

# **AGENDA**

**Board of Trustees  
School District Six and CFHS District  
Trustee Work Session  
Monday, October 28, 2019  
6:00 P.M.  
School District Six Board Room**

- 1. Call to Order**
- 2. Approval of Agenda**
- 3. Public Participation**
  
- 4. Action / Discussion Items**
  - a. General Obligation Bond issuance timeline presentation – DA Davidson
  - b. Presentation regarding options for construction contracts and construction delivery method – LPW Architecture:
    - Timeline estimate – Glacier Gateway and Ruder building projects and impact to students
    - Construction management contract
    - General contractor construction management contract
    - Design-build contract
  - c. Consideration of Alternative Project Delivery Contract. – Pgs. 1-6
  - d. Consideration of professional architecture and engineering service contract for K-8 Facility Bond Project – L’Heureux Page Werner (LPW) Architecture
  - e. K-8 Facility Bond Project Committee composition
  
- 5. Miscellaneous and Future Planning**
  - Owners Representative – RFQ – due November 1, 2019
  - November 4, 2019, 3:30 p.m. – Policy Committee Meeting
  - November 4, 2019, 5:30 p.m. – K-8 Facility Bond Project Committee Meeting
  - November 5, 2019, 4:00 p.m. – Health Insurance Committee Meeting
  - November 11, 2019 – 6:00 p.m. – Regular Board Meeting

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**KALEVA LAW OFFICES**

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**TO:** COLUMBIA FALLS SCHOOL DISTRICT  
**FROM:** KALEVA LAW OFFICES  
**SUBJECT:** ALTERNATIVES FOR CONSTRUCTION CONTRACTS  
**DATE:** 10/11/2019

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Congratulations on your successful bond campaign. It is a significant accomplishment. The purpose of this memo is to discuss the process moving forward as the design and construction phase of the project proceed.

We understand that the District has retained LPW Architects to provide the pre-bond as well as design and construction phase architecture services.

Options for Construction Contracts

The District must also determine how to proceed with retaining someone or entity for the actual construction services. Montana law requires that any contract for the building, furnishing, repairing, or other work for the benefit of a school district or purchasing of supplies and most services exceeding \$80,000 be let to the "lowest responsible bidder after advertisement for bids." MCA § 20-9-204(3). This means that when a school district needs to contract for a project that will exceed \$80,000 for most types of contracts, including construction, it must seek bids and award the contract to the lowest responsible bidder. A school district also cannot avoid the bidding requirements by dividing the work for the project into separate contracts in order to circumvent the \$80,000 bidding limit. MCA § 20-9-205.

There are certain exceptions for contracts for services from specified professionals in excess of \$80,000. For instance, retaining an attorney for services in excess of \$80,000 does not require a bidding process where the contract is given to the lowest responsible bidder. There are also exceptions to the bidding requirement for other contracts in excess of the \$80,000 limitation. One of these exceptions is a cooperative purchasing contract for supplies with one or more other school districts. MCA § 20-9-204(4). The relevant exception to the bidding requirement in MCA § 20-9-204(3)(b) is a contract for construction that meets the requirements of Title 18, Chapter 2, Part 5 of the Montana Code which is referred to as an alternative project delivery contract.

An alternative project delivery contract is a "construction management contract, a general contractor construction management contract, or a design-build contract." MCA § 18-2-501(1). Simply calling a contract by one of these names is insufficient to avoid the bidding requirements of MCA § 20-9-204. Rather, the contract must meet the requirements for each type of contract classified as an alternative project delivery contract as well as meet the requirements for all alternative project delivery contracts. For purposes of the alternative

project delivery contracts, "project" is "any construction or any of the land, a building, or another improvement that is suitable for use as a state or local governmental facility." MCA § 18-2-501(7). Although construction is not defined in the alternative project delivery provisions, the general definition of "construction" under Title 18 is "the construction, alteration, repair, maintenance, and remodeling of a building and the equipping and furnishing of a building during construction, alteration, repair, maintenance, and remodeling." MCA § 18-2-101(2). Under general rules of statutory construction, the definition of a word in one part of the code applies to the use of the same word in the remainder of the code unless a contrary intention "plainly" appears. MCA § 1-2-107.

Alternative project delivery contracts fall into three categories. The first is a construction management contract, which is "a contract in which the contractor acts as the public owner's construction manager and provides leadership and administration for the project, from planning and design, in cooperation with the designers and the project owners, to project startup and construction completion." MCA § 18-2-501(2). In short, the contractor acts only as a management of the construction and does not perform any work. All construction work is contracted to sub-contractors who bid for the various components of the project. The second category, and most often used in schools is a general contractor construction management contract, which is "a contract in which the general contractor, in addition to providing the preconstruction, budgeting, and scheduling services, procures necessary construction services, equipment, supplies, and materials through competitive bidding contracts with subcontractors and suppliers to construct the project." MCA § 18-2-501(5). This method has the contractor serving as both a construction manager and as a general contractor. In the general contractor role, the selected entity bids on components of the work. The third category is a design-build contract, which is "a contract in which the designer-builder assumes the responsibility and the risk for architectural or engineering design and construction delivery under a single contract with the owner." MCA § 18-2-501(4). The construction contract is actually with the architect in this type of contract. For purposes of these contracts, a contractor is anyone having a contract with a public entity, including a school district. MCA §§ 18-2-501(3), 18-4-123(5).

Put simply, a school district has two options with respect to contracts for construction services -- traditional bidding where the contract must be awarded to the lowest responsible bidder or an alternate project delivery contract. Alternate project delivery contracts are not appropriate in general for small scale projects. However, coordinated construction projects totaling millions of dollars may, if the project meets the requirements, benefit from an alternate project delivery method.

Advantages of an alternate project delivery contract is that selection of the contractor is not limited to price alone. Rather, the statute specifically allows for the consideration of other criteria. Alternate project delivery contracts can result in cost-savings and create a more collaborative approach between the district, contractor, and architect. One of the reasons for lowering costs is that the various players collaborate from an early time to resolve issues through construction and costs are better estimated. Although alternate project delivery contracts are an "alternative" to traditional bidding, the main disadvantage is the selection process itself. Unlike traditional bidding, the alternate project delivery method requires a two-step selection process through both a Request for Qualifications and a

Request for Production. The selection process can last around one month or more. Under all three types of contracts, the actual construction work is sub-contracted out to the lowest responsible bidder. Thus, while the contractor itself is not selected as the lowest responsible bidder, the actual construction work is performed by the lowest responsible bidder. Another disadvantage is that there is more complex management required. Montana law specifically requires that a district either have or contract with individuals who have the capacity to manage the project. This requirement mandates that the district have on staff individuals who are knowledgeable to perform the day-to-day management responsibilities or to retain an owner's representative to perform day-to-day management. These services add to the cost of the project.

Although traditional bidding involves a simpler process in terms of procuring the services, the selection of the contractor is primarily based upon price. While responsiveness and responsibility are factors to be considered, the presumption is that the lowest cost bidder will be selected. Traditional bidding separates the process into clear components – design as one phase involving the architect and construction as a different phase involving the contractor. Because these two phases are kept distinct, there is little collaboration. Costs can increase with traditional bidding if a contractor determines that it cannot build the design by the architect once construction begins. For this reason, contractors and architects may be adversarial to one another in a traditional bidding process.

There are also particular advantages and disadvantages to the various types of alternate project delivery contracts. The general contractor construction manager (GCCM) contract is the type used most frequently for school projects. It requires a separate relationship with the architect, which increases the contracts for the project. However, the primary advantage is the preconstruction process which has the contractor (acting as construction manager) work with the architect to vet the designs prior to construction beginning. It is not uncommon for architects to design spaces with a focus on aesthetics. During the preconstruction process, the construction manager can review the designs for constructability to ensure that the District obtains the expected function if costs prohibit specific aesthetic features. This is one of the key collaborations that occur in the GCCM model. During construction, the type also allows the contractor to “self-perform” work. Some general contractors will bid on all components offered for the project; some only bid on specific pieces where they have expertise or there is a lack of subcontractors who can perform the work. The benefit of this model is that the District is generally able to get the best price for each component of the work and is not negatively impacted if there is a lack of subcontractors bidding for a certain component. A benefit of a construction management contract is that the contractor only serves a manager and has no interest in actually performing work. However, if there is a difficulty finding subcontractors, this may result in increased costs or delays for the district. A benefit with a design-build contract is that there is only one contract for the project with the architect and there is collaboration between the architect and contractor pre-construction to help with cost-savings. However, this can also create a situation where the contractor's loyalty is to the architect, and not to the district.

#### Process for Alternate Project Delivery Contracts

If the District wishes to use an alternative project delivery contract (i.e., one of the contracts specified above), it must abide by the following mandatory requirements:

1. The District must demonstrate it has or will have the knowledgeable staff or consultants who have the capacity to manage the alternative project delivery contract chosen;
2. The District must clearly describe the manner in which it will conduct the award of the alternative project delivery contract and its process for selecting subcontractors and suppliers.

MCA § 18-2-502(1). In addition, prior to awarding the contract, the District needs to make a detailed written finding that project will not encourage favoritism or bias in awarding the contract or substantially diminish competition for the contract. MCA § 18-2-502(3). The detailed written finding by the District prior to the award of the contract must also describe how the project meets at least two out of the following three conditions:

1. A description of how the project has significant schedule ramifications and how using the alternative project delivery contract is necessary to meet critical deadlines by shortening the duration of construction. When making this finding, the District may consider the following factors, but this is not an exhaustive list:
  - a. Operational and financial data that show significant savings or increased opportunities for generating revenue as a result of early project completion;
  - b. Demonstrable public benefits that result from less time for construction; or
  - c. Less or a shorter duration of disruption to the public facility.
2. A description of how using an alternative project delivery contract, the design process will contribute to significant cost savings. The District must justify an alternative project delivery contract through significant cost savings derived from, but are not limited to, value engineering, building systems analysis, life cycle analysis, or construction planning; and/or
3. A description of how the project presents significant technical complexities that necessitates the use of an alternative delivery project contract.

MCA § 18-2-502(2).

From a practical standpoint, these written findings would probably be best made through a resolution by the district's Board that meets these requirements:

- Identification of the type of alternative project delivery contract chosen by the Board (i.e., construction management, general contractor construction manager, or design-build);

- An explanation of how it has or will have the knowledgeable staff or consultants who have the capacity to manage the alternative project delivery contract chosen;
- An explanation of the award process for the alternative project delivery contract and its process for selecting subcontractors and suppliers.
- Statements that the district and contractor chosen will not encourage favoritism or bias in awarding the contract or substantially diminish competition for the contract.
- An explanation and information regarding how the district will satisfy two out of the three criteria explained above – required because of (1) critical deadlines, (2) significant cost savings, and/or (3) significant technical complexities.

Based upon our knowledge of the District's project, the requirements specified above can be satisfied. Our office can prepare this resolution for consideration of the Board. In the resolution, there would be an identification the individuals with knowledge to manage the project as the architect (LPW Architects), our law office for the legal aspects, and either internal staff familiar with managing large-scale construction projects or that the District will be procuring the services of an Owner's Representative. We do recommend having legal counsel assist with development and/or review of contracts and advising on the legal components of the project. The District can also retain the services of an Owner's Representative. Owner's representation services can range roughly between one and three percent of the bond amount. While costly, services from an experience representative can be beneficial to the district where its staff lack knowledge about day-to-day construction issues or where it is not practical to use staff to manage the project because of the time burden and other job duties. Experienced owner's representatives are able to resolve disputes as well as offer suggestions and recommendations that can result in further cost-savings. As part of the same resolution, we can include language to meet the other requirements, including the cost-savings.

After making this writing finding or resolution, the District must then publish a request for qualifications (RFQ) for the award of the contract to the specific type of contractor associated with the alternative project delivery contract chosen. MCA § 18-2-503(1)(a). This request for qualifications must specify the qualification criteria of the contractor required for the award of the contract. At a minimum for the request for qualifications, it should be stated that architectural services, if any are required, must be performed by an architect and engineering services, if any are required, must be performed by a professional engineer. MCA § 18-2-503(3). The request for qualifications (explaining the qualifications required) must be published in a newspaper that will give notice to the largest number of people of the district as determined by the trustees and must be made once each week for 2 consecutive weeks (the second publication must be made not less than 5 days or more than 12 days before the qualifications are considered). MCA §§ 18-2-501(8), 20-2-904(3)(b). Based upon the language of the statute, the RFQ contains only minimum criteria that must be met and is not scored but rather reviewed to determine if the minimum criteria is met.

After the qualifications have been submitted by interested respondents, the District must then send a request for proposal (RFP) to each respondent that meets the qualification

criteria detailed in its request for qualifications. MCA § 18-2-503(1)(b). The request for proposal sent to each qualifying responder must:

1. Clearly describe the project;
2. The district's needs with respect to the project;
3. The requirements for submitting a proposal;
4. An explanation of the criteria that will be used to evaluate the proposals; and
5. An explanation of any other factors, including any weighting, that will be used to award the alternative project delivery contract.

*Id.*

When it is finally ready to award the contract based on a proposal submitted by a qualified respondent, the district's decision must, at a minimum, be based upon the qualified respondent's:

- History and experience with projects similar to the project under consideration;
- Financial health;
- Staff or workforce that is proposed to be committed to the project;
- Approach to the project; and
- Project costs.

MCA § 18-2-503(2). The District also must consider any additional criteria or factors that reflect the project's characteristics, complexities, or goals. *Id.* Unlike the RFQ, the criteria stated in the RFP is scored based upon objective scoring measures. School districts may include an interview component where the top scoring firms after the RFPs are scored are interviewed. RFQ review, RFP review/scoring, and/or interviews are done by either the entire board or a committee appointed by the District. The Board of Trustees, however, must vote on the selection of the contractor at a public meeting.

Following approval, the District must state in writing the reasons for selecting the contractor that was awarded the contract. MCA § 18-2-503(4). This documentation must be provided to all applicants and to anyone else, upon request. *Id.* This can be accomplished by another resolution or letter on behalf of the District.

Provided all unsuccessful applicants are treated equitably, the District may (but is not required to) compensate unsuccessful applicants for costs incurred in developing and submitting a proposal. MCA § 18-2-503(5).