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September 9, 2003

Mr. Mark Phillips
MICHIGAN ASSOCIATION FOR RESPONSIBLE CONTRACTING
1026 N. Washington Avenue
Lansing, MI 48906

RE: BIDDING ON PUBLIC SCHOOL CONSTRUCTION PROJECTS

Dear Mr. Phillips:

Your have asked for our legal opinion on the issue of whether a Michigan public school system, grades K through 12, is required by law to accept the lowest bid on a construction project. We have researched applicable Michigan statutes and case law, and we conclude that Michigan law does not require a public school system to accept the lowest bid on a construction project.

Revised School Code and Case Interpretations

Michigan's Revised School Code and Michigan's School Aid Act of 1979, as subsequently amended, require public school districts to solicit competitive bids for their school construction projects. Section 1267 of the Revised School Code, MCLA 380.1267, delineates the powers and duties of boards of education in selecting contractors for public school construction contracts. The statute states as follows:

- (1) Before commencing construction of a new school building, or addition to or repair or renovation of an existing school building, except repair in emergency situations, the board of a school district or board of directors of a public school academy, shall obtain competitive bids on all the material and labor required for the complete construction of a proposed new building or addition to or repair or renovation of an existing school building.
- (2) The board or board of directors shall advertise for the bids required under subsection (1) once each week for 2 successive weeks in a newspaper of general circulation in the area where the building or addition is to be constructed or where the repair or renovation of an existing building is to take place. The advertisement for bids shall do all of the following:

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- (a) Specify the date and time by which all bids must be received by the board or board of directors.
 - (b) State that the board or board of directors will not consider or accept a bid received by the board or board of directors after the date and time specified for bid submission.
 - (c) Identify the time, date, and place of a public meeting at which the board or board of directors or its designee will open and read aloud each bid received by the board or board of directors by the date and time specified in subdivision (a).
- (3) The board or board of directors shall require each bidder for a contract under this section to file with the board or board of directors security in an amount not less than 1/20 of the amount of the bid conditioned to secure the school district from loss or damage by reason of the withdrawal of the bid or by the failure of the bidder to enter a contract for performance, if the bid is accepted by the board or board of directors.
- (4) The board or board of directors shall not open, consider, or accept a bid that the board or board of directors receives after the date and time specified for bid submission in the advertisement for bids described in subsection (2).
- (5) At a public meeting identified in the advertisement for bids described in subsection (2), the board or board of directors or its designee shall open and read aloud each bid that the board or board of directors received at or before the time and date for bid submission specified in the advertisement for bids. The board or board of directors may reject any or all bids, and if all bids are rejected, shall readvertise in the manner required by this section.
- (6) This section does not apply to buildings, renovations, or repairs costing less than \$12,500.00 or to repair work normally performed by school district employees. The maximum amount specified in this subsection shall be adjusted each year by multiplying the amount for the immediately preceding year by the percentage by which the average consumer price index for all items for the 12 months ending August 31 of the year in which the adjustment is made differs from that index's average for the 12 months ending on August 31 of the immediately preceding year and adding that product to the maximum amount that applied in the immediately preceding year, rounding to the nearest whole dollar.

It is noteworthy that nothing in this statutory language requires school districts to let construction projects to the lowest bidders. Indeed, the language contained in subsection 5 (“[t]he board or board of directors may reject any or all bids”) indicates that school districts are not obligated to accept the lowest bids on construction projects. Although no Michigan court has directly addressed this question since the late 1800s, dicta from two court opinions appears

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to confirm that school districts are not obligated to accept the lowest bids. In *Thomas Electric, L.C. v Saginaw School District*, 1999 Mich App LEXIS 480, the court remarked in a footnote:

Defendant argues on appeal that its reservation of the right to "reject any and all bids, or parts thereof," along with MCL 380.1267(5); MSA 15.41267(5), which provides the authority for school boards to "reject any or all bids," allowed defendant to unilaterally reject plaintiff's bid. See *Leavy v City of Jackson*, 247 Mich 447, 450 (1920). However, plaintiff does not disagree with defendant's contention that defendant had the statutory authority to reject bids, arguing only that the statute's authority is limited by the federal and state Constitutions. Since all legislation and state action must indeed comply with the federal and state Constitutions, and since plaintiff does not contest the statutory authority of defendant to reject bids as long as such rejection does not violate equal protection, we will address only the equal protection issue appealed by plaintiff.

Thomas Electric at *6.

The court went on to state in *Thomas Electric* as follows:

Plaintiff also argues that because the purpose of MCL 380.1267; MSA 15.41267 is to "obtain school buildings at the lowest possible cost to the school district," *Hatch v Maple Valley Twp Unit School*, 310 Mich 516, 536; 17 NW2d 735 (1945), and because rejecting its bid based on its non-union status was not rationally related to that purpose, it has stated a claim on which relief may be based. However, the bid price is not necessarily the only project cost to be considered.

Thomas Electric at *12.

Similarly, in *Long Mechanical, Inc. v River Rouge School District*, 1997 Mich App LEXIS 1506, the lowest bidder on a construction project brought suit to prevent a school district from awarding a contract to a higher bidder. Although the court dismissed the case because it found that the contractor lacked standing to sue, the court stated:

Even if we were to find that plaintiff had standing, we would affirm the trial court's grant of summary disposition pursuant to MCR 2.116(C)(8) for failure to state a claim upon which relief could be granted. The pleadings fail to set forth any allegations of fraud, abuse or illegality by defendants in awarding the contract to [the higher bidding] Macomb Mechanical.

Long Mechanical at *11.

Detroit Public Schools

Section 166e of the School Aid Act of 1979, as amended, (MCLA 388.1766e) also provides guidelines by which school districts must abide when selecting contractors for construction projects:

Before entering into a contract in an amount in excess of \$15,000.00 for any materials, supplies, or equipment or a contract in an amount in excess of

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\$15,000.00 for construction of a new building, or addition to or repair or renovation of an existing building, the board of a district organized as a school district of the first class under part 6 of the revised school code, MCL 380.401 to 380.485, or any other purchasing authority within a district organized as a school district of the first class, shall obtain sealed competitive bids, and the district shall award such a contract using this competitive bid process. This section does not prohibit a district from making a public request for proposals before requesting bids and does not prohibit a district from awarding a contract based on a combination of price, quality, and service factors. A school official or member of a school board or other person who neglects or refuses to do or perform an act required by this section, or who violates or knowingly permits or consents to a violation of this section, is guilty of a misdemeanor punishable by a fine of not more than \$500.00, or imprisonment for not more than 3 months, or both.

MCLA 388.1766e.

Only school districts with at least 120,000 pupils are school districts of the first class under MCLA 380.402. Accordingly, only the Detroit Public School District is subject to MCLA 388.1766e. Again, nothing in this statute requires the school district to select the lowest bid.

Lack of Standing to Sue

Michigan courts have consistently ruled that contractors do not have standing to sue a governmental entity for failing to abide by competitive bidding statutes. The underlying policy for this is the determination of Michigan courts that competitive bidding statutes were created solely to protect taxpayers and not to protect construction bidders. The Michigan Supreme Court has stated:

The purpose [of statutes pertaining to the letting of contracts for the construction – of public works] is to invite competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in awarding municipal contracts, to secure the best work at the lowest price practicable, and they are enacted for the benefit of property holders and taxpayers, and not the benefit of or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest.

Lasky v City of Bad Axe, 352 Mich 272, 276 (1958). See also *L. Loyer Construction Company v City of Novi*, 179 Mich App 781 (1988), (quoting *Lasky* at 276. Accordingly, “disappointed bidders may not maintain an action because of a defendant’s refusal to accept the plaintiff’s bid.”); *G.P. Graham Construction Company v Chesaning Union Schools*, 2002 Mich App LEXIS 695 at **4-5, citing *Talbot Paving Co. v City of Detroit*, 109 Mich 657, 661-662 (1896) and *Lasky* at 276. This finding by the courts remains consistent regardless of whether a contractor seeks compensatory damages or an injunction. *Long Mechanical, Inc. v River Rouge School District*, 1997 Mich App LEXIS 1506 at 6-10, citing *Malan Construction Corp. v Board of County Road Commr’s*, 187 F.Supp. 937 (E.D.Mich. 1960), *City Communications, Inc. v City of Detroit*, 650 F.Supp. 1570 (E.D.Mich. 1987), and *Talbot* at 662.

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While disappointed bidders residing within a municipality have occasionally cloaked their legal actions under the guise of a taxpayer lawsuit, it is difficult for such taxpayers to obtain standing to sue. "Under Michigan law, a taxpayer has standing to sue if he can show a 'threat that he will sustain substantial injury or suffer loss or damage as a taxpayer, through increased taxation and the consequences thereof.'" *Michigan Paytel Joint Venture v City of Detroit*, 287 F.3d 527, 542 (6th Cir. 2002), quoting *Menendez v City of Detroit*, 337 Mich 476 (1953). "The plaintiff must allege with particularity how the alleged illegal act will cause injury through increased taxation, and allegations that are merely "general, conclusory and speculative" will not suffice. *Michigan Paytel* at 542, quoting *Killeen v Wayne County Rd. Comm'n*, 137 Mich App 178 (1984). The court in *Michigan Paytel*, therefore, held that a contractor did not have standing as a taxpayer where it merely established that the public entity incurred increased costs, without demonstrating that those increased costs would be passed on to the contractor in the form of increased taxes. *Michigan Paytel* at 542. This holding also poses a particular problem in the context of competitive bidding on school construction projects. Because the bond measure for a particular school construction project is usually passed before the bidding occurs, it is difficult to argue that violations of competitive bidding will result in a higher tax burden being placed on local residents.

Finally, it is important to note that a contractor cannot claim to be harmed by violations of competitive bidding requirements where the contractor's bid was rejected because it did not comply with the bid specifications. *Michigan Bell Telephone Company v Public Service Commission*, 214 Mich App 1, 4-5 (1995). This is true even where competitive bidding requirements were violated.

We trust that this opinion will be of assistance to the Michigan Association for Responsible Contracting.

Please feel free to contact me with any questions or concerns relative to this matter.

Very truly yours,

KERR, RUSSELL AND WEBER, PLC



Thomas R. Williams

TRW/kll