

CONTRACTING AND PROCUREMENT LAW MISSTEPS

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Authority To Issue And Sign Contracts

- NMSA 1978 § 22-5-4 – A local school board shall have the following powers or duties:
 - J. except for the expenditures for salaries, contract for the expenditure of money according to the provisions of the Procurement Code.
- All contracts entered into on behalf of the District must be approved by, and in the name of, the Board of Education of the District.
- The only exception to the requirement of Board approval are employment contracts for all employees other than the Superintendent.

BOARD DELEGATION OF CONTRACTUAL AUTHORITY

- Most Boards have a policy delegating to the Superintendent the authority to contract within specified dollar limits (eg. Expenditures of up to \$5,000, \$10,000, \$25,000)
- Even such contracts should be ratified by the School Board as part of its consent agenda at a regular meeting.

DON'T GET BURNED BY BAD CONTRACTS!!

- Over the years, School Districts have had to defend contract claims when agreements have been signed by:
 - IT Directors
 - School Principals
 - Business Office Staff
 - Athletic Directors/Coaches
 - Group Sponsors/PTO & PTA Chairs

DON'T GET BURNED BY BAD CONTRACTS!!

- Contract disputes and bad contracts result in claims which:
 - Are not covered by insurance (contract claims are excluded by NMPSIA)
 - Cost you \$\$\$ to defend or resolve (i.e., legal fees, liquidated damages or contract buyouts.)
 - Are an unanticipated drain on your budget
 - May be for goods or services which the District does not need or would not have procured if authorized personnel had been consulted

DON'T GET BURNED BY BAD CONTRACTS!!

- What do you need to do?
 - Issue a directive from the School Board and Superintendent (to all those just named) which provide that no one, other than the Superintendent, can bind the District to a contract, and the Superintendent may do so only if delegated authority to do so from the School Board.

ALL PROCUREMENT MUST BE DONE PURSUANT TO THE PROCUREMENT CODE

- SCOPE OF CODE
- Except as otherwise provided in the Procurement Code that code shall apply to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction. Section 13-1-30.

CENTRAL PURCHASING OFFICE

- All procurement for local public bodies shall be performed by a *central purchasing office* designated by the governing authority of the local public body **EXCEPT** as otherwise provided in the Procurement Code. Section 13-1-97C .

WHO'S IN CHARGE?

- "Chief procurement officer" (CPO) means that person within a state agency's or local public body's central purchasing office who is *responsible for the control of procurement of items of tangible personal property, services or construction.....*

Section 13-1-38.1

- CPO undergoes training every 2 years after initial certification by state purchasing agent and must pass recertification exam.

Section 13-1-95.2

CPO RESPONSIBILITIES

- *On and after July 1, 2015, **only** certified chief procurement officers may do the following, except that persons using procurement cards may continue to issue purchase orders and authorize small purchases:*
 - (1) *make determinations, including determinations regarding exemptions, pursuant to the Procurement Code;*
 - (2) *issue purchase orders and authorize small purchases pursuant to the Procurement Code; and*
 - (3) *approve procurement pursuant to the Procurement Code.*
- Section 13-1-95.2

COMPETITIVE PROCUREMENT

- All procurement not exempted from the Procurement Code shall be achieved by competitive sealed bid pursuant to Sections 13-1-103 through 13-1-110 NMSA 1978, except pursuant to the following sections of the Procurement Code
- A. Sections 13-1-111 through 13-1-122 NMSA 1978, *competitive sealed proposals*;
- B. Section 13-1-125 NMSA 1978, *small purchases*;
- C. Section 13-1-126 NMSA 1978, *sole source procurement*;
- D. Section 13-1-127 NMSA 1978, *emergency procurements*;
- E. Section 13-1-129 NMSA 1978, *existing contracts*;
- F. Section 13-1-130 NMSA 1978, *purchases from antipoverty program businesses*; and
- G. The Educational Facility Construction Manager At Risk Act Section 13-1-124.1 NMSA 1978.

Also procurement pursuant to the State Use Act, *purchases from New Mexico Council for Purchasing from Persons with Disabilities*, Sections 13-1C-1 through 7; NMAC 1.4.1.95; <http://horizonsofnewmexico.org/>

-Right of first refusal for services provided.

SMALL PURCHASES

- All Boards are required by the Procurement Code to have a small purchases regulation, governing purchases, which are exempt from the bidding or RFP process. See Section 13-1-125 NMSA 1978.
 - Up to \$20,000, best obtainable price
 - Up to \$60,000 for services, construction or tangible personal property, per small purchase rules
 - Up to \$60,000 for professional services (except landscape architects or surveyors for public works projects), per professional services procurement rules

REQUESTS FOR PROPOSALS (RFP) PROFESSIONAL SERVICES

- Develop a Scope of Work
- Develop evaluation criteria
- Select the Evaluation Committee
- Seeking the best value, most qualified and not the lowest price
- Negotiations (Best & Final Offers)
- Best practice is to include from of contract to be executed by successful offeror and make affirmative acceptance of the terms of the contract a requirement of the proposal

INVITATION FOR BID

- An invitation for bids shall be issued and shall include the specifications for the services, construction or items of tangible personal property to be procured, all contractual terms and conditions applicable to the procurement, the location where bids are to be received, the date, time and place of the bid opening and the requirements for complying with any applicable in-state preference provisions as provided by law.
- B. If the procurement is to be by sealed bid without electronic submission, the invitation for bids shall include the location where bids are to be received and the date, time and place of the bid opening.
- C. If the procurement is to be by sealed bid with part or all of the bid to be submitted electronically, the invitation for bids shall comply with the requirements of Section 13-1-95.1 NMSA 1978.

AWARD TO BIDDER

- Competitive sealed bids; award. **A contract solicited by competitive sealed bids shall be awarded with reasonable promptness by written notice to the lowest responsible bidder.** Contracts solicited by competitive sealed bids shall require that the bid amount exclude the applicable state gross receipts tax or applicable local option tax but that the contracting agency shall be required to pay the applicable tax including any increase in the applicable tax becoming effective after the date the contract is entered into. The applicable gross receipts tax or applicable local option tax shall be shown as a separate amount on each billing or request for payment made under the contract.

AWARD TO BIDDER

- "Responsible bidder" means a bidder who submits a responsive bid and has furnished, when required, information and data to prove that its financial resources, production or service facilities, personnel, service reputation and experience are adequate to make satisfactory delivery of the services, construction or items of tangible personal property described in the invitation for bids.
- "Responsive Bid" means a bid that conforms in all material respects to the requirements set forth in the invitation for bids. Material respects of a bid include, but are not limited to, price, quality, quantity or delivery requirements.

FORMAL ACTION TO AWARD RFP CONTRACT

- After the Board of Education has approved the award recommendation from the RFP evaluation committee, the award becomes public information. (Board may discuss the award of an RFP in closed session prior to public action. Section 10-15-1 (H)(6). Limited to purchases exceeding \$2,500 and made only from one source.) Public disclosure of the proposal documents is now permitted.

AWARD VERSUS CONTRACT APPROVAL

- Unless the notice of award is accompanied by a form of contract which was incorporated into the RFP or other bid documents, and the successful bidder or offeror accepted the terms as a condition of the bid or response, the notice of award is not the final action.
- IF contract terms are still to be negotiated, the Board's award is not approval of a contract.

CONTRACT BASICS

- Essential Terms
 - Offer
 - Acceptance
 - Consideration
- Term of Contract
- Price
- Scope of the Work

OTHER ESSENTIAL TERMS

- Termination Clause
- Non-Appropriation Clause
- Indemnification/Insurance
- Governing Law
- Dispute Resolution – Venue for Disputes
- Authority of Signatories

BOILERPLATE LANGUAGE

- Assignment
- Subcontracting
- Records & Audit
- Conflict of Interest
- Confidentiality – remember that most contracts are public records!
- Amendment
- Scope of Agreement / Merger of Prior Understandings
- Waiver of prior oral agreements or unwritten terms

THE “FINE PRINT”

- Read the “fine print” and know what it says and how it will affect you.
 - Maintenance Director believed he was signing a maintenance agreement with a vendor for a two year term. Contract stated that it was a five year term and early termination required payout of the full balance that would be owed over five years. After two years elapsed, Maintenance Director signed an agreement with a different vendor for the same service.
 - Some contracts incorporate other documents by reference into the contract. These other documents are not attached to the actual signed contract.

COMMON PROBLEMS: INDEMNIFICATION CLAUSES

- Indemnification Clause– An agreement to pay the other parties costs or losses in specified circumstances may violate NM law.
- Article IX, Section 12 and the similar constitutional debt restrictions for the state and other local governments (N.M. Const. art. IX, §§ 8, 11-13) have been judicially interpreted to preclude a government from entering into an agreement subjecting it to contingent liability, the amount of which is uncertain at the time of the agreement.
- NMSA Section 6-6-11. Yearly expenditures limited to income; Bateman Act. (1968) It is unlawful for any ...local school board, for any purpose whatever to become indebted or contract any debts of any kind or nature whatsoever during any current year which, at the end of such current year, is not and cannot then be paid out of the money actually collected and belonging to that current year.
- Violate Anti-Donations Clause (Art. IX, Sec. 14, N.M. Constitution)
- District should have vendor indemnify it.

COMMON PROBLEMS: VENUE FOR DISPUTE RESOLUTION AND GOVERNING LAW

- You may be presented with a contract that specifies that any disputes will be resolved in some other state or country and that the law of some other state or country will govern the interpretation of the contract. Why is this a problem?
 - Need to hire lawyers in another state or country
 - Need to travel to other state or country for hearings, depositions
 - You may not understand how the law of the other jurisdictions affects your understanding of the contract.
- Elevator Maintenance Contract– Venue in Rock Island, IL
- Artificial Turf Sale and Installation Contract– Venue in Montreal using Canadian law.
- Provisions in construction contracts with dispute resolution in another state or using another state's laws are void and unenforceable

COMMON PROBLEMS- LIMITS ON LIABILITY

- Be wary of contracts that limit the amount of damages District is entitled to seek upon breach by vendor.
 - Some contracts limit vendor's liability to District to amount District has paid under the contract or to a fixed dollar value.
 - Suppose you pay a vendor \$1000 to test fire suppression equipment and contract limits liability to \$1000. Vendor fails to do a competent job and school burns down.

COMMON PROBLEMS: AUTOMATIC OR UNILATERAL CHANGES IN CONTRACT TERMS BY VENDOR

- District and vendor negotiate a contract with a five year term. Fine print states that contract will automatically renew for an additional five years unless either party provides notice within 90 days prior to the end of the original term.
- Website “terms of service” that District accepts by a “click” may provide for unilateral change in price by the vendor.
- Group health insurance contracts that allow insurer to modify benefits unilaterally

COMMON PROBLEMS: ANTI-DONATION CLAUSE

- **Anti-donation Clause of New Mexico Constitution (Art.IX, Sec. 14):**
 - Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit **or make any donation to or in aid of any person, association or public or private corporation** or in aid of any private enterprise ...
 - Prohibits district from contracting for something when what it gets is not reasonably equivalent to what it gives.
 - If District leases property in exchange for services, services must be of equivalent value as cash in the amount of the appraised value of the property.
 - Prohibits funding non-profit corporations, i.e. contributing to Boy Scouts or Salvation Army

COMMON PROBLEMS: FERPA

- If contractors will have access to student educational records, contract must require contractor to comply with FERPA.
 - Not only contracting entity, but individuals who have access to personally-identifiable student information (PSI) must agree to comply.
 - Use of PSI must be limited to purpose for which contractor has access
 - Agreement to not re-disclose
 - Specify points of contact for individuals managing data
 - Not assigning ownership of data to contractor
 - Identify penalties for non-compliance
 - Set terms of data destruction
 - Compliance with all applicable laws, not just FERPA
 - Plan to handle data generated by contract

COMMON PROBLEMS: AMBIGUOUS TERMS

- Ambiguous, if reasonably subject to more than one interpretation.
- Who has obligation to report, every person or just those listed?
 - “Every person, including a licensed physician; a resident or an intern examining, attending or treating a child; a law enforcement officer; a judge presiding during a proceeding; a registered nurse; a visiting nurse; a schoolteacher; a school official; a social worker acting in an official capacity; or a member of the clergy who has information that is not privileged as a matter of law, who knows or has a reasonable suspicion that a child is an abused or a neglected child shall report the matter immediately”
- Can result from lack of defined terms:
 - Vendor agrees to use only “quality” parts.
 - Delivery to occur in 10 “days.”
- Headlines: “Safety Experts Say School Bus Passengers Should be Belted;” “Juvenile Court to Try Shooting Defendant”
(Google News)

WHEN CONTRACTS REQUIRE OUTSIDE APPROVAL

- PSFA– Construction Contracts.
 - Approval required to construct or enter into contracts to construct school buildings or related school structure or
 - Entering into a lease-purchase agreement for a building to be used as a school building or related school structure
- Other approvals necessary to sell, trade or lease District real or personal property.

CONFLICTS OF INTEREST

NMSA 1978 § 22-21-1(A)

- A member of a local school board, a member of the governing body of a charter school, or a school employee shall not, directly or indirectly, sell or be a party to any transaction to sell any instructional material, furniture, equipment, insurance, school supplies or work under contract to the school district or public school with which such person is associated or employed. No such person shall receive any commission or profit from the sale or any transaction to sell any instructional material, furniture, equipment, insurance, school supplies or work under contract to the school district or public school with which the person is associated or employed.

CONFLICTS OF INTEREST

NMSA 1978 § 13-1-190

- A. It is unlawful for any local public body employee, as defined in the Procurement Code, to participate directly or indirectly in a procurement when the employee knows that the employee or any member of the employee's immediate family has a financial interest in the business seeking or obtaining a contract.
 - The Procurement Code includes non-salaried public officials under the employee definition
 - APPLIES TO BOARD MEMBERS

CONFLICT OF INTEREST

NMSA 1978 § 13-1-193

- It is unlawful for any local public body employee who is participating directly or indirectly in the procurement process to become or to be, while such an employee, the employee of any person or business contracting with the governmental body by whom the employee is employed.

Conflict Of Interest

Waiver/Exceptions

NMSA 1978 § 13-1-194

- A local public body may grant a waiver from unlawful employee participation or contemporaneous employment upon making a determination that:
 - A. The contemporaneous employment or financial interest of the employee has been publicly disclosed;
 - B. The employee will be able to perform his procurement functions without actual or apparent bias or favoritism; and
 - C. The employee participating is in the best interests of the state agency or a local public body

CONFLICT OF INTEREST

- Governmental Conduct Act
 - Current Officers or Employees:
 - Officer or employee, family members, or businesses in which officer or employee has a **substantial interest** may not enter into contract with Agency, unless public disclosure of interest is made, and competitive process is used to award the contract. **Sections 10-16-13.2B and 10-16-7 (similar to current restrictions imposed by Sections 22-21-1 and 13-1-190.)**

QUESTIONS & COMMENTS?

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