

Statutory Considerations in School District Construction Contracts

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From tremendous financial commitments and uncertainty surrounding the status of state reimbursement funds to the potential for costly litigation, large-scale school construction projects have presented a myriad of issues to school boards and administrators. School districts that are considering or are experiencing construction projects must be cognizant of potential pitfalls at every step of the process. Here are some important statutory considerations:

24 P.S. § 5-508: Majority Vote Required

According to the Pennsylvania School Code, a majority of a district's school board members must approve any contract over \$100 and the board president and secretary must sign these contracts. All school construction contracts fall under these requirements. This is true even in instances in which board members or administrators claim they can "speak for" a majority of the board. School districts must not play fast and loose with this mandate, as they may find themselves seeking to enforce an invalid agreement against a contractor.

This list is not exhaustive - even the most diligent school district cannot fully inoculate itself against potential delays, disputes and unanticipated increases in expenses.

It is important to remember this provision also relates to modifications of an original contract. Verbal agreements or representations by board members or administrators cannot alter the terms of a contract, even if the original agreement has been approved by the school board.

24 P.S. § 7-751: Competitive Bidding

Virtually all construction contracts will have more than \$18,500 in total costs; therefore, they must be subjected to a competitive bidding process in which districts publicly advertise and request competitive bids. Keep in mind, school districts cannot evade competitive bidding by advertising for bids in piecemeal fashion. Contracts must be awarded to the lowest responsible and responsive bidder.

Periodically, school districts have awarded to someone other than the lowest bidder because the lowest bidder was deemed unresponsive. It is far less common for a bid to be rejected based upon lack of responsibility, as it is much more difficult to prove. Pennsylvania courts have occasionally authorized school districts to engage in prequalification processes. However, the courts have stated prequalification must apply equally to all bidders in order to avoid favoritism.

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Discipline of Special Education Students: Out-of-School Suspensions

by Rebecca Heaton Hall, Esq.



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The rules and procedures regarding the discipline of students with disabilities differ from those relating to the discipline of students without disabilities.

In general, a special education student may be removed from school for 10 or fewer days, but total removals for a school year may not exceed 15 days. In the case of a student with an intellectual disability (mental retardation), any removal from school constitutes a change in placement. In-school suspensions are governed by different standards and have no set length of time before a change in placement is necessary.

Under the Individuals with Disabilities Education Act (IDEA), short-term removals of special education students should generally follow a 10-day rule. This rule indicates that any special education student who violates a code of student conduct may be removed to an appropriate interim alternative educational setting, another setting, or receive a suspension for no more than 10 consecutive school days. If the removals are not consecutive but constitute a pattern of removals for more than 10 days in a school year, a change in placement will occur.

A student may be removed up to 10 days at a time even if the behavior is related to the student's disability. However, if the student receives a removal of more than 10 days, the District must conduct a manifestation determination; provide educational services to the student in another setting that permits progress on IEP goals; and provide a functional behavioral assessment and services designed to address the behavior so it does not occur again. If a manifestation determination review concludes that the behaviors causing the removal were a manifestation of the student's disability, the student should be immediately placed in his or her original placement.

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71 P.S. § 1618: Separations Act

There was a time when the Mandate Waiver Program allowed school construction projects to adopt a “single-prime” model (i.e., a model in which a general contractor subcontracts work). Now, however, school districts are required to engage in separate bidding and prime contract awards for plumbing, heating, electrical and ventilating projects costing more than \$4,000.

24 P. S. § 1-111: Criminal History / Clearances

The recently enhanced criminal history clearance requirements for school employees also apply to prospective vendors and independent contractors seeking to work in public and private schools, intermediate units and vocational-technical schools. All vendors, contractors and their employees must submit to criminal background checks, unless they will not have direct contact with children. Prospective contractors must produce the following records for their employees prior to employment and administrators are required to keep a copy on file.

- Employees’ criminal history records, which are less than a year old, from the Pennsylvania State Police;
- Employees’ federal criminal history records, which are also less than a year old and are obtained by transmitting employees’ fingerprints to the FBI; and
- Child abuse clearance forms from the Department of Public Welfare.

Depending on the information found in the reports, prospective employees can be permanently disqualified from working at schools or be barred for periods of time. Districts should spot-check contractors and their employees to ensure ongoing compliance with the clearance requirements.

24 P. S. § 7-756: Bonds for Payment of Labor, Materials, etc.

A contractor working for a school district must post a bond for 50% to 100% of the construction costs, to be determined by the district, to ensure prompt payment for all materials, labor and machinery used during the project. Any interested party who has furnished material or performed labor may sue on the bond and the school district will not be liable for any expenses of suit.

Planning and Construction Workbook: “PlanCon”

School districts around the Commonwealth are in limbo regarding state reimbursement for portions of their school construction costs. Districts are required to go through a design and planning process, known as PlanCon, if they intend to seek reimbursement. However, a moratorium was placed on PlanCon in October 2012; as a result, 350 approved construction projects were awaiting an estimated \$1.2 billion in PlanCon reimbursements. The moratorium was lifted with the passage of the most recent state budget. However, it remains unclear how much money will be allocated for PlanCon reimbursements and how this money will be distributed.

School districts seeking reimbursements should still follow PlanCon, a process typically spearheaded by project architects and/or design professionals.

PlanCon restricts parties from signing construction contracts until all permits, including environmental permits, are secured and the parties have received certification of those secured permits. Failure to do so can void a district’s entitlement to PlanCon reimbursement.

62. P.S. § 3901 et seq.: Prompt Payment Act

There are occasions in which a district may believe a contractor did not follow the contract and may consider withholding payments on a “good faith basis.” However, a district cannot use this tactic over minor disputes. If it is determined the school district did not act in good faith, contractors may recover interest damages and attorney’s fees under the Prompt Payment Act. Districts should confer with their solicitor before withholding a contractor’s payment.

This list is not exhaustive – even the most diligent school district cannot fully inoculate itself against potential delays, disputes and unanticipated increases in expenses. The help of legal counsel, designers and construction managers at all phases of the project will ensure districts’ construction plans run smoothly and are on budget.

Out-of-School Suspensions, *continued from page 1*

In a limited number of circumstances, a school district may move a special education student to an interim alternative educational setting for up to 45 school days before considering whether the behaviors causing the removal were manifestations of the student’s disability. A 45 day placement without a manifestation determination may occur if the following events occur on school premises or at a school function:

- The student carries or possesses a weapon at school;
- The student knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance; and
- The student has inflicted serious bodily injury upon another person.

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