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Senator Jim Mehlhaff
South Dakota State Senate Majority Leader
500 E. Capitol Ave.
Pierre, SD 57501
Via email: jim.mehlhaff@sdlegislature.gov

OFFICIAL OPINION 26-03

Re: Official Opinion Concerning Public School Construction Contracts

Dear Senator Mehlhaff,

In your capacity as a South Dakota Senator, you have requested an official opinion from the Attorney General on the following questions:

QUESTIONS:

1. Can public school districts in South Dakota legally enter into construction contracts with out-of-state cooperative purchasing companies, without locally soliciting or obtaining competitive bids or proposals, for the construction of public improvements involving \$100,000 or more?
2. What are the remedies available when public school districts enter into construction contracts that violate state law?

ANSWERS:

1. No, South Dakota school districts cannot use out-of-state cooperative purchasing arrangements to bypass local competitive bidding requirements

for construction projects costing \$100,000 or more. While cooperative purchasing exemptions exist, they apply to supplies and services, not to public improvement construction contracts.

2. Taxpayers generally have a right to bring equitable actions to challenge unlawful and void public school contracts, provided they seek timely relief and pursue the proper equitable remedy.

FACTS:

Public school districts in South Dakota are entering into contracts with out-of-state sports construction firms. These construction firms are suppliers for out-of-state cooperative purchasing organizations. The contracts consist of agreements between the school districts and the construction firms to build facilities on public school properties. The school districts are entering into design-build contracts with these construction firms, in some or all instances:

- Without soliciting or obtaining competitive bids and proposals;
- Without soliciting or obtaining competitive sealed proposals;
- Without establishing or publishing procedures for the solicitation and award of design-build contracts;
- Without publishing notices that the school districts have determined that it is in the best interest of the public to enter into design-build contracts to complete the public improvements;
- Without pre-qualifying design builders; and
- Without holding public hearings on the use of funds for the projects.

The cooperative purchasing companies publicize that their contracts comply with state law because South Dakota permits school districts to enter into agreements to participate in cooperative purchasing contracts with purchasing agents. You inquire whether the agreements between these public school districts and the out-of-state construction firms are illegal contracts.

IN RE QUESTION 1:

Under SDCL 13-20-3, if any school facilities are to be built or remodeled, or improvements are to be made to school sites, the school board must let contracts in accordance with chapters 5-18A and 5-18B. SDCL 5-18A-14 sets forth when and how bidding is required for public improvement contracts. Public school districts typically procure large construction projects through competitive bidding, awarding contracts to the lowest responsible and responsive bidder to ensure fairness,

transparency, and cost-effectiveness. Competitive sealed bidding has historically been preferred, and its purpose is clear. “The object the legislature sought to accomplish through the requirement of competitive bidding in making contracts for public corporations is to guard against favoritism, improvidence, extravagance, fraud and corruption.” *Fonder v. City of S. Sioux Falls*, 76 S.D. 31, 34–35, 71 N.W.2d 618, 620 (1955) (citations omitted). As the South Dakota Supreme Court emphasized:

Since they are based upon public economy and are of great importance to the taxpayers, laws requiring competitive bidding as a condition precedent to the letting of public contracts ought not to be frittered away by exceptions, but, on the contrary, should receive a construction always which will fully, fairly, and reasonably effectuate and advance their true intent and purpose, and which will avoid the likelihood of their being circumvented, evaded, or defeated.

Fonder, 76 S.D. 31, 35, 71 N.W.2d at 620–21 (*quoting* 43 Am. Jur. *Public Works and Contracts*, § 26). Procurement in public school districts revolves around competitive bidding doctrines to safeguard public funds and maintain integrity in awarding large construction contracts.

South Dakota law does permit purchasing agencies — including school districts — to enter into design-build contracts for public improvements, but only if specific conditions are met. SDCL 5-18B-20. A design-build contract is defined as “any contract between a purchasing agency and a design-builder to furnish architecture, engineering, and related services as required, and the labor, materials, and other construction services for a public improvement.” SDCL 5-18A-1(9). The purchasing agency must follow the procedures of other laws governing public improvement construction contracts when such laws are compatible with the use of design-build contracts. SDCL 5-18B-20(3). This means the competitive bidding and advertisement requirements of SDCL 5-18A-14 still apply to design-builds.

South Dakota’s cooperative purchasing statute, titled “Cooperation and agreements with other state and federal purchasing agencies,” grants limited permissions:

Any purchasing agency may enter into agreements with purchasing agents in this or any other state or the United States government under which any of the parties may agree to participate in, administer, sponsor, or conduct purchasing transactions under a joint agreement or contract for the purchase of supplies or contractual services. A purchasing agency may cooperate with purchasing agencies and other

interested parties in any other state or the United States government to develop uniform purchasing specifications on a regional or national level to facilitate cooperative interstate purchasing transactions.

SDCL 5-18A-37. This law permits a school district to work with other governmental purchasing entities to buy goods or services through cooperative purchasing arrangements. For example, a school district may use this statute to “piggyback” an underlying, lawfully-awarded government contract to buy technology for the school. This statute does not exempt an agency from all procurement rules.

Lastly, South Dakota law does provide certain exemptions from competitive bidding requirements under SDCL 5-18A-22. That statute says the procurement provisions of chapters 5-18A through 5-18D do not apply to a long list of contracts or items. Relevant to this topic, SDCL 5-18A-22(3) exempts:

[a]ny purchase of supplies or services, other than professional services, by purchasing agencies from any active contract that has been awarded by any government entity by competitive sealed bids or competitive sealed proposals or from any contract that was competitively solicited and awarded within the previous twelve months[.]

SDCL 5-18A-22(3).¹ This exemption is expressly limited to supplies or services — it does not extend to public school construction contracts.

To answer your question, a review of the definition of “public improvement” is important. A public improvement is “the process of building, altering, repairing, improving, or demolishing any public infrastructure facility, including any utility infrastructure, structure, building, or other improvements of any kind to real property, the cost of which is payable from taxes or other funds under the control of the purchasing agency . . .” SDCL 5-18A-1(22).

In contrast, the definition for “supplies” is “any property, including equipment, materials, and printing.” SDCL 5-18A-1(29). “Services” are defined as “furnishing of labor, time, or effort by a contractor not involving the delivery of a specific end product other than reports which are merely incidental to the required performance.” SDCL 5-18A-1(28). And professional services are “services arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.” SDCL 5-18A-1(19).

¹ SDCL 5-18A-22(3) will become SDCL 5-18A-22(4) on July 1, 2026.

Thus, I conclude that public school construction projects are public improvements by definition, not supplies or services, and therefore they fall outside the cooperative purchasing exemptions. I believe the cooperative purchasing authority in SDCL 5-18A-37 is limited to intergovernmental agreements between public purchasing agencies, not arrangements with private vendors or membership organizations that happen to offer group buying services.

In summary, SDCL 5-18A-37 explicitly says it can be used only to contract for supplies or contractual services, not public improvements. Further, SDCL 5-18A-37 does not specifically exempt school districts from following the procurement requirements in SDCL chapters 5-18A and 5-18B, such as the advertisement for bids and proposals. Similarly, SDCL 5-18A-22(3) is expressly limited to supplies or services — it does not extend to public school construction contracts. I thus conclude that public school districts cannot legally enter into these contracts without following South Dakota's public procurement laws.

IN RE QUESTION 2:

South Dakota courts have consistently held that nonobservance of the statutory competitive bidding requirements for school district contracts renders the contracts void. *See Seim v. Indep. Dist. of Monroe*, 70 S.D. 315, 318, 17 N.W.2d 342, 343 (1945) (finding “nonobservance will render the contract void”). *See also Schull Const. Co. v. Webster Indep. Sch. Dist. No. 101 of Day, et al., Ctys.*, 86 S.D. 475, 483, 198 N.W.2d 512, 516 (1972) (holding “[t]he contracts are void.”). “The requirement for competitive bids contained in the cited statute constitutes a jurisdictional prerequisite to the exercise of the power of a public corporation to enter into a contract.” *Fonder*, 76 S.D. 31, 36, 71 N.W.2d at 621 (citations omitted). Importantly, the Legislature has codified the voidness conclusion. SDCL 5-18A-33 explicitly provides that “[a]ny contract entered into in violation of this chapter or chapter 5-18B, 5-18C, or 5-18D is null and void.”

What follows, then, is your question of what remedies are available if public school districts enter into contracts for construction that violate state law.

In general, a party establishes standing to challenge a contract by showing “that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.” *Agar School Dist. No. 58-1 v. McGee*, 527 N.W.2d 282, 284 (S.D.1995) (*quoting Parsons v. South Dakota Lottery Comm’n*, 504 N.W.2d 593, 595 (S.D.1993)). Thus, to have standing, a party must show some

actual or threatened injury caused by the school district's actions. *H & W Contracting, LLC v. City of Watertown*, 2001 S.D. 107, ¶ 9, 633 N.W.2d 167, 171.

Disappointed bidders have no standing to challenge alleged violations of competitive bidding laws because bids are only offers to contract. *Tri-State Milling Co. v. Bd. of County Com'rs*, 75 S.D. 466, 68 N.W.2d 104 (1955); *H & W Contracting*, 2001 S.D. 107, ¶ 10, 633 N.W.2d at 171.

South Dakota taxpayers, on the other hand, may have standing to take action on behalf of themselves and other taxpayers. *Dale v. Sch. Dist. No. 9 of Bennett Cnty.*, 66 S.D. 346, 283 N.W. 158, 160 (1938). “[U]nder the proper circumstances,’ taxpayers may institute actions on behalf of themselves and other taxpayers to recover funds paid to a contractor under a void or illegal contract.” *Bozied v. City of Brookings*, 2001 S.D. 150, ¶ 17, 638 N.W.2d 264, 271 (quoting *Sioux Falls Taxpayers Ass’n v. City of Sioux Falls*, 69 S.D. 93, 7 N.W.2d 136, 140 (1943)). Taxpayers typically have a right to bring equitable actions — including suits for injunction, mandamus, or recovery of funds — to challenge unlawful and void public school contracts, provided they seek timely relief and pursue the proper equitable remedy. *Id.* And SDCL 15-17-45 allows circuit courts to award reimbursement to plaintiffs in actions brought by taxpayers to recover school district funds wrongfully expended.

As for contractors who have performed work on a void contract, a contractor who has fully fulfilled its obligations under a void contract may retain all payments received, at least absent proof of fraud, collusion, or undue influence. *Bozied v. City of Brookings*, 2001 S.D. 150, ¶ 28, 638 N.W.2d 264, 274. If the contractor has not fully fulfilled the contract and the contract is void, the contract cannot be enforced, and the parties are left as the courts found them. *Id.* ¶ 22. And just as a contractor cannot recover on an invalid contract against a public entity, so too a public entity cannot recover money it paid on a void contract. *Id.*

Once a project is completed, there may be no effective remedy. Courts cannot undo what has already been done, as illustrated in *Winter Brothers Underground Inc. v. City of Beresford*, 652 N.W.2d 99 (2002), where the Court noted that with the project completed at trial, there was no longer any dispute to settle.

The Legislature has not established specific criminal penalties for public school district personnel who enter into contracts without following procurement laws. The primary consequence is that such contracts are void and unenforceable. SDCL 5-18A-33.

CONCLUSION

Competitive bidding is the proper method for awarding public construction contracts, designed to ensure fairness, prevent favoritism, and secure the best value for public funds. The legal framework surrounding public contracts demands strict compliance with bidding procedures, with noncompliance rendering contracts void. Taxpayers generally have standing to take action against local school districts to prevent the unauthorized expenditures of public funds, including contracts that violate statutory requirements for competitive bidding. The Legislature has the power to create penal statutes or to revise any statutes if desired.

Sincerely,



Marty J. Jackley
ATTORNEY GENERAL

MJJ/SLT/dd