Washington School Construction Update

Potential Change in Requirements for Procuring Some Construction-Related Services

On April 21, 2020, Washington’s Attorney General issued a nonbinding legal opinion (Opinion) that addresses Washington school districts’ procurement of certain construction-related services, including construction management, value engineering, constructability, and building commissioning services. This update summarizes the Opinion and our initial observations regarding how the Opinion, if followed, will require significant changes from historical procurement practices.

The Attorney General’s Opinion addressed two questions:

1. May a school district enter into an interlocal or interagency agreement with an educational service district for construction management, value engineering, constructability, or building commissioning services without seeking formal, competitive bids?

2. May a school district enter into an interlocal or interagency agreement with an educational service district for “other public works” without seeking competitive bids?

The Attorney General answered the first question by concluding that construction management, value engineering, constructability, and building commissioning services should be subject to the same bidding rules as traditional construction under RCW 28A.335.190 (the primary school district bidding statute, which applies to the procurement of “any furniture, supplies, equipment, building, improvements, or repairs, or other work or purchases”). The Attorney General answered the second question by concluding that school districts may not enter into interlocal or interagency agreements with educational service districts for “other public works” without seeking competitive bids.

In reaching these conclusions, the Attorney General determined that the reference to “other work” in RCW 28A.335.190 refers to both professional services and traditional construction. As a result, the Opinion concluded that procurement of professional services for construction management, value engineering, constructability reviews, and building commissioning is subject to the same competitive bidding requirements established in RCW 28A.335.190 for traditional construction. Therefore, under the Opinion, a school district may not enter into an interlocal or interagency agreement with an educational service district for these services without seeking competitive bids, unless the contract is estimated to cost less than $100,000. See RCW 28A.335.190(4). This implies that school districts would also need to hard bid these services when they are expected to cost more than $100,000, or to use the small works process when the expected cost is below $350,000. While the $100,000 price threshold may not affect many value engineering, constructability, and commissioning contracts (because most are below this limit), following this Opinion would significantly affect the procurement of construction management services (which are generally above the price...
The Attorney General’s Opinion is likely to be controversial among many school districts because it conflates the long-recognized distinction between construction work and professional services. This fundamental distinction has been acknowledged by dozens of courts and legal commentators, and it is recognized by many other provisions of Washington law (including specific statutes relating to the procurement of professional services by state agencies, as well as statutes that govern contractor and construction manager licensing requirements and lien rights).

If followed, the Opinion would require the selection of consultants on the basis of price alone, with almost no consideration of qualifications. This approach is inconsistent with widely-accepted procurement practices in Washington and across the United States, and is likely to have unintended consequences, if adopted. As one major commentator has recognized, “[c]ontracts requiring special skills, expertise and services of a particular person or firm obviously are not conducive to formation on the basis of competitive sealed bidding limited to price alone, and are appropriate for negotiation.” 1 Bruner & O’Connor Construction Law § 2:38.

The Attorney General’s Opinion represents a significant departure from the current practices of Washington school districts. While the Opinion does not carry the binding force of law and, in our view, is erroneous, it nonetheless represents important guidance that school districts should consider and auditors may take into account in reviewing construction management, value engineering, constructability, and commissioning contracts going forward. We are communicating our concerns to the Attorney General, but, at least for now, the Opinion stands as the Attorney General’s position.

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