

THE INS AND OUTS OF PRIVATIZATION OF NON-INSTRUCTIONAL SERVICES



MSBO
77th Annual Conference

April 29, 2015

© 2015

CLARK HILL

About the Presenter

Jeremy S. Motz, Esq.

Clark Hill PLC

151 S. Old Woodward Ave., Suite 200

Birmingham, Michigan 48009

248.988.5895

jmotz@clarkhill.com

Bio:

<http://www.clarkhill.com/people/jeremy-s-motz>

What's on Tap?

- **Legal Basis of Privatization**
- **Legal Trends in Privatization**
- **Issues when considering privatization of non-instructional services**
- **The Plan for Success**
- **The RFP Process**



This document is comprised of general information relative to the subject matters discussed herein. It is not intended to give legal advice and does not establish any attorney-client relationship. School Districts facing specific issues should seek the assistance of an attorney.

Legal Aspects Of Privatization – MCL 380.11a

The Broad Powers under the Revised School Code – MCL 380.11a

- **General Powers School Districts**
- **School districts have express powers, and may exercise those powers that are implied or incidental to those express powers, and may also exercise a power incidental or appropriate to the performance of any function related to the operation of the school district in the interest of public elementary and secondary education within the school district.**
- **MCL 380.11a(4) – “A general powers school district may enter into agreements or cooperative arrangements with other entities, public or private, or join organizations as part of performing the functions of the school district.”**
- **Unlike Construction and Supplies/Equipment, NO express legal requirement to bid “non-instructional services.”**
- **EXCEPT:**
 - **Must comply with applicable school district policy(ies).**
 - **PERA – Must give union an opportunity to bid on an “equal basis as other bidders.”**
 - **Must competitively bid food service contracts.**

Legal Trends In Privatization

- **Recent Decisions Regarding Privatization**
 - **Attorney General Opinion 7249 (2010)**
 - ***Rochester Comm. Schools v. AFSCME* (2011)**
 - ***Woodhaven-Brownstown v. AFSCME* (2011)**
 - ***Lakeview Comm. Schools v. MEA* (2011)**
 - ***Mt. Pleasant Public Schools v. AFSCME* (2013)**
 - ***Tri-County Area Schools v. MEA* (2015)**

- **“Equal Basis” does not include requirement to allow union to bargain over RFP content or how bidding is conducted.**

- **Submission of a proposal for a concessionary collective bargaining agreement does not qualify as a “bid or proposal” under PERA.**

- **Not all “services” considered “non-instructional” services. Certain categories deemed “instructional” by courts.**
 - **Special Needs Aide – *Harrison Comm. Schools v. MEA* (2010)**
 - **Therapists – *Pontiac School District v. Pontiac Education Association* (2012)**

Issues When Considering Privatization

- **Separating the MYTHS from the FACTS**

<u>Myths</u>	<u>Facts</u>
Contractor personnel are “child molesters” and criminals.	Contractor personnel subject to fingerprinting and background laws
Services will be lost	Service levels can increase
All control is lost	School District now “client” = more control
Loss of local jobs	Contractors hire from within community
All former school district employees lost	Contractors offer application opportunities

- **What are potential savings ?**
 - **Review of current budgets.**
 - **Dependent upon services outsourced.**

Issues When Considering Privatization

- **What are the drivers for, potential benefits of, privatization?**
 - Utilization of entities with lower cost structures.
 - Elimination of legacy costs.
 - Elimination or reduction in overtime costs.
 - Ability to “right size” operations and service levels.
 - Reduction in personnel issues for the school district.
 - Improved service levels (easier to replace contractor personnel).
 - Ability to streamline services.
 - Ability to utilize better equipment.

- **Other Issues to Be Aware Of**
 - Potential Tax Issues
 - Union Issues

- **Consider available delivery methods for desired services.**
 - Management Only vs. Full-Service Turn-Key methods

Developing a Plan for Successful Privatization

- **Timing is Critical – Plan Ahead, do NOT rush process or wait until last minute.**
 - **Timing of Entire Process.**
 - **Proper time to implement transition plan.**
- **Develop a comprehensive RFP.**
- **Understand your school district's current operations and contracts (all have unique issues).**
- **Set forth school district's service expectations.**
- **Communication is Crucial**
 - **All key stakeholders need to be informed.**
 - **Administration and Board must speak with "one" voice/message.**
- **Understand the issues on BOTH fronts**
 - **Legal Issues – Both LABOR and RFP issues and how they interact.**
 - **Political Issues.**
- **Involve legal counsel for both labor and bidding issues.**
- **Treat all parties participating in RFP process fair.**
- **Retain "knowledgeable" person to "oversee" 3rd party service provider(s).**

Designing the RFP Documents

- Understand applicable statutory provisions and Board policies and procedures.
- **DO NOT** simply use other school district's RFP documents!!!!
 - Verify the need for every provision/term/specification.
 - Make sure all provisions are on point and needed.
 - Thoroughly review entire document and cross-reference all citations/references.
- Develop Specifications for Service desired.
 - Involve key stakeholders (beware of using vendors)
- Key components of solicitation document
 - Instructions to Bidders
 - Parameters of submission of bid/proposal
 - Specifications or service parameters
 - Contractual terms and conditions (preferably attach form of contract)
 - Pricing Parameters
 - Proposal forms and Attachments

Designing the Solicitation Documents

Specifications or Service Parameters

- Clearly define specifications
- Clearly define scope of services

Contractual Terms and Conditions

This section would include provisions such as:

- Term and Termination
- Governing Law
- Payment Terms
- Warranties
- Insurance (review with insurance carrier)
- Bonds (bid, performance, payment)
- Indemnification (general, environmental and/or intellectual property)
- Require fingerprinting and criminal background checks
- Incorporate RFP and Proposal by reference or will lose protections

*****Attach form of contract to RFP*** Beware - DO NOT simply use existing or old contract!!**

Designing the Solicitation Documents

Pricing Parameters

- **Clearly specify how pricing must be presented**
- **Alternates (beware of “voluntary” alternates)**
- **Not-to-exceed amounts**
- **Attach Proposal Pricing Form**

Proposal Forms and Attachments

- **Pricing Form**
- **Form of Contract**
- **Specifications**
- **School District specific background information needed by service providers**
- **Familial Disclosure Affidavit**
- **Iran Linked Business Affidavit**

Analysis of Bids/Proposals

Due Diligence

- OAG 4371, in essence, suggests a due diligence requirement of the Board to determine the abilities of any prospective service provider and to make the award, if any, to the lowest responsible bidder.

- Due Diligence Criteria for Determining the Lowest Responsible Bidder
 - Did service provider submit bid/proposal in proper format?
 - Did service provider submit all required forms with bid/proposal?
 - Did services proposed meet specifications?
 - Price
 - References
 - Reputation
 - Ability to Perform Project (Size, Experience, Capacity etc.)
 - Years in Business

Analysis of Bids/Proposals

Acceptance of Bids/Proposals

- **Before presentation to Board or acceptance:**
 - **Ensure all specifications and parameters are correct.**
 - **The contract is in executable form (and appropriate provisions addressed).**
 - **Bonds, Insurance and other forms secured as applicable.**

- **Bid should be in form necessary for approval, subject to either:**
 - **Contractor executing attached contract, or**
 - **Contractor executing contract that is:**
 - **Negotiated by school district administration and within defined parameters; and**
 - **Final contract approved by legal counsel.**

THANK YOU! Any Questions?



This document is not intended to give legal advice and does not establish any attorney-client relationship. It is comprised of general information. School Districts facing specific issues should seek the assistance of an attorney.