

Attorneys at Law

A.F. Ringold
Coleman L. Robison
John G. Moyer, Jr.
John E. Howland
Jerry L. Zimmerman
Frederick J. Hegenbart
Eric P. Nelson
Karen L. Long
John E. Priddy
Bryan K. Drummond
Kent "Bo" Rainey
Eric D. Wade
Matthew P. Cyran
Jerry A. Richardson
Staci L. Roberds
Cheryl A. Dixon
Adam S. Breipohl
N. Roxane Mock
Haley A. Drusen

C.H. Rosenstein
(1893-1990)
Henry L. Fist
(1893-1976)
David L. Fist
(1931-2008)

In this issue:

- 1 Proposed Construction Management Reform: How a Proposed Bill Aims to Change the CMAR Process
- 4 OCR and OSERS to Oversee Initiative to Address Inappropriate Use of Restraint and Seclusion by School Districts
- 5 Payment of Prior Fiscal Year Debts Owed by School Districts

Proposed Construction Management Reform: How a Proposed Bill Aims to Change the CMAR Process

by Haley A. Drusen & Eric P. Nelson

With the new year comes the start of a new legislative session. The First Regular Session of the 57th Oklahoma Legislature is set to convene on February 4, 2019. Although there are many proposed bills that may affect school districts, this article focuses on a proposed bill that has the potential to change the current processes for Construction Management At-Risk ("CMAR").

The Current Process

Under the Public Competitive Bidding Act of 1974 (the "Act"), school districts and other public agencies are required to award construction contracts to the lowest responsible bidder on the basis of sealed bids. When the project delivery method is designed-bid-build, the selection of a contractor is governed entirely by the Act. When construction management is the project

delivery method, the selection of a construction manager falls outside the scope of the Act and is subject to fewer formal requirements.

School districts and political subdivisions select a construction manager under the authority of OKLA. STAT. tit. 61, § 220 (hereinafter "Section 220") on the basis of "the professional qualifications and technical experience of the construction manager." The selection criteria must include "the experience of the [construction manager], past performance, and certification of the company or individuals within the company of their knowledge of recognized standards of construction, construction management and project management." *Id.* Only firms recognized as qualified construction managers by the Office of Management and Enterprise Services ("OMES") are permitted to be considered.

There are few formal requirements governing the procedure that school districts must follow, but most school districts gather information about interested candidates through Requests for Qualifications.

Section 220 does not expressly permit or prohibit asking interested candidates for a proposal regarding the cost of the candidate's construction management services. Once the political subdivision has selected the most qualified construction manager, the political subdivision and the construction management company may negotiate a fee that is fair and reasonable to both parties. If the political subdivision and the selected construction manager cannot agree on a fee, the political subdivision may negotiate with other construction managers in order of their qualifications.

The Proposed Changes

Senate Bill 698, authored by Senator Tom Dugger of Stillwater, changes the way in which construction managers are selected. This bill would require that construction managers be selected on the basis of their qualifications as determined on the basis of their response to a formal Request for Qualifications. After the formal Request for Qualifications, the political subdivision must request additional information from a group

of qualified prospective construction managers before making their selection. This "more detailed qualified-based proposal response" must contain information regarding: (1) technical experience; (2) references; (3) proposed project schedule; (4) proposed personnel; (5) proposed form of contract; (6) proposed fees; (7) proposed mark up; and (8) proposed methodology for savings/contingency return.



**Senate Bill
698 changes
the way in which
construction
managers are
selected.**

We believe this bill contains a significant flaw. The bill repeatedly states that at-risk construction management is (or will be) subject to the requirements of the Act. However, the Oklahoma Supreme Court has previously determined that at-risk construction management contracts are not subject to the requirements of the Act.

McMaster Constr. v. Bd. of Regents of Oklahoma Colleges, 1997 OK 21, 934 P.2d 335. Adding this additional language regarding competitive bidding and incorporating the Act into the required Requests for Qualification is confusing and will burden political subdivisions with additional legal requirements that they are not required to follow under current law.

While this bill has some flaws that need to be addressed, the proposed changes

in this bill would allow for greater transparency in construction management proposals by requiring that qualified prospective construction managers provide information on proposed fees and timeline for completion for the project. It would confirm that political subdivisions may consider the costs of each candidate's proposal to determine which candidate would ultimately provide the best service and value to its taxpayers. While this bill would not require that a political subdivision use CMAR to perform a project, it would clarify that political subdivisions are in control of the construction manager selection process and have the authority to exercise that control in a cost effective manner best suited to its needs. However, for these advantages to be realized, the language incorporating provisions of the Public Competitive Bidding Act must be removed.

School officials interested in obtaining more information about this can contact Terry Simonson, Director of Governmental Affairs for Tulsa County, at tsimonson@tulsacounty.org.

Other Proposed Measures

RFR has received an advance copy of language that will likely be the topic of a shell bill during this legislative session. The proposed language seeks to impose on political subdivisions a new law to be known as the Public Construction Management Act for Political Subdivisions (the "CM Act"). The CM Act, which is supported by the construction

management community, will create formal procedures and rules governing the selection of construction managers and the administration of CMAR construction projects. For example, political subdivisions would be expressly prohibited from discussing fees with construction management candidates prior to selecting the most qualified bidder. The CM Act would also require that the construction manager at-risk enter into contracts directly with trade contractors, though still subjecting those contractors to the competitive bidding act. The CM Act also permits OMES to engage in rulemaking to effect procedures, processes and construction management fee guidelines applicable to school districts in the selection of CMAR projects. Because this proposed language would reduce local control over CMAR projects, we wanted to bring it to our readers' attention.

As always with proposed bills, we caution readers that though bills may be introduced containing certain language, the legislature may always change that language through the legislative process. We therefore urge readers to share their views on the proposed construction management reform bills with their local legislators.

If you have any questions regarding construction management processes, contract provisions, or bidding procedure under the Public Competitive Bidding Act, RFR is here to help. You can contact your RFR school attorney for assistance in

finding solutions that work for your construction project.

Additionally, if you would like copies of Senate Bill 698 or other legislation affecting school districts and/or construction management, please contact Haley Drusen, hdrusen@rflaw.com.

OCR and OSERS to Oversee Initiative to Address Inappropriate Use of Restraint and Seclusion by School Districts *by Cheryl A. Dixon*

It may be time for your school district to review practices and procedures if it is struggling with how to address behaviors of its special education students. The U.S. Department of Education announced on Thursday, January 17, 2019, that it intends to address inappropriate use of restraint and seclusion in schools. According to a statement by Secretary Betsy DeVos, "This initiative will not only allow us to support children with disabilities but will also provide technical assistance to help meet the professional learning needs for those within the system serving students." The Education Department's Office of Civil Right (OCR) and the Office of Special Education and Rehabilitative Services (OSERS) will oversee the initiative.

The Education Department set out the initiative in three parts:

Compliance reviews: OCR's 12 regional offices will conduct compliance reviews on the use of restraint and seclusion. OCR's

reviews will focus on the possible inappropriate use of restraint and seclusion and the effect of those practices on the schools' obligation to provide FAPE for all students with disabilities. OCR will also work with schools to correct areas of noncompliance.

Civil Rights Data Collection: OCR will conduct data quality reviews and work with districts to improve data submissions. OCR will also provide technical assistance on data quality to ensure schools are collecting and reporting accurate information relating to the use of restraint and seclusion.

Support for schools: OCR will provide technical assistance to schools on the legal requirements of Section 504 relating to the use of restraint and seclusion with children with disabilities. OCR will also partner with OSERS to help school districts understand how the IDEA, Section 504, and Title II of the ADA inform the development and use of policies related to the use of restraint and seclusion. According to Secretary DeVos's statement, this effort will include multiple resources and educational opportunities for schools about the appropriate use of interventions and supports to address the behavioral needs of students with disabilities.

In addition to the Education Department's initiative, in November, 2018, Democratic leaders in the House and Senate renewed their efforts to ban the seclusion and limit the restraint of students in America's schools by introducing the Keeping All

Students Safe Act. The Oklahoma State Department of Education several years ago issued guidelines on restraint and seclusion in Oklahoma schools, which can be found in the Special Education Handbook. Additionally, Oklahoma statutes at Title 70, Section 13-116, **prohibits** school district personnel “from using corporal punishment on students identified with the most significant cognitive disabilities,” unless the student’s parent or legal guardian provides written consent.

Therefore, it is very important for school district staff to appropriately and effectively address disruptive student behaviors. If your district is facing ongoing behavioral issues from a special education student, we highly recommend involving a behavioral expert to assist the district. Contact your school district’s attorney to discuss this issue and/or get a referral to a qualified, effective behavioral expert in Oklahoma.

Payment of Prior Fiscal Year Debts Owed by School Districts *by N. Roxane Mock*

School districts routinely enter into contracts with employees, building and grass maintenance businesses, trash providers, uniform and supply rental companies, as well as many more various businesses and individuals. Occasionally, a school district or the contracted with individual/business will find that a billing or payment error has been made and that

the school district needs to pay an additional amount to the business/individual. This may seem easy enough; however, when a billing or payment error is discovered during a different fiscal year than when the amount owed was due (i.e., when the service or good was provided to the school district), then the school district will need to pay the amount owed through a judgment entered against the school district.

Article X, §26 of the Oklahoma Constitution requires a political subdivision to operate on a pay-as-you-go basis and prohibits paying a previous year’s debts from the current year’s funds. Due to this prohibition, the procedures set out in Title 62 of the Oklahoma Statutes must be followed. These statutes control judgments being entered against political subdivisions. In order to lawfully pay a debt from a previous fiscal year (including employee wages and amounts owed to service providers), an Oklahoma school district must have a judgment entered against it.

Only a court of law may enter a judgment against a school district. In order to have a judgment entered against a school district, the school district must go through a “friendly lawsuit.” A friendly lawsuit means that the individual/business to whom money is owed must file a petition in the correct Oklahoma district court, after which the school district must file an answer admitting that the prior fiscal year debt is owed to the individual/business. The school district and individual/business owner may

then file a joint motion asking the court to enter a judgment against the school district so that the prior fiscal year debt may be satisfied. This joint motion asking the court to enter a judgment should also be accompanied by an affidavit of the school district's treasurer stating that the amount is owed by the school district and a signed settlement agreement by the individual/business owner stating that no further amounts are owed by the school district beyond the amount included in the judgment.

Title 62 of the Oklahoma Statutes also sets out the manner that political subdivisions may lawfully pay judgments. Judgments for debts of previous fiscal years may only be paid from the school district's sinking fund. No payment shall be made until the judgment is levied against the school

district's sinking fund. If the school district's sinking fund contains sufficient funds to pay the judgment in full, then the entire amount of the judgment may be paid at once. If the school district's sinking fund does not contain sufficient funds to pay the entire judgment, then the judgment must be levied against the school district's sinking fund and paid out over the course of three years. In order for the judgment to be levied against the school district's sinking fund, a certified copy of the judgment must be provided to the county clerk of the respective county so that the judgment may be included on the upcoming years' property tax levies.

If you have any questions regarding paying prior fiscal year debts, please contact your school district's attorney.

Tulsa Office:
525 S. Main, Suite 700
Tulsa, Oklahoma 74103
Phone: 918.585.9211
Fax: 918.583.5617
Toll Free: 800.767.5291



Oklahoma City Office:
3030 NW Expressway
Suite 200
Oklahoma City, OK 73112
Phone: 405.521.0202

ROSENSTEIN FIST & RINGOLD
ATTORNEYS & COUNSELORS AT LAW

Chalkboard is a Rosenstien, Fist & Ringold publication that addresses current education law issues. *Chalkboard* is published monthly through the school year and is sent without charge to all education clients of Rosenstien, Fist & Ringold and all other persons who are interested in education law issues. We invite you to share *Chalkboard* with your friends and colleagues. We think you will find *Chalkboard* to be informative and helpful with the difficult task of operating our educational institutions.

Chalkboard is designed to provide current and accurate information regarding current education law issues. *Chalkboard* is not intended to provide legal or other professional advice to its readers. If legal advice or assistance is required, the services of a competent attorney familiar with education law issues should be sought.

We welcome your comments, criticisms and suggestions. Correspondence should be directed to: Rosenstien, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.

Please use the form on www.rfrlaw.com (located on the *Chalkboard* page) to add or change *Chalkboard* e-mail addresses.