

WELCOME

Welcome to the latest edition of AHC's Construction Client Alert. This edition focuses on public owners and, more specifically, school board construction management contracts. A recent appellate opinion emphasizes the importance of constitutional and statutory provisions in drafting construction contracts for public owners. We hope you enjoy this Client Alert. If you have any questions or comments, contact us at law@ahclaw.com.

COURT OF APPEALS PROVIDES GUIDANCE ON SCHOOL BOARD CONSTRUCTION MANAGEMENT CONTRACTS

In a recent case, the Court of Appeals provided interesting analysis regarding school boards' multi-year construction contracts under O.C.G.A. § 20-2-506. In *Green County School District v. Circle Y Construction, Inc.*, the court addressed the enforceability of a construction management contract that, according to the school district, did not comply with the multi-year contract statute.

Background of the Case

The case involved a contract between a school district and a contractor for construction management services on the school district's facilities. County voters approved the project funding through an Educational Local Option Sales Tax (ELOST). The school district terminated the contract after eleven months, and the contractor filed suit.

The school district moved to dismiss the lawsuit arguing that the contract was void because it did not comply with O.C.G.A. § 20-2-506 (the "Multi-Year Contract Statute"). Specifically, the contract did not contain the provisions required by the statute to be incorporated into multi-year contracts.

Was the Contract Void?

The school district argued that the contract was void because it did not comply with the statutory scheme governing multi-year contracts. Accordingly, the court analyzed the multi-year contracting authority of the school district. It appropriately began with the constitutional provision that precludes political subdivisions of the state from incurring new debt without the required majority vote. The court then cited a Supreme Court case that held this constitutional provision applied to contractual obligations that extend beyond a single fiscal year.

Finding that the constitutional provision was satisfied by the county's ELOST vote, the court then looked to the Multi-Year Contract Statute under O.C.G.A. § 20-2-506. (Note that this statute is separate from the Georgia Local Government Public Works Construction Law, O.C.G.A. §§ 36-91-1 through 36-91-95.) The Multi-Year Contract Statute provides that school boards may enter certain multi-year contracts, as long as the contract contains certain necessary provisions. The parties agreed that the contract did not contain the required statutory provisions.

The statute provides an exception, however, for "reasonable contracts arising out of [a school board's] proprietary functions." Based on this exception, the contractor argued that proprietary contracts need not contain the statutory provisions that other multi-year contracts must contain.

The problem, noted by the court, is that neither the statute nor Georgia courts have defined "proprietary functions," as used in this particular statute. Applying rules of statutory construction (and a legal dictionary), the court determined that "proprietary functions" are generally defined as "conduct that is performed for the profit or benefit of the [public owner], rather than for the benefit of the general public." It emphasized that the question is highly factual, depending on the nature of services provided under the contract.

The court ruled for the contractor, concluding that the lower court was authorized to conclude that the contract was enforceable. The opinion implies that the contract was enforceable due to either of two bases: (1) the county's vote, which satisfied the constitutional provision, or (2) the proprietary nature of the contract, which satisfied an exemption in the statute. The school district has filed a notice of intent to seek certiorari from the Supreme Court.

Does Sovereign Immunity Bar the Contractor's Claims?

The defense of most public owners must begin with sovereign immunity and its exceptions. One important constitutional and statutory exception is the ex contractu exception, which waives sovereign immunity for breach-of-(written)-contract claims.

In this case, the school district raised the defense of sovereign immunity. It also correctly argued that this defense generally bars recovery under an implied contract theory. The contractor responded that it was seeking restitution for out-of-scope work and should not be barred by sovereign immunity.

The court ruled for and against both parties. The contractor's claim was barred by sovereign immunity to the extent it sought restitution for out-of-scope work. In contrast, the contractor was permitted to seek restitution for services under the contract.

Implications

The case illustrates two important points that public owners regularly encounter in construction projects. First, public construction contracts must be crafted to account for various constitutional and statutory provisions. These provisions not only affect the public owner's authority, they also affect its potential liability.

Second, the defense of sovereign immunity is a powerful defense - when it applies. Public owners must require strict adherence to the contract documents and claims procedures. They should take precautionary measures to avoid any out-of-scope claims. Further, certain carefully crafted contract provisions may limit a public owner's exposure for such claims.

The multi-year school board contracting statute discussed in this case also authorizes guaranteed energy savings performance contracts for school boards. [Read more about the state Guaranteed Energy Savings Performance Contracting Act in another AHC Construction Update.](#)

[Read more about the Georgia Local Government Public Works Construction Law, O.C.G.A. §§ 36-91-1 through 36-91-95, in a prior AHC Construction Update.](#)

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