

Recurring and Current School Board Contract Issues

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I. Recurring Issues in Forming Commercial Contracts

A. Who Can Enter Contracts for Your Board?

Vendor forms often have clauses stating that the Board "warrants that its official who signs is fully authorized to bind the Board to perform its obligations in the contract"

- ▶ Superintendent
- ▶ Principals?
- ▶ Coaches?

Who Can Enter Contracts for Your Board?

Administrative Practices Your Board Might Consider

- ▶ All Contracts be approved by Board
- ▶ Board designates which Official(s) can Sign & Enter Contracts
 - Only the Superintendent might be authorized
 - or
 - Multiple Board Officials could sign contracts but their respective ranges of authority be limited (e.g., "Principals may not execute a contract that obligates the Board to expend more than \$X,000.00 annually.")

These would help CSFOs implement financial controls & the Central Office staff receive the information needed to manage your System

B. Names on Contracts

- ▶ Use the correct Legal Name of Board in the Preamble and on Signature Page (i.e., "City of Tuscaloosa Board of Education")
 - Individual Schools in a District (e.g. "Central High School") not legal entities
 - An Acronym like "TCS" not a Legal Name
- ▶ Use Legal Name of Contractor (not just a d/b/a or Trade Name) (e.g., "Smith Enterprises, LLC d/b/a Dave's Flowers", not just "Dave's Flowers")

C. Must the Board and the Successful Contractor Sign a Contract after a Bid Award?

- ▶ Board can and should control the contract formation process and language in contracts that are competitively bid
- ▶ The language and specifications in the Bid Package should constitute the "contract"

Here are provisions to include in your Bid package that clarify this:

"After the award the Board will not ask the successful Contractor to execute any particular form of agreement. In accepting the award the successful Contractor agrees to perform its obligations pursuant to the specifications and other provisions in these Bidder Information materials. Unless expressly agreed by Board in a writing, no terms, conditions or language that Contractor includes with its bid or stated in an invoice or other writing it submits to the Board shall be effective or modify those in the specifications or other Bidder Information materials."

"By submitting a bid, the Contractor acknowledges that it has read and understands the Specifications to provide goods or services to the Board, and, other than an exception to those Specifications that the Board accepts in writing, agrees to perform the contract in accordance with those Specifications."

Watch for and resist the request of the Contractor for the Board to sign "their contract" after the Board has prepared the bid specifications and made an award to them

II. Pitfalls & Problematic Clauses in Vendor Forms

A. Should the Board Just Sign the Vendor's Form?

- ▶ No one has the time to read all that fine print and legalese
- ▶ It is expensive to ask the Board lawyer to review, revise and negotiate changes to their form
- ▶ Our lawyer has advised that the Board is an instrumentality of the State, that the State has "sovereign immunity", and therefore that the Contractor can't successfully sue us in State court for breach of contract.
- ▶ Will it really matter if the Board just signs their form, issues a PO and moves forward in the interest of expediency?

- ▶ The Contractor has a recognized Remedy if the Board Breaches the Contract
- ▶ We have a State Board of Adjustment in Montgomery
- ▶ A contractor can make a claim against the Board before the State Board of Adjustment to enforce its contract and recover damages from the Board for breach

- ▶ Board of Adjustment Procedures:
 - Disputes tried before an Administrative Law Judge, not a jury
 - The Attorney General's Office will represent the Board, but it must assist the AG in these proceedings
 - Proceedings are like lawsuits: Board witnesses must testify, resources must be devoted to help defend the claim and defending these claims will inconvenience the Board

1. Common Business Concerns

a. Term: We should focus more on "Term" provisions.

- ▶ **Automatic Renewal Provision** – We often see a provision like this in Vendor Forms:

The Contract will be effective when it signed by both parties and continue for three (3) years (the "Term"). Thereafter, it shall be automatically renewed for additional like periods unless a party gives notice to the other of its intent not to renew at least ninety (90) days prior to the expiration of the then current Term.

- ▶ Is your organization that good? Who is tracking deadlines like this?
- ▶ These provisions can inadvertently lock the Board into long term agreements

- ▶ Better approach: Include a provision like below to extend the Contract only if Board takes affirmation action to renew and state a maximum contract period:

The Contract will become effective on _____, 2019, and thereafter continue in effect for three (3) years (the "Initial Term"). At the end of the Initial Term, the Board may renew the Contract on the same conditions applying during the Initial Term for up to two (2) additional periods of one year each (a "Renewal Term") by providing Contractor notice of its intent to renew at least sixty (60) days prior to the expiration of then current contract period.

- ▶ Is there a maximum period for a commercial contract?

Yes: 5 Years for a commercial contract that the Board awards under the Competitive Bid Law. Ala. Code § 16-13B-7(f)

b. Limitation of Vendor's Liability to Board for Vendor's Breach – Sounds legalistic but is Business issue.

- ▶ Vendor forms often limit their liability to the Board for breach to either (1) a pre-set dollar amount, or (2) the total amount the Board pays them for their goods or services.
- ▶ Depending on the circumstances, these clauses may be reasonable and should be considered on contract-by-contract basis
- ▶ Another typical Limitation of Liability Provision in Contracts is an "Exclusion of Consequential Damages" - these are usually appropriate if both the Board and Vendor release each other from those damages

c. Late Payment Provisions– Always strike provisions of this ilk:

Delinquent amounts owed by the Board accrue at 1.5% per month or the maximum rate allowed by law, which is greater.

d. Warranty that Board Property is Safe for Vendor's Operations. Vendor forms may provide that the Board "warrants and represents that its properties which Vendor's workers will access are safe, free from defect and fit for them to perform their operations."

- ▶ Do not accept these.

- ▶ Recommendation: Flip the responsibility for safety to the Vendor with a provision like this:

Before any Contractor employees, workers or authorized subcontractors ("Contractor Workers") perform work or services on Board property (a "Board Site(s)" or "Site"), Contractor agrees (i) to inspect each such Site, (ii) that it has the sole responsibility to identify any condition or hazard thereon that will prevent it or any Contractor Workers from safely performing their work at a Site, and (iii) that it and the Contractor Workers are responsible for performing its services in a safe manner that does not put at risk the safety of other persons or endanger property. The Board makes no representations concerning the condition of any Site, whether any Site contains any latent or patent defects, or whether any Site is fit and safe for the Contractor's operations. The Contractor exclusively is responsible for the safety of the Contractor Workers while any of them are performing services or work at a Site.

2. Common Legal Issues

a. Indemnification by Board. Provisions obligating the Board to indemnify and hold Contractor harmless from claims arising out of a Contract violate Article IV, Section 93 of the Constitution of Alabama and also conflict with Article 1, Section 14 of the State Constitution. See Ala. AG Opin. No. 2007-048. Indemnification provisions like these are invalid as a matter of law. See Id, p. 3.

- ▶ Recommendation: (1) strike these, or (2) if the Contractor's lawyer will not remove their indemnification/hold harmless provision, qualify it by adding the proviso "To the extent enforceable under applicable law" at the beginning of each such provision.

b. Applicable Law. If Vendor is based or organized outside Alabama, their form invariably will provide that the law of another state applies and governs the contract.

- ▶ Always provide in Board contracts that the law of the state Alabama is the Applicable Law.

c. Venue/Forum Selection Clauses. If Contractor is an out-of-state company, their form commonly provides that litigation and proceedings to resolve or contest disputes must be conducted outside Alabama.

- ▶ Always strike these.

d. Dispute Resolution Provisions: Strike any provision requiring the Board to participate in a mandatory mediation, to mediate before filing a breach-of-contract lawsuit or to arbitrate Contract disputes.

- ▶ In its place, you could substitute a provision like this:

The respective contract representatives of the parties will use their good faith efforts to resolve any dispute or claim between them arising from this Contract (a "Dispute"). If those representatives are unable to amicably resolve a Dispute, it will be escalated to the senior manager/official level of each party for consideration. If the Dispute cannot be resolved at the senior official level, either party may request that the Dispute be mediated.

e. Provisions Obligating Board to Purchase Insurance. Strike these as the Board (and other instrumentalities of the State of Alabama) does not have or regularly carry liability insurance.

- ▶ Trend: Some Vendors are refusing to do business with Boards unless they protect the Vendor from certain liabilities and risks. In these cases, Board may have to consider purchasing Special Event Insurance or a Liability Insurance policy that insures the Vendor against those risks.

f. Attorneys' Fee Provisions. Strike any provision that obligates the Board to pay the Vendor's attorneys fees if they prevail in a lawsuit or other contested proceeding.

3. Addendum to Vendor Contract Documents

- ▶ Our firm has developed an "Addendum to Principal Agreement" that your Board might want to consider using to lessen the time you spend to administer run-of-the-mill commercial contracts

- ▶ This Addendum "overrides and nullifies" many of the troublesome provisions that Vendors may have in their forms

- ▶ The Addendum is not a panacea for all ills and cannot address all problematic language in contracts

- ▶ No substitute for reading the Vendor form if a Board agrees to use or sign it

- ▶ I am providing David a copy of this Addendum if you are interested in considering it.

Issues with Specific Types of Contracts

The threshold question about Contracts that CSFOs and I usually address is this:

"DOES OUR BOARD HAVE TO BID THIS ONE?"

Always good to start with this for two reasons:

- ▶ Contracts that are entered without complying with the bid law are null and void
- ▶ Persons who violate the bid laws can be convicted of a Class C felony (1 to 10 years imprisonment).

Ala. Code § 16-13B-2 (d) & § 39-2-2 (c)

Refresher/Bid Law Basics

Two different bid laws in Alabama - one in Title 16 (the Education Title of the Alabama Code) and the Public Works law in Title 39

- ▶ Title 16 ("Competitive Bid Law")
- ▶ Title 39 ("Public Works Law")

Title 16 (Competitive Bid Law)

- ▶ Bid provisions in this Section start at § 16-13B-1
- ▶ Requires a competitive bid process on contracts for expenditures for labor, services, work, or for the purchase of materials, equipment, supplies, or other personal property involving fifteen thousand dollars (\$15,000) or more. § 16-13B-1
- ▶ Professional Services and other types of contracts listed in § 16-13B-2 are excepted from bidding
- ▶ The bid provisions in Title 16 not applicable for "contracts for public works whose competitive bidding requirements are governed exclusively by Title 39." § 16-13B-1

Title 39 (Public Works Law)

- ▶ Applies to contracts on "Public Works" projects
- ▶ "Public Works" defined as:

The construction, installation, repair, renovation, or maintenance of public buildings, structures, . . . [and] any other improvement to be constructed, installed, repaired, renovated, or maintained on public property and to be paid, in whole or in part, with public funds . . . " Ala. Code § 39-2-1(6).

- ▶ Contracts on Public Works projects must be bid if they exceed \$50K in value. Ala. Code § 39-2-2(a).

Title 39 (cont.)

- ▶ Bid processes in Title 39 are different and more onerous than contracts let under Title 16.
 - ❑ Contractor must furnish Bid security and post Payment & Performance Bonds for Public Works contracts, but Bid security & Performance Bond optional on contracts let under Competitive Bid law
 - ❑ Advertising for Public Works contracts requires publication in newspapers of general circulation

Bid Law Fundamentals

- ▶ Every contract committing the Board to pay more than \$15K requires an analysis whether it must be bid.
- ▶ If bidding is required, Board must also determine whether it is a "Public Works" contract.
- ▶ The "Sweet Spot": Many Public Works contracts to maintain, service, or construct improvements on Board properties are valued at \$15K or more (the bid requirement point in Title 16), but do not exceed the over \$50K bid threshold in Title 39. No Public Works contract that is valued at \$50,000 or less has to be bid.

Bid Law Fundamentals (cont.)

- ▶ RFP v Bid Distinction. Soliciting quotes and entering a contract in the course of a Request-For-Price (RFP) process is not a competitive bid.
- ▶ Even if bidding is not required under Title 16 or Title 39, the Board can always elect to use a competitive bid process to award a contract

Recurring Issues With Specific Contract Types

1. Construction Contracts

Situation 1:

All of the construction bids from interested contractors on a Public Works project exceed the construction budget. Can the Board negotiate a lower Contract Price with the low bidder?

Yes if Certain Conditions Apply:

- ▶ Leading authority on Situation 1 is AG Opinion No 79-00313. AG advised that the awarding authority can negotiate a lower contract price if these conditions exist:
 - ❑ The authority has an actual shortage of funds for the Project;
 - ❑ The Project architect (or engineer) certifies that the lower, negotiated price was not attributable to "material or substantive changes to the original plans and specifications to the extent that the scope of the project has been altered";
 - ❑ redesign and rebidding of the Project would result in a delay and additional costs ; and
 - ❑ the reduced, negotiated price is not more than 10 % less than the bid."

Situation 2:

After the Board awards a competitively bid construction contract, the Project Architect and Contractor submit an Additive Change Order for the Contractor to perform additional work that was not in the original scope of work. Can the CSFO process this Change Order and the Board agree to increase the Contract Price without rebidding the additional work?

Yes, if the Change Order does not increase the original Contract Price more than 10%.

What if the amount of the Change Order in Situation 2 increases the original Contract Price more than 10%?

Yes if "Extraordinary Conditions" exist :

AG Opin. No. 2011-078: Change Order in excess of 10% of the Contract Price may be approved without rebidding if the Project Architect (or Engineer) furnishes the following information:

- ❑ what the change order covers
- ❑ who instituted the change order
- ❑ why it is necessary or desired;
- ❑ the reason for using the change order method rather than competitively bidding the additional work; and
- ❑ a statement that the adjusted prices have been reviewed and found reasonable, fair and equitable and recommending the approval of the same.

What Legal Remedies and Other Considerations Apply when if the Contractor Delays Performing, Fails or is Unable to Complete a Major Project

- ▶ Contractor and Board will execute the Alabama Building Commission Form Owner-Contractor Agreement on large Public Works projects
- ▶ Multiple Legal Remedies in Agreement if Contractor falls behind Schedule or totally defaults
 - ❑ Pay Liquidated Damages if Project Not Timely Completed
 - ❑ Architect can order Contractor to Dedicate more Resources until Project is back on schedule
 - ❑ Declare Contractor in Default & Board Takeover/Complete Project

Legal Remedies & Practical Considerations (cont.)

- ▶ Exercising these contractual rights could be counterproductive if Contractor still can finish construction of the Project
 - ❑ Formally declaring a default does not expedite completion of the Project and is very injurious to Contractor's business
 - ❑ Removal of Contractor from Project will further delay completion
 - ❑ "Sternly Push Contractor" likely better strategy

Ace Up Board's Sleeve – The Performance Bond

- ▶ Claim on this Bond always option for Board if Contractor cannot perform
- ▶ If Bond Claim made, Surety may take over management and complete Project
- ▶ Large economic motivation for owner of Contractor to avoid filing of claim against Performance Bond
- ▶ Ability to Obtain Bond critical for Contractor to stay in business
- ▶ Owner of Contractor must indemnify the Surety from damages if it incurs expense on Bond Claim of taking over and completing Project
- ▶ Owners of Contractor may give Personal Guarantees to Surety or Pledge Personal Assets to backstop their indemnification obligation to Surety

Most Important Action Board Can Take to Mitigate Risk of Contractor Default

- ▶ Pre-Qualify bidders to the maximum extent

2. Board Contracts that Grant Exclusive Rights

Is this statement accurate?

A Board must competitively bid only when the contract obligates the Board to pay \$15K or more for goods and services?

It is generally accurate but

There are contracts where a Board may not pay for services or consideration it receives.

► Examples

- ❑ Beverage Contract
- ❑ Athletic Training Service Contract
- ❑ Scoreboard Advertising

In these the Vendor may only ask the Board to designate it as "exclusive service provider" or not enter a similar contract with another party.

- Obscure bid law issue exists in these situations arises from Article I, Section 22 of the Alabama Constitution
- This Section states "[n]o ... law ... making any ... exclusive grants of special privileges ... shall be passed by the legislature." It been interpreted as allowing a governmental entity in Alabama to grant an exclusive right or privilege only if it conducts competitive bid process before granting that right. Kennedy v. City of Pritchard, 484 So. 2d 432 (Ala. 1986)

So . . . oddly, a bid law concern can exist with a contract where the Board pays nothing for the services or consideration it receives.

Guaranteed Energy Savings Contracts (GESC)

- Special type contract authorized by the Legislature in 1998 and codified at Ala Code § 41-16-140, et. seq.
- Concept: Parties agrees that the Contractor will furnish Energy Saving Measures over an extended period to achieve savings on the Board's energy costs and reduce its energy consumption

Examples of Energy Savings Measures:

- Insulation and other steps to reduce air infiltration into buildings
- Installing storm windows or doors, or caulking, weather-stripping, adding glazing or other modifications for doors and windows
- Automated or computerized energy control systems (including computer software and technical data licenses)
- Modifying or replacing HVAC systems or ventilating systems
- Replacing or modifying lighting fixtures or systems
- Improving energy recovery systems.
- Improving electric systems
- Adopting building operation programs that reduce operating costs.
- Implementing water and other natural resources conservation measures.

Ala. Code § 41-16-141(1)

GESC is Hybrid Type of Contract

- ▶ These combine operations that on a Public Works project the Board must bid with professional services that can be contracted for on a non-bid basis
- ▶ Alabama Courts struggled with this type contracts before GESCs expressly were authorized
- ▶ *Anderson v. Fayette Cty. Bd. of Educ.*, 738 So.2d 854 (1999).

In this case a citizen complained that an energy management contract between Trane and the local school board that was not bid was void because components of it allowed physical improvements to Board properties to be made only by Trane without bidding. The Court upheld the contract because its principal features were to provide engineering, consulting and other professional services to the local board, not install improvements.

Takeaways on GESCs

1. The GESC law passed in 1998 resolved any questions about the validity of energy management savings contracts.
2. Your Board must take certain specific actions to enter a GESC. These processes are different than those for other contracts.
 - a. Board requests RFPs from interested providers of an energy savings program
 - b. Before selecting a provider and entering a GESC, the Board must:
 - Satisfy itself that "the amount it would spend on the energy cost savings measures recommended in the proposal would not exceed the amount of energy or operational cost savings, or both, within the lesser of a 20-year period or the average useful life of the energy cost savings measures from the date installation is complete and has been accepted." Ala Code § 41-16-143 (a).

- Analyze "all costs of installation, modifications, or remodeling, including, without limitation, costs of a pre-installation energy audit or analysis, design, engineering, installation, maintenance, repairs, debt service, and post-installation project monitoring, data collection, and reporting, as well as whether energy consumed or the operating costs, or both, will be reduced." Ala Code § 41-16-143 (c).
- Analyze the qualifications of the contractor; and
- Provide 10-day advance notice and conduct a public meeting before approving the GESC. § 41-16-143 (b).

3. Savings are Contractually Guaranteed

- Contractor must furnish a written guarantee "that either the energy or operational cost savings, or both, will meet or exceed the costs of the energy cost savings measures within the lesser of 20 years or the average useful life of the energy cost savings measures"
 - Contractor annually must reimburse the Board for any shortfall in savings that it does not receive
4. Board can require Contractor to furnish a Performance and Payment Bond to secure its obligations in the GESC.
 - Bonding is not required by law, but Board should strongly consider requiring if the GESC commits the Board to incur significant costs to make improvements

Personnel/Staffing Contracts

- ▶ Boards across the State have staffing contracts with Appleton Learning and Kelly Services for them to provide temporary personnel for various Certified and Classified positions.
- ▶ We could extensively consider these contracts, but there are two ongoing issues that relate to this type of contract that I briefly will mention:

1. Must a Board bid a Staffing Contract before entering one?

- Some Boards are bidding these contracts and others are not.
- Good argument that a staffing contract is exempt from bidding under the Professional Services Exception in Ala. Code § 16-138-2(a)(2):

(a) Competitive bids shall not be required for . . . (2) contracts for securing services of attorneys, physicians, architects, teachers, superintendents of construction, artists, appraisers, engineers, consultants, certified public accountants, public accountants, or other individuals possessing a high degree of professional skill where the personality of the individual plays a decisive part.
- Boards do rely on the knowledge and special skills that staffing contractors have to locate, train, screen and furnish temporary workers who understand and are capable of working in the Public Education environment.
- Some have questioned whether providing temporary workers for Classified positions is a professional service.
- Our firm is unaware of any case or authority that has addressed or resolved this issue.

2. Are Temporary Workers Only an Employee of the Staffing Contractor?

- > The Staffing Contracts provide that the firms providing these services are independent contractors of the Boards they serve, and that the workers they furnish are employees of the staffing contractor, not Board employees.
- > Will employees of the staffing contractors try to assert that they are also employed by a Board and make employment related claims against them?

Questions?