

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL August 25, 2006	No. I06-002 (R06-022) Re: Application of A.R.S. § 38-503(C) to Sales of Goods or Services by School District Employees to Their Employing School Districts
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To: Tom Pickrell
General Counsel, Mesa Public Schools

Pursuant to Arizona Revised Statutes (“A.R.S.”) § 15-253, you submitted for review an opinion prepared for the Superintendent of Mesa Public Schools. The opinion you submitted for review concludes that A.R.S. § 38-503(C) requires school districts to follow the School District Procurement Code’s public competitive bidding procedures and not the Auditor General’s Guidelines for all transactions between school district employees and their employing school districts regardless of the dollar amount involved and regardless of whether the funds at issue are district funds, students activities monies or extracurricular activities and character education program contributions. This Office concurs with your opinion regarding the application of A.R.S. § 38-503(C) to sales of goods or services by school district employees to their school district or student

organization within the district.¹ We issue this opinion to provide uniform guidance on this question to all Arizona school districts.

Questions Presented

1. Is A.R.S. § 38-503(C)'s requirement for "public competitive bidding" met if, due to the small amount of the transaction, a sale of goods or services to a school district by a district employee complies with the Auditor General's *Guidelines for Competitive Purchasing Below the Dollar Limits Required for Sealed Bids* (the "Guidelines")?
2. Does A.R.S. § 38-503(C) require public competitive bidding for sales of goods or services to a school district by a district employee if the goods or services are purchased with student activities monies or extracurricular activities and character education program contributions?

Summary Answer

1. To comply with A.R.S. § 38-503(C), procurements between school districts and their employees must follow the School District Procurement Code's competitive bidding procedures regardless of a procurement's total cost.
2. Arizona Revised Statutes § 38-503(C) requires public competitive bidding whenever a school district purchases goods or services from district employees, regardless of whether payment is made with

¹ We decline to review that portion of your opinion regarding the application of A.R.S. § 38-503(C) to limited liability companies in which a school district employee owns a membership interest.

student activities monies or extracurricular activities and character education program contributions.

Background

The Arizona Legislature promulgated A.R.S. § 38-503(C) in 1968² as part of a body of law meant to protect the public from self-dealing by public officers and employees. Ariz. Att’y Gen. Op. I99-020 (citing *Maucher v. City of Eloy*, 145 Ariz. 335, 338, 701 P.2d 593, 596 (App. 1985)). The statute provides:

no public officer or employee of a public agency shall supply to such public agency any equipment, material, supplies or services, unless pursuant to an award or contract let after public competitive bidding

A.R.S. § 38-503(C).³ Certain exemptions exist for school district governing boards and other political subdivisions allowing the bodies to purchase supplies, materials, and equipment from their members if the costs fall below set thresholds. A.R.S. § 38-503(C)(1) and (2). No similar exemption exists, however, for purchases made from public agency employees, including school district employees.⁴

Public competitive bidding is defined as “the method of purchasing defined in title 41, chapter 4, article 3, **or procedures substantially equivalent** to such method of purchasing, or as provided by local charter or ordinance.” A.R.S. § 38-502(7) (emphasis

² 1968 Ariz. Sess. Laws ch. 88 (codified as A.R.S. § 38-501 through 38-511).

³ This provision is applicable to school district employees. A.R.S. § 38-502(2) and (5).

⁴ School district employees also must comply with other requirements in A.R.S. § 38-503, which require public employees to disclose any substantial interest that they, or a relative, have in any contract, sale, purchase or service to the employing public agency or decision of the public agency, and to refrain from participating in any manner in such contract, sale, purchase or service or decision. A.R.S. § 38-503(A) and (B). See, Ariz. Att’y Gen. Op. 72-25.

added). Opinions issued by this Office have described public competitive bidding as procedures substantially equivalent to those set forth in A.R.S. § 41-730,⁵ which required sealed competitive bids for purchases exceeding \$5,000. Ariz. Att’y Gen. Ops. I79-308; I79-133; I79-067;⁶ *see also Maucher*, 145 Ariz. at 337, 701 P.2d at 595. The Legislature repealed A.R.S. § 41-730 in 1984 and replaced it with the Arizona Procurement Code (1984 Ariz. Sess. Laws ch. 251 [codified as A.R.S. Title 41, ch. 23]). Ariz. Att’y Gen. Op. I99-020 n.3. Arizona Revised Statutes § 38-502(7) still references title 41, chapter 4, article 3, despite the repeal of A.R.S. § 41-730.

Analysis

1. Public Competitive Bidding Is Required For All School District Procurements From District Employees.

School districts adhere to a procurement process delineated by the Board of Education (“Board”). The Board is required by statute to adopt rules prescribing procurement practices for school districts that are consistent with the procurement practices set forth in the Arizona Procurement Code, title 41, chapter 23, and specifying the total cost of district procurements that are subject to invitations for bids, requests for proposals, and requests for clarification. A.R.S. § 15-213(A)(1). These rules are promulgated in the Arizona Administrative Code (“A.A.C.”), R7-2-1001 through R7-2-1195, and constitute the School District Procurement Code (the “Code”).

⁵ Arizona Revised Statutes § 41-730 stated in part, “All purchases or supplies, materials, equipment, risk management services, insurance and contractual services made by the section of purchasing having an estimated cost in excess of five thousand dollars per transaction shall be based on sealed competitive bids . . .” A.R.S. § 41-730 (1972).

⁶ The Opinions also referred to the Board of Education’s public competitive bidding rule, Arizona Administrative Code (“A.A.C.”) R7-2-701(1978). Ariz. Att’y Gen. Ops. I79-308; I79-133; I79-067. Like A.R.S. § 41-730, the rule had a sealed bid threshold of \$5,000 for school district purchases of supplies, materials, equipment and risk management services. A.A.C. R7-2-701 (December 4, 1978, Supp. 78-6).

The Code applies to procurements involving total costs that exceed the competitive sealed bid threshold and requires school districts to select a vendor from among sealed bids or proposals submitted after public notice of invitations for bids or proposals. A.A.C. R7-2-1002(A). The Board annually determines the competitive sealed bid threshold.⁷ See A.A.C. R7-2-1002(A). Procurements with total costs that are less than the competitive sealed bid threshold fall outside the Code, and are governed by guidelines adopted by the Auditor General pursuant to statutory authority. *Guidelines for Competitive Purchasing Below the Dollar Limits Required for Sealed Bids* (the “Guidelines”). The Guidelines require districts to obtain written price quotes for procurements between \$15,000 and the sealed bid threshold and oral price quotes for procurements between \$5,000 and \$15,000. No formal process exists for procurements below \$5,000. Uniform System of Financial Records (“UFSR”) at VI-G-8.

This Office has consistently taken the position that A.R.S. § 38-503(C) requires public competitive bidding regardless of the amount of a transaction when school districts wish to do business with their employees. See Ariz. Att’y Gen. Ops. I87-035; I79-308; I79-177; I79-133; and I79-067. Although these Opinions address the issue in the context of school district governing board members providing goods or services to school districts, the analysis also applies to school district employees.⁸

⁷ For fiscal year 2005-2006, the sealed bid threshold was \$33,689. USFR Memorandum No. 213 (June 20, 2005).

⁸ Except for Arizona Attorney General Opinion I87-035, the opinions cited interpret A.R.S. § 38-503(C) as it existed prior to the adoption of amendments exempting certain procurements between district governing boards and their board members. See 1980 Ariz. Sess. Laws ch. 170, § 3; 1986 Ariz. Sess. Laws ch. 17, § 3. Arizona Attorney General Opinion I87-035 discussed procurements involving services, which are still not exempt under A.R.S. § 38-503(C). Therefore, the analysis in the cited opinions regarding board members applies to district employees as well.

The conclusion that school district governing boards must follow public competitive bidding procedures when procuring goods or services from employees is bolstered by the fact that in 1980, the Legislature provided a limited exemption for school district governing board members from the public competitive bidding requirement but did not provide a corresponding exemption for school district employees. A.R.S. § 38-503(C)(1)⁹ Moreover, the Legislature historically has applied a higher standard to school district employees than it has to school district governing board members where district contracts are concerned. The statute preceding and subsequently replaced by the current conflict of interest laws prohibited school district employees from having any direct or indirect interest in school district contracts but made allowances for school district governing board members. A.R.S. § 15-205(A)(1960) (repealed by 1968 Ariz. Sess. Laws ch. 88, § 2).¹⁰

If the Legislature had intended school districts to follow a process other than or in addition to public competitive bidding when procuring goods or services from school district employees, it would have provided a statutory exemption for employees as it did for governing board members. When construing a statute, one presumes that “what the legislature means it will say.” *Padilla v. Indus. Comm’n*, 113 Ariz. 104, 106, 546 P.2d

⁹ Arizona Revised Statutes § 38-503(C)(1) states that “[a] school district governing board may purchase, as provided in sections 15-213 and 15-323, supplies, materials and equipment from a school board member.” Arizona Revised Statutes § 15-323(B) limits purchases from governing board members to \$300 per transaction or \$1,000 total per twelve-month period provided that the governing board has adopted a policy authorizing such purchases within the preceding twelve months. Arizona Revised Statutes § 15-323(C) eliminates price limits for school districts with less than 3,000 students, provided that the governing board follows certain requirements.

¹⁰ Arizona Revised Statutes § 15-205(A) stated, “No school officer, teacher or employee of a school district shall be interested directly or indirectly in any contract or in any sale or purchase made by the school district. Approval by the county school superintendent and by a unanimous vote of the board shall be required when a school board member is interested directly or indirectly in any contract or sale or purchase made by such school district.” A.R.S. § 15-205(A) (1960) (repealed by 1968 Ariz. Sess. Laws ch. 88, § 2).

1135, 1137 (1976); *see also Banks v. Arizona State Bd. of Pardons & Paroles*, 129 Ariz. 199, 203, 629 P.2d 1035, 1039 (App. 1981) (“Where the legislature has specifically used a term in certain places within a statute and excluded it in another place, courts will not read that term into the excluded section”).

For school districts, public competitive bidding means that process prescribed by the School District Procurement Code. The Code requires public notice of invitations for bids and proposals and sealed bids or proposals for procurements that exceed the sealed bid threshold. The Code’s competitive bidding process is substantially equivalent to repealed statute A.R.S. § 41-730’s (and repealed Board rule R7-2-701’s) sealed bid process that this Office identified as public competitive bidding pursuant to A.R.S. § 38-503(C). *See* A.R.S. § 38-502(7); Ariz. Att’y Gen. Ops. I79-308; I79-133; I79-067.

The Auditor General’s Guidelines are not substantially equivalent to the purchasing method set forth in A.R.S. § 41-730 because they allow for written or oral quotes rather than sealed bids or proposals for amounts that fall below the School District Procurement Code’s sealed bid threshold. Because the Guidelines specify the use of methods other than sealed bids or proposals, they do not satisfy the definition of public competitive bidding in A.R.S. § 38-502(7) or meet the public competitive bidding requirement of A.R.S. § 38-503(C). That statute requires a more rigorous process when districts procure goods or services from employees than the process that districts would normally follow for procurements falling below the competitive sealed bid threshold. Ariz. Att’y Gen. Ops. I87-035; I79-308; I79-177; I79-133; and I79-067. Therefore, school districts should comply with the School District Procurement Code’s competitive bidding procedures for all procurements from district employees regardless of the

transaction's total cost. Any other result would allow a school district employee contracting with his or her school district to be treated "no differently from any one else which is obviously contrary to the intent of A.R.S. § 38-503(C)." Ariz. Att'y Gen. Op. I79-067.

2. Public Competitive Bidding Is Required For All School District Purchases From District Employees, Regardless of the Source of the Funding.

Arizona Revised Statutes § 38-503(C) applies to transactions between public agencies and their employees. The issue here is whether purchases made from district employees using student activities monies or extracurricular activities and character education program contributions constitute purchases by a school district in its capacity as a public agency, thus requiring compliance with A.R.S. § 38-503(C).

a. Student Activities Monies.

Student activities monies include all monies raised with school district governing board approval "by the efforts of students in pursuance of or in connection with all activities of student organizations, clubs, school plays or other student entertainment other than funds [generated by the activities of book stores and athletic activities]" A.R.S. § 15-1121. The monies are "derived from various sources, including dues, concessions, ticket sales, fundraising events, and like activities." Ariz. Att'y Gen. Op. I98-009 (citing USFR, Appendix H, Student Activities Fund at X-H-5). Student activities monies are not district funds, but they are subject to school district governing board oversight. USFR, Appendix H, Student Activities Fund at X-H-1; *See* Ariz. Att'y Gen. Op. 58-13.¹¹ Student activities monies constitute public money.¹²

¹¹ Arizona Attorney General Opinion 58-13 concluded that pursuant to A.R.S. § 15-1271 (the predecessor to A.R.S. § 15-1121), student activities funds were not school district funds; school boards had no direct

A school district governing board establishes and oversees the student activities fund and appoints a treasurer (or assistant treasurer as necessary) to maintain the fund for the benefit of the student organizations, covers the cost of bond premiums related to the fund, prescribes the form for and reviews on a monthly basis revenue/expenditure records that the treasurer prepares, and invests and reinvests monies in the fund. A.R.S. §§ 15-1122, 1123. The district must maintain the fund in a manner that is separate and distinct from district operating funds. USFR, Appendix H, Student Activities Fund at X-H-1.

The board-appointed treasurer deposits the student activities monies in student activities bank accounts, signs the disbursement checks, and maintains accounts showing the balances for each student organization. A.R.S. §§ 15-1122, 1123. The treasurer oversees the fund's accounting functions, but the students must actively participate in the management of the monies. Ariz. Att'y Gen. Op. I98-009 (citing USFR, Appendix H, Student Activities Fund at X-H-1). Any disbursement from the fund must be authorized by or on behalf of the student club or organization as the USFR provides. A.R.S. § 15-1122(A); Ariz. Att'y Gen. Op. I98-009 (citing USFR, Appendix H. Student Activities Fund at X-H-1). The governing board may, however, allocate the monies between schools without student input or approval. Ariz. Att'y Gen. Op. I98-009. While the students decide how to spend student activities monies and authorize the disbursements,

authority to determine how monies were expended; and the school board's authority was regulatory or supervisory in nature.

¹² See *State v. Mecham*, 173 Ariz. 474, 481, 844 P.2d 641, 648 (1992) "public money" is defined as "all monies coming into the lawful possession . . . [of] a state officer . . . in his official capacity, irrespective of the source from which, or the manner in which, the monies are received").

the district, acting in its fiduciary capacity, is the purchaser. *See* A.R.S. § 15-1122.¹³ USFR, Appendix H, Student Activities Fund at X-H-1.

Expenditures from student activities monies are exempt from the School District Procurement Code. A.A.C. R7-2-1002(E). Despite the exemption, the USFR recommends that expenditures from student activities funds comply with the Code for sealed competitive bids and with the Guidelines for amounts exempt from the code. USFR, Appendix H, Student Activities Fund at X-H-1, 9. Although the Code exempts expenditures of student activities monies, that exemption only applies to purchases in which school district employees are not involved. Because the district is the purchaser, A.R.S. § 38-503(C) mandates a different result when purchases are made from district employees, thus raising the risk of self-dealing. Therefore, public competitive bidding is required where an employee proposes to sell goods or services to the district regardless of whether the transaction is funded with district or student activities monies and regardless of the amount involved.

b. Extracurricular Activities and Character Education Program Contributions

Extracurricular activities or character education program contributions are monies received pursuant to A.R.S. § 43-1089.01. In 1997, the Legislature enacted A.R.S. § 43-1089.01 to “provide a tax credit for taxpayers who paid fees [or cash contributions] to an Arizona public school to support the school’s extracurricular activities or character education programs.” *Ariz. Att’y Gen. Op. I03-008* (quoting *Ariz. Att’y Gen. Op. I98-007*). The district spends the fees in accordance with the purpose that the contributor

¹³ Pursuant to A.R.S. § 15-1122, the student activities treasurer or assistant treasurer and another co-signer designated by the school district governing board sign disbursement checks expending student activities monies.

designates or determines the use in cases where the contributor does not designate a purpose. A.R.S. § 43-1089.01(E). The contributions are essentially conditional or restricted donations that upon receipt become the district's property. *See* A.R.S. § 43-1089.01(E) and (F); Ariz. Att'y Gen. Op. I98-007.¹⁴ Therefore, if the district spends such funds to purchase goods and services from a school district employee, it must follow the public competitive bidding process that A.R.S. § 38-503(C) requires, regardless of the amount involved.

Conclusion

This Office concurs with your conclusion that A.R.S. § 38-503(C) requires school districts to follow the School District Procurement Code's public competitive bidding procedures and not the Auditor General's Guidelines for all procurements between school districts and their employees regardless of the dollar amount involved and regardless of whether the funds at issue are regular district funds, student activities monies or extracurricular activities and character education program contributions.

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¹⁴ The Opinion refers to contributions collected pursuant to § 43-1089.01 as revenues subject to guidelines for apportionment that the Auditor General creates in conjunction with the Arizona Department of Education, pursuant to A.R.S. § 15-271(C)(4). Ariz. Att'y Gen. Op. I98-007; *see also* USFR Memorandum No. 214 (August 8, 2005).