

**LETTER OPINION
2002-L-42**

July 12, 2002

Honorable Matthew M. Klein
State Representative
1815 7th Street NW
Minot, ND 58703-1314

Dear Representative Klein:

Thank you for your letter asking about a school district entering into a guaranteed energy savings contract under N.D.C.C. §§ 48-05-09 through 48-05-13.¹ You ask whether the school district violated the above sections of law by stating in its request for proposals (RFP) for the energy saving contract that only contractors with five years' experience in energy management could submit proposals and that there must be seamless integration with the schools' existing system. You allege these provisions make the RFP "proprietary" and exclusive to one contractor because only one contractor in the area had the requisite experience and equipment.

Chapters 48-01.1 and 48-02, N.D.C.C., provide criteria for construction, repair, and alteration contracts for public buildings. They include requirements for advertising (N.D.C.C. § 48-01.1-03), plans and specifications (N.D.C.C. § 48-01.1-04), opening bids and award of contracts (N.D.C.C. §§ 48-01.1-07; 48-02-10.2), and limiting materials to certain brands (N.D.C.C. § 48-02-11).

A well-known commentator on public contracting has stated:

The question whether a particular contract requires competitive bidding as a condition precedent to awarding the same depends upon the construction of the particular statute, ordinance or charter; in the absence of some legal requirement contracts need not be let by competitive bidding.

13 McQuillin, The Law of Municipal Corporations § 37.106 (3d ed. 1997).

¹ This opinion assumes that the work under the contract falls within the definition of "energy conservation measure" in N.D.C.C. § 48-05-09(1).

Section 48-05-12, N.D.C.C., specifically excludes the application of N.D.C.C. chs. 48-01.1 and 48-02, as well as N.D.C.C. § 43-19.1-28 (professional preparation of plans and specifications for public projects), to guaranteed energy savings contracts.² Also, N.D.C.C. § 48-05-09(5)(f) authorizes the school board to include in its request for proposals “[t]he criteria for awarding the contract.” Because the standard provisions for public bidding and award of construction-related contracts for public building improvements do not apply to guaranteed energy savings contracts, and because similar limitations are not contained elsewhere that apply to those contracts, it is my opinion that the provisions you describe in the RFP are not prohibited by N.D.C.C. §§ 48-05-09 through 48-05-13.

You also ask if the school board’s award of the guaranteed energy savings contract was erroneous under the statute because the architect it hired to evaluate the report recommended that the school board review with the provider certain elements not contained in the report from the provider. The response to the RFP (referred to as a report in N.D.C.C. § 48-05-10) in question used the term “capital avoidance” to describe a large portion of the anticipated savings from the proposed improvements.

Section 48-05-10, N.D.C.C., requires a governmental unit to solicit proposals in the form of reports on energy savings to be derived from any energy conservation measure. The governmental unit is to evaluate the reports, and if the governmental unit does not have an architect or engineer on its staff, it is directed to hire one for that purpose.

The evaluation from the architect in your scenario stated the payback to the school district for utility savings and operational expenditures was relatively good. He also said the school board needed to review with the provider the capital avoidance and labor/material items of operational expenditures to determine realistic expenses attributable to recapturing the school district’s investment.

Section 48-05-11, N.D.C.C., authorizes a governmental unit to award guaranteed energy savings contracts to a provider “if it finds that the amount it would spend on the energy conservation measures recommended in the report is not likely to exceed the amount to be saved in energy and operation costs over a period not exceeding ten years. . . .” The contract “must include a written guarantee of the qualified provider that the energy and operating cost savings will meet or exceed the costs of the system.” The qualified provider must also provide a bond for the faithful performance of the contract.

² It is my opinion that N.D.C.C. § 15.1-09-34 also does not apply to energy savings contracts governed by N.D.C.C. §§ 48-05-09 through 48-05-13, because it appears from the legislative history that the legislature intended to exclude energy savings contracts from being subject to bid and awarded under a competitive bidding statute. Hearing on H.B. 1266 Before the House Comm. on Political Subdivisions 1991 N.D. Leg. (Feb. 7) (Statement of Rep. Rod St. Aubyn, sponsor of the bill).

The authority of the governmental unit to contract is based on its findings of fact from its review of the report from the qualified provider. After receiving the evaluation, the governmental unit has discretion to make its own findings. The terms of the statute are designed to protect the public with the requirements of a written guarantee from the qualified provider supported by a bond that covers all work under the contract, including the written guarantee of the provider that energy cost savings will meet or exceed the costs of the system installed. The statute does not regulate the quality of the information the governing board receives, nor how the board interprets the information. These are factual determinations for the board to make. It is the policy of this office not to make factual determinations in legal opinions. 2002 N.D. Op. Att'y Gen. L-36, fn. 6.

It is therefore my opinion that the school board did not violate a specific provision of law by awarding the guaranteed energy savings contract under the circumstances you relate. The manner and means of how a governmental entity exercises its statutory authority where not prescribed by the Legislature is not subject to the rule of strict construction, but is left to the discretion of the municipal authorities. Haugland v. City of Bismarck, 429 N.W.2d 449, 453 (N.D. 1988). When decisions of local governing bodies are challenged by appeal (N.D.C.C. §28-34-01), the court determines only whether the decision was arbitrary, capricious, or unreasonable. It does not substitute its judgment for that of the local governing body. Pic v. City of Grafton, 586 N.W.2d 159, 162 (N.D. 1998).

In supplementary correspondence, you asked if the contract entered into by the school district and the qualified provider complies with N.D.C.C. § 48-05-11 where it stipulates in a schedule the amount of utility savings and operational savings to be obtained, but does not call for a determination of actual savings achieved over the term of the contract.

A guaranteed energy savings contract is "a contract for energy conservation measures which provides that energy cost savings are guaranteed to the extent necessary to make payments for the recommended energy conservation measures." N.D.C.C. § 48-05-09(3). The contract "must include a written guarantee of the qualified provider that the energy and operating cost savings will meet or exceed the costs of the system." N.D.C.C. § 48-05-11. That section also requires a bond be provided by the qualified provider for the faithful performance of the guaranteed energy savings contract.

The copy of the contract you provided only lists "stipulated" amounts of money for each of ten years as the guaranteed savings, but does not provide a method for calculating the actual savings or comparing actual savings to amounts paid under the contract. Though the contract form you sent frequently refers to amounts calculated and adjusted, no actual calculation or adjustment methods are provided. Also, the contract neglects to provide a process for the qualified provider to pay the school board the amount by which actual energy savings are less than the cost of the improvements installed by the qualified provider for any of the ten years of the term of the contract. No mention of the provision of

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a bond, nor its term or amount, is included in the contract you sent. All the contract provides for is installation of the improvements, payment in full by the school board within about one year of the commencement of the contract, and a ten-year term of stipulated savings. No calculations on actual savings nor their relationship to guaranteed savings and payment of shortfalls are included. Sections 48-05-09(3) and 48-05-11, N.D.C.C., make it clear that there is to be a calculable specific relationship between payments for the improvements and actual energy and operational savings derived from the installation of those improvements.

In consideration of the above-noted omissions in the contract form you provided, it is my opinion that the form is not in compliance with the intent of N.D.C.C. §§ 48-05-09 through 48-05-13, which is that the public entity pay no more for the energy conservation measures than the amount of energy and operational cost savings actually received over the full term of the contract.

Sincerely,

Wayne Stenehjem
Attorney General

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