such contracts, but does not preclude later legislative action by third-party agencies with jurisdiction over the subject matter of such agreements.

Therefore, it is important to consult with legal counsel to consider whether the subject matter of an interlocal agreement is within the regulatory authority of state or federal agencies. If so, provisions should be included for the termination or renegotiation of the agreement in the event of changed regulations that affect the parties performance under the agreement.

G. Dispute resolution procedures are a must.

Often missing from interlocal agreements is an effective means for dispute resolution. Given that most interlocal agreements will be infrequently reviewed in the absence of significant questions or disputes, the parties drafting the agreements should attempt to provide a means for resolution of disputes that is intended to be effective under the particular circumstances.

Mediation and arbitration are two methods for dispute resolution that may be considered as an alternative to litigation. For disputes of a lesser nature, it may be effective to comprise a dispute resolution committee mutually selected by the parties' governmental bodies or alternatively, other local officials. It is seldom worthwhile to litigate disputes involving interlocal agreements in court due to the expense and time-consuming nature of litigation. In addition, the political fallout from protracted litigation among local governments can be significant, especially when the local taxpayers see the magnitude of legal fees paid to the attorneys for the parties.

H. Performance under the agreement - choice of law.

Section 791.012 of the Interlocal Cooperation Act allows local governments to agree that the local law applicable to one of the parties is applicable to the performance of the services under the agreement. The parties to the agreement should discuss the benefits and disadvantages of specifying a choice of law applicable to their performance under the contract.

I. Creation of administrative agency.

For large and complex interlocal agreements, the parties are expressly authorized to create an administrative agency to supervise the performance of the contract. *Tex. Gov't Code § 791.013(a).* The creation of an agency lessens the administrative burden on the respective parties, and usually provides a more-or-less neutral facilitator whose function is to ensure performance under the parties' agreement. An example of such an agency is the self-insurance risk pool. The agency created pursuant to the agreement is authorized to employ personnel, perform administrative activities and services necessary for performance under the interlocal agreement. *Tex. Gov't Code § 791.013(b).*

J. Other Concerns.

For some interlocal agreements, the parties' must contemplate what actions are to be taken upon the completion or termination of the agreement. For example, if assets such as property and equipment are jointly purchased, then the contract should contain provisions for its disposition and a method for sharing in the proceeds therefrom.

Other typical issues of concern that should be considered and addressed in such agreements are typical of other contracts and include:

1. unanticipated increases in cost of performance;
2. unanticipated legal regulations or other events that could detrimentally affect or make performance impossible;
3. liability issues and risk management;
4. command issues (*i.e.*, the extent to which the parties' share control of the project);
5. the responsibility of each party;
6. termination provision;
7. the impact of a lack of appropriations required for performance under the agreement; and
8. Force majeure.

These matters are sometimes forgotten in interlocal agreements, especially when the activities contemplated by such agreements are simple and straightforward in nature.

K. Don't draft from scratch.

Transactional attorneys have learned not to reinvent the wheel when drafting contracts. Rather, they search for appropriate language from previous contracts of a similar nature. The same holds true for interlocal agreements. Most interlocal arrangements contemplated by local entities have been contemplated before by other local entities and are generally readily available on request. Texas cities and larger counties are excellent sources for sample contracts. These sample agreements make an excellent resource for the county official. However, as with any contract, caution must be exercised not to rely too heavily on language contained in other agreements since the facts surrounding a particular contract can require

specific language to authorize the performance. The County's attorney should always be consulted in the preparation, drafting and execution of an interlocal contract.

CONCLUSION

Although there are many other factors that must be considered by county officials when deciding whether to enter into interlocal relationships, the points set forth in this paper are some of those that are often forgotten. Careful draftsmanship of such agreements will result in less risk to the parties, a better understanding of their respective obligations, and flexibility to address unexpected contingencies. Good luck!