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E-Procurement Requires Careful Planning

Since the laws governing school districts first became codified in 1949, school districts have been bound to follow the public bidding laws. However, just as technology has changed the way school districts deliver educational instruction to pupils, it too has infiltrated the bidding process.

Over the past few years, municipal bodies subject to public bidding laws have been moving towards an electronic bidding process, or what is commonly referred to as E-procurement. E-procurement can either be customized or done as part of an E-procurement community.

A customized E-procurement system allows a municipal entity to manage its own bidding program by issuing a bid or request for proposals, reviewing the bid specifications, and awarding to the lowest responsible bidder. E-procurement communities pool the purchasing needs of several municipal bodies into one bid package, creating centralized control over the bidding process, but allowing individual municipalities to effectuate the actual purchase.

Moving from a traditional bidding process to E-procurement has not always proven to be a smooth transition. School districts contemplating this move should develop an E-procurement strategy to help facilitate the transition. This strategy should include a training program for district representatives as well as vendors. The training program should include how to effectively utilize the software supporting the E-procurement program to reduce mechanical problems such as that encountered in 2003 by the Department of Transportation, by school districts and interested vendors.

In July of 2003, PennDOT solicited bids for the construction of a bridge through PennDOT's electronic bid program. Six (6) bids were received, however, only five (5) were publicly opened and read. The sixth bid was identified by the software program as "submitted with errors" and could not be opened.

The sixth bidder, Cummins, submitted the lowest bid by nearly $30,000. Cummins filed a bid protest to which the Secretary of Transportation decided to rebid the project. Cummins subsequently filed an appeal to the Commonwealth Court. The Commonwealth Court ruled in favor of PennDOT concluding that the Secretary's decision to rebid the project was an acceptable remedy to the challenge.

Although the Court found PennDot's response to the mechanical problem to be acceptable, the outcome could have been different had the statute set forth in the Procurement Code not specifically identified cancellation of all bids as an acceptable response to an invitation for bids. Obviously, the Legislature cannot account for every type of problem school districts may encounter in the bidding process, therefore it is recommended that school districts prepare procurement manuals/policies detailing the changes to the school district's bidding program.

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IN THIS ISSUE

Department of Education Issues Revised IDEA Regulations

The Office of Special Educational Rehabilitative Services of the Department of Education issued final regulations amending Part B regulations of the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The process to revise the regulations began in early 2005, with public meetings. The proposed regulations were released in June of 2005. The final regulations, published on August 14, 2006, will take effect October 13, 2006.

The major changes in the regulations affected: *General Definitions* at Subpart A, *State Eligibility Criteria* at Subpart B, *Evaluations, Eligibility Determinations, Individualized Education Programs and Educational Placements* at Subpart D, *Procedural Safeguards* at Subpart E, *Monitoring, Enforcement, Confidentiality and Program Information* at Subpart F, and *Authorization, Allotment, Use of Funds and Authorization of Appropriations* at Subpart G. The following are a few highlights from the revised regulations.

§300.154(d) now requires public agencies to obtain parental consent each time the agency accesses the parents' public benefits or insurance to pay for services and notify the parents that refusal to allow access to their public benefits does not relieve the agency of its responsibility to ensure that all required services are provided at no cost to the parents.

§300.177 has been added acknowledging that states accepting funds under Part B of the Act waive governmental immunity under the 11th Amendment of the Constitution of the United States and suit in Federal Court for violation of the Act.

§300.300(a)(3) provides clarification that a school district does not violate its obligations under §300.111 and §300.301-§300.311 if it declines to pursue an initial evaluation after a parent fails to consent to the initial evaluation.

§300.323(d) requires school districts to notify each regular teacher, special education teacher, related service provider and other service provider of specific responsibilities related to implementing a student's IEP.

§300.510(b)(4) allows an educational agency to request that a hearing officer dismiss a parent's Due Process complaint if the parent fails to participate in a resolution meeting within the thirty (30) day time period, so long as the school district documents the reasonable efforts it utilized to try to get the parents to participate.

§300.516(b) clarifies that the ninety (90) day appeal period for filing a civil action starts the day the hearing officer/state renders a decision.

E-Procurement

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The procurement manual should include definitions of pertinent terms, competitive bid solicitation procedures, such as where the bid advertisements will be published (on-line/newspapers/etc.), the bid evaluation process to determine whether or not the bid submitted is responsive to the specifications and from a responsible bidder and the contract process from the award notification process up through the conclusion of the contract.

As a final note, transitioning to E-procurement will not change the categories of purchases subject to the bidding laws. Purchases for less than $4,000.00 can be awarded without getting written or telephonic quotes. Purchases in excess of $4,000.00, but less than $10,000.00, can be awarded after retrieving three (3) written or telephonic quotes from qualified responsible bidders. Purchases in excess of $10,000.00 must be publicly advertised in at least two (2) newspapers of general circulation for three (3) consecutive weeks and the award must be given to the lowest responsible bidder.

Act 1: School Boards Prepare for 2007 Front End Referendum

A Front End Referendum requirement is mandatory for all School Districts under Act 1. School Boards must adopt a Resolution by March 13, 2007 to authorize either an Earned Income Tax or Personal Income Tax to fund Homestead tax exclusions. The proposed Front End Referendum must be submitted to the County Board of Elections no later than sixty days prior to the Primary Election. The proposed language for the Referendum question is set forth in the Act.

Importantly, only one question is allowed in the proposed Front End Referendum to be placed on the ballot. The Front End Referendum as proposed by the School Board must also include an Interpretive Statement which District officials must discuss with County officials. The proposed Front End Referendum question must be posted and advertised (i.e. public advertisement once a week for three consecutive weeks), and state the purpose, limitations and its effects as part of the Interpretive Statement with the ballot question.

One of the key issues in connection with the Referendum is whether a School District is required to propose a 2007 Earned Income Tax rate increase of at least one percent, or whether the District is required merely to propose a total District Earned Income Tax rate of at least one percent. The language of Act 1 is ambiguous on this point regarding the Earned Income Tax. The Secretary of Education, Gerald Zahorchak, issued a letter on August 18th to the Superintendents of School Districts across the State giving his interpretation that the one percent minimum applies just to the increase, not to the total District EIT rate.

In reviewing Act 1, the reference to the Personal Income Tax minimum of one percent unambiguously applies to the total District rate. Therefore, we believe that the one percent Earned Income Tax minimum applies to the total District rate, not merely to the increase.

School Districts should be aware that they should make preliminary approval of their ballot questions in January of 2007 and begin advertising.

In addition, School Districts must comply with the accelerated budget adoption process unless the School Board adopts a Resolution by January 25, 2007 (110 days prior to the primary election) stating that a tax increase will not exceed the inflationary index and that the Board will comply with the provisions of the Act for budget adoption.

This Resolution must be given to the Pennsylvania Department of Education within 5 days after adoption. If PDE determines that the proposed increase is not under the inflationary index, it can require a Back End Referendum.

Court Defines How to Correct Defective Dismissal

The Commonwealth Court recently rendered a decision defining the proper steps a governmental body can take to cure a procedurally defective dismissal of a professional employee. In the case of *Flickinger v. Lebanon School District,* 898 A.2d 62 (Pa. Cmwlth. 2006) the School District discharged Flickinger, the Middle School Principal, without issuing a Statement of Charges or offering a local agency hearing. Flickinger appealed his dismissal on the basis that his Due Process rights were violated.

In response to Flickinger's initial appeal, the School Board rescinded its employment action and placed him on administrative leave pending an independent investigation. At the conclusion of the independent investigation, the District issued a Statement of Charges and Notice of Hearing alleging various violations of the School Code with respect to his reaction to an incident on September 17, 2004, as well as other incidents of misconduct. Hearings were conducted before the Board of School Directors, after which Flickinger was once again discharged from employment for willful neglect of duties.

Flickinger appealed to the Secretary of Education. The Secretary of Education affirmed the School Board's decision and Flickinger appealed to the Commonwealth Court. In a decision rendered May 3, 2006, the Commonwealth Court affirmed the discharge. The Court concluded that *(Dismissal continued next page)*

Court Concludes School District Can Expel Student With Proven "Circumstantial" Evidence

By decision rendered August 31, 2006, a panel of the Commonwealth Court concluded that a school district can expel a student on properly proven "circumstantial" evidence. In *Bennett v. Slippery Rock Area School District*, —A.2d—, 2006 WL2506068 (Pa.Cmwlth. August 31, 2006), the Commonwealth Court was asked to determine whether a student could be expelled for violating the School District's Terroristic Threats Policy without direct evidence to support the alleged violation.

The School District's Policy prohibited threats "to commit violence communicated with the intent to terrorize another, to cause evacuation of a building, or to cause serious public inconvenience, in reckless disregard of the risk of causing such terror and inconvenience."

On the morning of January 12, 2006, AB, a female sixth grade student, reported finding a bomb threat on top of a toilet in the girls' restroom. Upon exiting the restroom, AB told another student about the note. Both students reported the incident to a teacher who subsequently reported it to the Principal. The Principal reported the incident to the Police.

At the beginning of the police interview, AB denied writing the note. However, she told the police that she wrote a similar bomb note approximately two weeks earlier and gave it to a friend as a joke. AB never admitted to placing a note in the bathroom on January 12th. AB put her confession to writing a note two weeks prior in writing, however indicated that she did not recognize the note found on January 12th as the one she had authored in the past.

The police believed that AB wrote the note because of her reactions to questions during the investigation and similarities in handwriting. The School District pursued an expulsion for the remainder of the school year. A local agency hearing was held before the Board of School Directors. The Board found the testimony given by the police to be more credible than that of AB and concluded that AB's actions on January 12, 2006, violated the School District's Terroristic Threats Policy.

AB appealed the expulsion arguing that the School District did not satisfy its burden of proof by proving by preponderance of the evidence that AB wrote the note and placed it in the bathroom on January 12, 2006. The Trial Court agreed with the student and found that the record from the local agency hearing did not contain substantial evidence to support the Board's determination. The Court further opined that the School District failed to prove that AB intentionally communicated a threat to commit violence to another.

The School District appealed. The Commonwealth Court reversed the Trial Court and concluded that the School District satisfied its burden of proof by establishing by a preponderance of the evidence that AB placed the note in the bathroom. The Court further opined that the School District did not have to present direct evidence to establish that AB placed the note in the bathroom.

In addition to affirming a school district's decision to expel a student on circumstantial evidence, the Commonwealth Court's decision in *Bennett* affirms a couple of important points with respect to expulsion proceedings. First, school districts only have to prove a violation of a particular policy by a preponderance of the evidence. In order to prove a particular issue by a preponderance of the evidence, Courts consider whether such proof exists that leads the fact finder to find the existence of a contested fact more probable than its non-existence. *Sigafoos v. Pennsylvania Board of Probation and Parole,* 503 A.2d 1076, 1079 (Pa. Cmwlth. 1986).

Second, when a complete record is made during a local agency hearing before the Board of School Directors

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Dismissal

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in situations wherein a governmental body fails to give the required Due Process/Statutory Hearing to an employee, the procedural flaw can be corrected by rescinding the previous disciplinary action, giving the employee the appropriate Due Process and rendering a new employment decision.

This case is a reminder that professional employees must be given Due Process prior to pursuing any type of discipline. It is imperative that employees be notified of the allegations made against them and be given an opportunity to respond to those charges.

Department of Education Issues New Direction on Attendance and Truancy

On August 8, 2006, the Pennsylvania Department of Education issued a Basic Education Circular (BEC) with respect to each school district's obligation to enforce the compulsory attendance laws of the Commonwealth of Pennsylvania. In conjunction with the Statewide Task Force on School Attendance and Truancy Reduction, the Department of Education is recommending a uniform response by all school districts in the Commonwealth to reduce truancy and absenteeism problems.

The BEC identifies the following response for unlawful absences:

(1) Immediately inform parents in writing of the first unlawful absence and the consequences of future unlawful absences;

(2) Written notification to the parents upon a second unlawful absence, again attaching the consequences for future unlawful absences;

(3) A conference between the student's family and school district administrators to discuss the reasons for the truancy/absenteeism and to develop a Truancy Elimination Plan to reduce or eliminate the truant behavior after the third unlawful absence.

The Truancy Elimination Plan should be negotiated by the family and administrators and include: the Plan's goal, commencement date, contact information, identification of all absences for the school year and the causes identified for each absence, the student's educational strengths, consequences for failing to comply with the law, benefits for compliance and a resolution of the meeting where the Plan was drafted. It is further recommended that a copy of the Plan be provided to the Student, Parent/Guardian, and certain school personnel.

The BEC also identifies the mandatory requirement imposed on school districts to employ at least one attendance officer or home and school visitor to enforce the compulsory attendance laws. Finally, the BEC calls for local law enforcement agencies, social service providers, and the local education agencies to coordinate services by advising all relevant parties, including parents, students, district magistrates, the Court, and social service agencies of the procedure the School District will follow to address attendance/truancy programs.

Prior Litigation History Constitutes Material Defect in Bidding

Although the utilization of E-procurement by school districts is a relatively novel concept that will undoubtedly be the subject of legal challenges for years to come, traditional means of awarding public contracts do not go unchallenged. The issue of what constitutes a material defect in a bid has been the subject of litigation for years. Recently, in the case of *Dunbar v. Downington Area School District*, 901 A.2d 1120 (2006) the Commonwealth Court was asked to determine whether a bidder's failure to comply with bid instructions requiring the contractor to identify whether or not it had filed any lawsuits with regard to a construction contract within the past five (5) years, constituted a material defect such that it could be eliminated from selection even though it was the lowest responsible bidder.

In *Dunbar*, the contractor failed to disclose that it had been involved in litigation with another school district, in three (3) locations on the bid document. Upon discovering this omission, Downington Area School District declared the bidder's bid to be deceptive for failing to disclose the lawsuit and as having a non-waivable material defect. The School District's action was challenged and the case made its way up to the Commonwealth Court.

In rejecting the School District's position, the Commonwealth Court cited the Supreme Court's decision in *Gaeta v. Ridley School District*, 567 Pa. 500, 788 A.2d 363 (2002) and found that Dunbar's bid was not materially defective. In *Ridley*, the Supreme Court concluded that in determining whether a defect is material, the issue is whether the defect would undermine the assurance of contract performance and whether the defect would advantage the bidder in relation to other bidders. Based on this rationale, the Commonwealth Court concluded thatDunbar's failure to identify prior discontinued litigation did not impact *(Dunbar - continued page 8).*

Proposed Revisions to Age Discrimination Regulations

On August 11, 2006, the Equal Employment Opportunity Commission published proposed amendments to the regulations interpreting the Age Discrimination in Employment Act. The proposed amendments published for comment reflect the recent Supreme Court decision in *General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. 581, 586 (2004) wherein the Court clarified the meaning of "age" under the Act.

The Supreme Court addressed whether or not an employer's favoritism towards older workers violated the ADEA, in particular in situations wherein the younger individual not favored by the employment decision was also over the statutory threshold for age discrimination, forty (40) years old. The current regulations provide that any age-based preference between persons aged forty (40) or over, regardless of whether the treatment favors older or younger persons, violates the Act.

In 2004, the Supreme Court rejected claims that favoritism towards older workers also violated the Act. In reaching its conclusion, the Court noted that the legislative history of the ADEA reflects that Congress only intended to protect a relatively older worker from discrimination that works to the advantage of the relatively young. The Court further opined that the initial draft of the Act was in response to a report issued by the Secretary of Labor identifying high unemployment rates among older workers, but did not mention an unfair advantage accruing to older employees at the expense of younger employees over the age of forty (40).

As a result of the Supreme Court's decision in *Cline,* the Equal Employment Opportunity Commission proposes the following revisions:

(1) The proposed amendments would describe discrimination prohibited by the Act as follows:

"It is unlawful for an employer to discriminate against an individual in any aspect of employment because that individual is forty (40) years old or older, unless one of the statutory exceptions applies. Favoring an older individual over a younger individual because of age is not unlawful discrimination under the Act, even if the younger individual is at least forty (40) years old."

(2) In addition, the EEOC proposes amendments to §1625.4 regarding "Help Wanted" notices or advertisements as follows:

(a) Help Wanted notices or advertisements may not contain terms and phrases that limit or deter the employment of older individuals. Notices or advertisements that contain terms such as "age 25 to 35," "young," "college student," "recent college graduate," "boy," "girl," or others of a similar nature violate the Act unless one of the statutory exceptions applies. Employers may post "Help Wanted" notices or advertisements expressing a preference for older individuals with terms such as "over age 60," "retirees," or "supplement your pension."

(b) "Help Wanted" notices or advertisements that ask applicants to disclose or state their age do not in themselves violate the Act. But because asking applicants to state their age may tend to deter older individuals from applying, or otherwise indicate discrimination against older individuals, employment notices or advertisements that include such requests will be closely scrutinized to assure that the requests were made for a lawful purpose.

(3) The EEOC also seeks to amend §1625.5 regarding employment applications as follows:

"A request on the part of an employer for information such as date of birth or age on an employment application form is not, in itself, a violation of the Act. But because a request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination against older individuals, employment application forms that request such information will be closely scrutinized to assure that the request is for a permissible purpose and not

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Evidence

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or a hearing officer designated by the Board of School Directors, the lower court will not take any additional evidence into consideration when reviewing the matter appealed. Rather, the trial court's scope of review is limited to whether the local agency's adjudication violated provisions of the Local Agency Law or made findings of fact necessary to support its adjudication which were not supported by substantial evidence in the record. *Monaghan v. Board of School Directors,* 618 A.2d 1239, 1241 (Pa. Cmwlth. 1992).

Legislative Update

Every summer the General Assembly of the Commonwealth of Pennsylvania enacts an Act encompassing amendments to the Public School Code of 1949. On July 11, 2006, the General Assembly enacted Act 114 amending the Public School Code of 1949. Act 114 included amendments to Articles I, V, VI, IX(a), XI, XII, XIV, XV, XVI(b), XVII(a), XVII(b), XIX(c), XIX(d), XX(a), XX(c), XXI, and XXV. Highlights of the Act 114 amendments to select Articles of the School Code are set forth below.

- 24 P.S. §1-111 - Effective April 1, 2007, criminal background checks for all prospective employees of public and private schools, intermediate units and area vocational-technical schools will be required. The statute specifically identifies teachers, substitutes, janitors, cafeteria workers, independent contractors and their employees, bus drivers and student teacher candidates as covered. Student teacher candidates continuously enrolled in an educator preparation program can use the criminal history record initially submitted by the candidate to that program. If the candidate's enrollment is interrupted or the student transfers to another educator preparation program, the student must provide to the program administrator all criminal history record information required of an employee subject to the Act.

- 24 P.S. §5-504.1 - Prior to entering into an exclusive competitive food or beverage contract, Boards must provide reasonable public notice or hold a public hearing about the contract. The provision defines what constitutes a *competitive food or beverage contract* and what qualifies as *reasonable notice*. The Section further declares the contracts to be made accessible to the public in accordance with the Right to Know Law.

- 24 P.S. §1195 – The Department of Education will be establishing a Distinguished Educators Program where select educators will be invited to participate in an intensive and comprehensive training program, then assigned to an eligible school district to recommend curriculum and assessment techniques and methodologies to improve the quality of education. The provision defines the term *eligible school district.* The successful completion of the Distinguished Educator Program Training and completion of at least one assignment through the Program will satisfy the Continuing Professional Development and Program of Continuing Professional Education requirements imposed on professional educators by 12-1205.1 and 12-1205.2.

- 12 P.S. §14-1402 – School districts must compute each student's BMI (weight/height ratio) and provide the information to each student/parent.

- 24 P.S. §14-1422 – The Advisory Health Council appointed by the Superintendent can also provide recommendations on the development of the local Wellness Policy.

- 24 P.S. §14-1422.1 – In accordance with the requirements imposed on all public school districts by the Federal Mandate known as the Child Nutrition and WIC Reauthorization Act of 2004, the General Assembly of the Commonwealth passed §1422.1 requiring all local education agencies to establish a Local Wellness Policy by June 30, 2006. The Local Wellness Policy should be included in the School District's Strategic Plan. In addition, the Secretary of Education, the Secretary of Health and the Secretary of Agriculture will be establishing an Interagency Coordinating Council to assist school districts in meeting the goals identified in the Local Wellness Policy. Council will annually review, revise and publish the *Pennsylvania Child Wellness Plan* to promote child health nutrition and physical education. 24 P.S. §14-1422.2.

Age Discrimination Regulations
continued

for purposes proscribed by the Act. That the purpose is not one proscribed by the statute should be made known to the applicant by reference on the application form to the statutory prohibition in language to the following effect:"

The proposed amendments are open for public comment up through October 10, 2006. The EEOC will consider any comments received and adopt final regulations after the comment period closes. Although the regulations to date are not final, the Supreme Court's holding in *Cline* is binding on employers. For this reason, advertisements for help and/or employment with the School District should be void of any preferences for applicants of a particular age.

Dunbar - *Continued from page 5*

Dunbar's ability to perform or provide a bidding advantage over another contractor.

School districts should use the Commonwealth Court's decision in the *Dunbar* case as a reminder that it is not easy to disqualify the lowest bidder. Prior to rejecting a bid for materiality or irresponsibility, school districts must truly analyze and investigate the situation. Defects must truly be material and contractors must truly be irresponsible for a school district to reject a lowest bidder. Consultation with your solicitor is strongly recommended

Andrews and Beard Education Law Focus

As solicitors, labor counsel and special counsel, Andrews and Beard represents more than 40 school districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts. Andrews and Beard is also one of the first firms in the state to pioneer Timed Mediation to successfully negotiate teacher-union contracts in a 48-hour process. This process can result in the settlement of the contract six months before expiration, at a large financial savings to the school district.

The Firm also represents a large area of the State for coverage of school board directors through their insurance carrier.

Our legal expertise includes:

- Negotiation of teacher and support staff contracts
- Employment Discrimination
- Special Education Litigation
- Veterans' Preference Litigation
- Teacher and student discipline hearings
- Leaders in Timed Mediation contract negotiations

Subsequent Issues

If you have a school law question or topic you would like to have addressed in subsequent issues of the newsletter, please send an email to:

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