

# School Board Contracting: Nuts & Bolts/Developments

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# Common Board Contracts

1. Contracts to Purchase or Lease of Goods & Services
2. Public Works Contracts Not Exceeding \$50K
  - ▶ Today we will primarily focus on Types 1 and 2
3. Public Works Contracts Over \$50K - will briefly address
4. Special Contracts (e.g. Real Estate, Financial) - should seek guidance and advice of your Board Counsel on these

# I. CONTRACT FRAMEWORK

THRESHOLD QUESTION

**“DO WE HAVE TO BID BEFORE ENTERING THIS AGREEMENT WITH OUR CONTRACTOR?”**

# Two Good Reasons to Ask this First

- ▶ Contracts that are entered without complying with the bid law are null and void;
- ▶ Persons who violate the bid laws are subject to prosecution for a Class C felony (1 to 10 years imprisonment).

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

# A. Refresher/Bid Law Basics

Two different bid laws in Alabama apply to School Boards:

- ▶ 1. Title 16 of the Education Code Section of the Alabama Code (“Competitive Bid Law”)
- ▶ 2. Title 39 in the Alabama Code (“Public Works Law”)

# Title 16

## (Competitive Bid Law)

- ▶ Bid provisions in this Section start at § 16-13B-1
- ▶ Law generally requires a competitive bid 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

# Title 16 (cont.)

- ▶ Multiple situations where bidding not required before entering a contract
- ▶ Purchases Off State Bid List: As an instrumentality of the State, a local School Board can always buy goods off the State of Alabama bid list
- ▶ Particular types of Contracts and transactions listed in § 16-13B- 2 are exempted from bidding even if they are \$15K or greater in value

# Title 16 (cont.)

## - Professional Services Exception in § 16-13B-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.***

# Title 16 (cont.)

## Governmental Purchasing Co-ops

- ▶ Purchases of goods or services, other than voice or data wireless communication services, made as a part of any purchasing cooperative sponsored by the National Association of Counties . . . or any other national or regional governmental cooperative purchasing program. Such purchases may only be made if all of the following occur:
  - ❑ a. The goods or services being purchased are available as a result of a competitive bid process approved by the Department of Examiners of Public Accounts for each bid.
  - ❑ b. The goods or services are either not at the time available to local boards of education on the state purchasing program or are available at a price equal to or less than that on the state purchasing program.
  - ❑ c. The purchase is made through a participating Alabama vendor holding an Alabama business license if such a vendor exists.

§ 16-13B-2 (11)

**Caution:** Marketing representatives of contractors often try to rely on this exception but conditions in subpart (11) may not apply

# Title 16 (cont.) Sole Source Exception

Ala. Code §16-13B-2(a)(11):

“(11) Contractual services and purchases of commodities for which there is only one vendor or supplier and contractual services and purchases of personal property which by their very nature are impossible to award by competitive bidding.”

- Often referenced and relied by marketing representatives of contractors
- **Caution:** This exception is narrowly interpreted under Alabama law to apply only if the Board can establish that there is no other available product that provides the functionality that is needed

# Title 16 (cont.) Software Exception

Ala. Code §16-13B-2(a)(10):

- ▶ (10) Purchases of computer and word processing hardware when the hardware is the only type that is compatible with hardware already owned by the entity taking bids and **custom software**.
- ▶ There is no general software exception; only applies when procuring “custom” software
- ▶ Custom means ““substantial creative work by a professional/vendor, developed and designed for the particular needs of the buyer.” AG Op. 94-00023 to Ennis
- ▶ Board must make a factual determination that it is obtaining custom software
- ▶ Complications applying this exception arise when enhancements to existing software are being considered

# Title 39 (Public Works Law)

- ▶ Applies to contracts on “Public Works” projects

- ▶ “Public Works” are:

*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 for contracts falling under Title 39 differ and are more onerous than contracts let under Title 16.
  - ❑ Contractor must furnish Bid Security and post Payment & Performance Bonds for Public Works contracts (bid security & Performance Bond optional on contracts awarded under Competitive Bid law)
  - ❑ Advertising for Public Works contracts requires publication in newspapers of general circulation (no advertising required under general competitive law)

# Title 39 (cont.) – Contracts for Public Works Projects

- ▶ Good News for You: A standard set of contracts on Board public works projects over \$50K exists
- ▶ State Division of Construction Management (f/k/a Ala. Building Commission) issued latest set of these in 2020 for \$50K+ PW Projects
  - ❑ Form Board/Architect Agreement for Professional Services
  - ❑ Recommended Fee Schedule for Professional Services
  - ❑ Form Board/Contractor Agreement for the work
  - ❑ The Board's Architect or Engineer usually prepares the Construction Contract & interacts with State Architect as part of their Basic Services on \$50K+ public works projects

## B. Your Bid Analysis

- ▶ Initial Consideration: Every contract obligating the Board to pay more than \$15K on any commercial transaction requires a bid law analysis
- ▶ Next Determination: Board must determine whether the contract is:
  - ❑ (a) a “Public Works” contract that is governed by Title 39; or
  - ❑ (b) a contract that falls under and is administered under the general Competitive Bid Law in Title 16
- ▶ Very Important Provision in Title 16: Title 16 is not applicable for "contracts for public works whose competitive bidding requirements are governed exclusively by Title 39." § 16-13B-1 (a)

# Your Analysis (cont.)

- ▶ The “Sweet Spot”: Many Public Works contracts to maintain, service, or improve Board properties are more than \$15K (the bid requirement point in Title 16) in value, but less than \$50K bid threshold in Title 39. If dealing with a Public Works contract that is valued at \$50,000 or less, it does not have to be bid!
- ▶ 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.

## II. Common Issues in Contracting

- ▶ We have completed our bid law analysis, conducted a bid if required, and selected our contractor
- ▶ Now the Board needs a contract
- ▶ The Contractor gives the Board its 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 the Contractor's form
- ▶ Now what?
- ▶ Does it really matter if the Board just signs the Contractor's form, issues a PO and moves forward in the interest of expediency?

# Should the Board Just Sign the Contractor's Form Contract?

- ▶ Our lawyer has advised that the Board is an instrumentality of the State, that we have “sovereign immunity,” and can’t be sued in State court for breach of contract
- ▶ But . . . I also understand that Alabama law assumes that parties to a contract have read and understand its terms
- ▶ I also know that the Board is bound by the provisions in contract if a dispute with the vendor later arises
- ▶ You have to decide which approach is best for the Board to deal with preparing a contract or if you want to ask for assistance from the Board’s lawyer.
- ▶ Let’s assume you want to use the Contractor’s form.
- ▶ Here are some questions and problems that you and your Board will commonly encounter in your contracting endeavors

# A. Who has Authority to Sign the Contract and Obligate Your Board?

- ▶ Only the Superintendent?
- ▶ Principals?
- ▶ Coaches?

# Who Has Authority to Sign & Obligate Your Board to a Contract? (cont.)

## Administrative Practices Your Board Might Consider

- ▶ All Contracts be approved by Board
- ▶ Board could designate 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 practices would help CSFOs implement financial controls & the Central Office staff receive the information needed to manage your organization.

## 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 is Awarded to that Contractor?

- ▶ Board should control the contract formation process and the provisions in contracts that are competitively bid
- ▶ Provisions and specifications in the Bid Package should state that the Package is the “Contract”
- ▶ **Caution:** Watch for and do not accept 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

Recommend including Provisions like these in your Bid package to clarify what is the Contract:

*“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.”*

## D. How long can Contract be effective?

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

### **Yes:**

-5 Years is the maximum period of a commercial contract that is bid and awarded pursuant to the Competitive Bid Law. Ala. Code § 16-13B-7(f)

-10 years is maximum term on Lease Purchases

# E. Problematic Provisions in Contractor Forms

## 1. *Term*: Should focus more on “Term” provisions.

- ▶ *Automatic Renewal Provision* – We often see a provision like this in Vendor Forms for contracts falling under Title 16:

*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.*

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

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- ▶ Better approach: In contracts falling under Title 16 include a provision like below to extend the Contract only if Board takes affirmative action to renew and state a maximum contract period:

*The Contract will become effective on \_\_\_\_\_, 202\_\_, and thereafter continue in effect for \_\_\_\_\_ (\_\_) 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 \_\_\_\_\_ (\_\_) 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.*

## 2. **Limitation of Damages Provisions if Contractor Breaches Contract**– Sound legalistic but is important Business issue.

- ▶ Vendor contracts forms for agreements often have a provision limiting their liability to the Board for Contractor's 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 in a contract falling under Title 16 but should be considered on contract-by- contract basis
  - ❑ Would not include a Limitation of Liability provision in a Public Works contract without careful consideration
- ▶ Another limitation of liability provision is an “Exclusion of Consequential Damages” provision
  - these could be appropriate in contracts falling governed by Title 16 if both the Board and Vendor release each other from those damages



### **3. *Late Payment Provisions***

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

- Always strike these



#### *4. Warranty that Board Property is Safe.*

Contractor forms may provide that the **“Board warrants and represents that its properties that Contractor’s workers will access are safe, free from defect and fit for them to perform their operations.”**

- ▶ Do not accept these.

- ▶ Recommendation: Change the responsibility for safety to the Contractor with a provision like this:

*Before any Contractor employees, workers, or authorized subcontractors (“Contractor Workers”) perform work or services on Board property (“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.*

## 5. Tax Provisions

- ▶ These commonly provide that “the Board is responsible all sales, use or other governmental taxes or charges related to the contract, and that the Contractor will pass through to the Board any taxes or charges assessed to the Contractor from the transaction.”
- ▶ No big deal right? After all, the Board is exempt from state sales and use taxes.
- ▶ Wrong: Pursuant to Ala. Code § 40-12-222 (1975), Boards and other governmental entities are not exempt from a 4% state license or privilege tax on the lease or rental of tangible personal property.
- ▶ Vendor may not pass responsibility for this 4% tax to the Board “unless the flat amount collected by the [Vendor] includes both the tax and leasing fee.”



**6. 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. *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.



**7. *Applicable/Governing 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 Alabama is the applicable or Governing Law.

**8. *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. Put in the contract that the dispute resolution will be conducted in accordance with Applicable Alabama Law.



9. ***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.*

## Dispute Resolution (cont.)

- ▶ The Contractor and Board have a recognized forum and procedural approach if a dispute arises and cannot be amicably resolved
- ▶ We have a State Board of Adjustment in Montgomery
- ▶ A contractor can make a claim against the School Board before the State BOA to enforce its contract and recover damages from the Board

## Dispute Resolution (cont.)

### ▶ Board of Adjustment Procedures:

- ❑ Disputes tried before an Administrative Law Judge, not a jury
- ❑ The Attorney General's Office will represent the School 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

**10. Provisions Obligating Board to Purchase General Liability or Property Insurance.**

Strike these as the Board does not have or regularly carry general liability insurance

- ▶ Trend: In contracts falling under Title 16, some Vendors are refusing to do business with Boards unless they protect the Vendor from certain liabilities and risks. In these cases, Boards may have to purchase Special Event Insurance or a Liability Insurance policy that insures the Vendor against those risks

**11. 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.

# Possible Tool to Use in Your Contracting Initiatives – “The Addendum”

- ▶ Our firm has developed and has provided AASBO 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
- ▶ Addendum “overrides and nullifies” many of the problematic provisions that Vendors place in their contract forms
- ▶ The Addendum is not a panacea for all ills and cannot address all issues and pro-contractor language in contracts
- ▶ No substitute for reading the Contractor form if a Board agrees to use or sign it
- ▶ Let’s look at the Addendum

# III. RECENT CONTRACTING ISSUES & DEVELOPMENTS

## A. Emergencies

Is bidding excused when the Board needs to procure goods and services in emergency conditions?

**No! Board still must receive bids even when procuring goods and services in emergency conditions.**

- ❑ Much confusion about this subject last year after Gov. Ivey issued her March 18, 2020 Emergency Proclamation allowing governmental entities to “enter into contracts *without public advertisement* to the extent necessary to respond to COVID-19”
- ❑ Only the advertising requirement in Bid Laws is excused
- ❑ Similarly, Section 16-13B-3 of Competitive Bid Law and Section 39-2-2(e) of Public Works Law only excuse advertisement for bids “in case of an emergency affecting public health, safety and convenience”

## B. Contracts Where Board Does not Pay the Contractor

- THERE ARE CONTRACTS WHERE A BOARD DOES NOT PAY FOR THE BENEFITS THAT A CONTRACTOR FURNISHES.

### EXAMPLES:

- ❑ ATHLETIC TRAINING SERVICE CONTRACT
- ❑ SCOREBOARD ADVERTISING/BEVERAGE CONTRACT
- IN THESE THE CONTRACTOR WILL ASK THE BOARD TO DESIGNATE IT AS “EXCLUSIVE SERVICE PROVIDER”, AGREE NOT TO ENTER A SIMILAR CONTRACT WITH ANOTHER PARTY, OR ASK FOR THE EXCLUSIVE PRIVILEGES.

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- ▶ Can't these be awarded without bidding if the Board is not paying the contractor?
  - ▶ Not so because Article I, Section 22 of the Ala. Constitution applies. This Section states “[n]o ... law ... making any ... exclusive grants of special privileges ... shall be passed by the legislature.”
  - ▶ This Section interpreted as allowing a governmental entity to grant an exclusive right or privilege *only if* it conducts a competitive bid process before granting that right. Kennedy v. City of Pritchard, 484 So. 2d 432 (Ala. 1986)

So . . . oddly, bids must be conducted before the Board enters a contract that grants exclusive rights to a contractor even if the Board has no monetary obligation to the contractor!

# C. Lease/Purchase Equipment Finance Agreements

- ▶ The Problem: Board needs a considerable amount to obtain critically needed equipment (e.g. school buses or Chromebooks for students), but has limited funds to acquire
- ▶ Borrowing money from a bank at their interest rate or issuing bonds is impractical (because of underwriting fee, cost of bond counsel or other expense of issuing bonds)
- ▶ Option used by several Boards - Lease Purchase Agreements
- ▶ The financier funds the expense of the equipment and the Board compensates the financier on highly favorable financial terms
- ▶ Because the Board is a governmental entity and the interest paid to investors in governmental obligations is exempt from income tax under the IRC, the financier enters the L/P Agreement and often securitizes it by assigning it a third party who bundle the Board's L/P Agreement with those of other government entities
- ▶ **Caution:** the Board's obligations to make the lease in these L/P Agreements are absolute and the terms in them are onerous and largely non-negotiable

# D. Can Board Reject Low Bid?

- ▶ When bidding required, Competitive Bid Law and Public Works Law provide the Board should award the contract to “lowest responsible bidder” Ala. Code § 16-13B-1 (a) & § 39-2-6 (a)
- ▶ Law gives the Board discretion determine who is the “lowest **responsible** bidder”
- ▶ Can look at factors other than price is determining which the lowest responsible bidder
- ▶ Decision to reject low bid must be made in good faith and not be arbitrary
- ▶ Carefully consider this decision
- ▶ If not awarded to low bidder, “reasons for the award shall . . . be open to public inspection” § 16-13B-1 (a)



## Questions About My Presentation

- (1) Call 205-251-2881 & Ask for Me  
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