

It's the Most Wonderful Time of the Year – Construction Contract Season. Is your District Positioned for Success When Ground is Broken?

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Practice Area: School Law

This past Fall saw voters approve numerous referenda authorizing Wisconsin school districts to address long-standing facility and deferred maintenance needs. As we have discussed on previous occasions, school districts are not restricted by the requirements of the bidding laws applicable to local governments when seeking proposals and letting contracts to improve facilities and otherwise engage in construction activities. Nonetheless, there are best practices and legal considerations related to the proposal and contracting process. Over the past couple of months, we have seen several instances where proposed contracts did not align with our client school district expectations for a project. In short, it is critical that school districts pay close attention to their contracts before negotiating and executing a contract to avoid problems that may arise as the project progresses.

One of the primary issues we have seen relates to the school district's use of a contract template from the contractor that assisted the district with the referendum process. Understandably, the district is relying upon the skill, expertise, and judgment of the contractor that played a significant role in designing the construction program that voters approved. While understandable, there is no reason that a district needs to utilize a contractor's proposed project delivery method or contract set. After all, the school district is the owner and is spending a significant sum of money on the particular project or projects. All school district stakeholders, including taxpayers, should seek comfort in a project delivery method and contract set that is established, at inception, to protect the district's interests.

Another area of concern relates to a disconnect between our clients' expectations on project budget and a contractor's view of how firm that budget really is. In recent matters we have handled, certain of our clients expected a hard cap on project costs, but the contracts they were asked to sign did not provide the cap. Concepts related to Guaranteed Maximum Price (commonly known as GMP) were either missing entirely or too malleable to achieve the hard cap our clients expected. We have worked with our clients to establish firm maximum prices for projects or, when that is not attainable, to draft the contracts to provide the highest level of budgetary certainty. As we have also seen when engaged to assist with disputes arising after the contracts are signed, a budget is far different from a guaranteed price. It is very difficult to try to find back-end savings to bring a project in under the authorized referendum amount without dramatically altering project plans.

The role of a good contract is to put clear and easily understood legal form to the parties' expectations of rights, benefits, and obligations. If that discussion, negotiation, and drafting happens before execution of a contract, the parties' relationship is typically productive throughout the life of the project and thereafter. If, however, expectations are not aligned with the contract documents, disagreements occur and the relationship between school district and contractor breaks down. Such a breakdown leads to increased costs, time, and effort to bring a project to completion.

Three key takeaways for any construction project are:

1. Invest in legal counsel early in the contract process.
2. Ensure that your district is getting exactly what it needs out of a project contract set.
3. Confirm that you are getting the most out of the money that the voters authorized you to spend.

If you have any questions about the various project delivery methods, the contract forms, or best practices for negotiation, please contact a member of our School Law Section. We have significant experience representing both private sector and public sector project owners in construction law and we understand the needs of school districts in these projects.

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