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SUBCONTRACTING

In today's environment of limited financial resources, subcontracting to a private company support staff jobs that were historically performed by employees of a school or municipal entity is occurring more and more often. The purpose of this article is to provide a broad overview of the process by which the entity can subcontract bargaining unit work.

The decision to subcontract has significant labor relations implications and has been the subject of much litigation over the years. Neither the school code nor case law establishes an absolute prohibition against subcontracting. However, each entity's collective bargaining agreement (CBA) and decisions of the Pennsylvania Labor Relations Board (PLRB) and the courts must be reviewed.

The first step in the process is to carefully review the CBA which covers the employees who would be affected by a subcontract to see if the CBA prohibits subcontracting. Assuming the CBA does not prevent subcontracting, the basic premise which has been established is that an employer's decision to replace the services performed by support staff bargaining unit members with a contracted service has a direct and immediate impact on wages, hours, terms and conditions of employment which outweighs the right of the public employer to take unilateral action. Accordingly, the public employer is obligated to bargain in good faith with the union representing the affected employees before it decides to subcontract bargaining unit work.

At a minimum, this obligation to bargain in good faith requires the public employer to take the following action prior to subcontracting:

- (1) inform the union of the possibility of a subcontract occurring;
- (2) provide the union with the bid specifications once they are developed;
- (3) present to the union the results of the bid which the public employer has preliminarily decided it would accept if it were to subcontract; and,
- (4) hold formal negotiations with the union to provide it with the opportunity to submit its own proposals.

A necessary element of the formal negotiation process may require the school or municipal entity to modify its position on the amount of savings it would accept from a union proposal to something below that which the contractor could save the entity. Another necessary element of the formal negotiation process is the requirement to proceed through the impasse resolution procedures established in Act 88 (for school entities), or Act 195 (for municipal entities) such as mediation. After the negotiation process has been exhausted and if the union has not been able to meet the needs of the public employer, it can award the contract.

The scenario which typically arises in the subcontracting context is as follows: The parties bargain to the point where the public employer decides to proceed with awarding the subcontract; the public employer enters into a contract with a



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private company; the union then files a charge of unfair practices with the PLRB alleging a refusal to bargain in good faith because the union believes the bargaining that occurred was not sufficient because it was not given the appropriate opportunity to respond to the bids. If the PLRB finds an unfair practice, it can and has directed employers to rescind the subcontract into which they had entered and to reinstate with back pay any employees laid off.

In summary, the decision to replace bargaining unit employees with contracted services requires the public employer to bargain with the union before a final decision is made. The way to combat any charge of unfair practices alleging a refusal to bargain is to be open with and accessible to the union concerning the possibility of a subcontract. Because of the serious consequences of a failure to meet this bargaining obligation, we recommend that the public entity be prepared to enter into formal negotiations with the union if it decides to consider subcontracting.

Clients who have questions regarding issues discussed in this article, or any labor law matter, should feel free to call us at 215-345-9111.