

OUTSOURCING OF THIRD PARTY NON-INSTRUCTIONAL SERVICES

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With today's budget pressures and demands, more school districts are exploring the possibility of outsourcing their custodians, bus drivers or other non-instructional staff as a means to save money or to address operational concerns. However, under the *School Code's* third party subcontracting provision (105 ILCS 5/10-22.34c), school districts face a number of legal pitfalls and hurdles as they navigate through this process. Our interactive 45-minute presentation will review the procedures and requirements listed below for outsourcing non-instructional personnel and will discuss some of the associated pitfalls.

1. Overview – See Attached Checklist

2. Applicability of Statute

- a. Does Section 10-22.34c of the Illinois *School Code* apply to professional/managerial employees, such as IT professionals? (see H.J.R. 78, adopted 5-31-08)
- b. What if the District has traditionally outsourced some, but not all, of the work?
- c. What if the District wishes to outsource services (e.g., snow plowing) to another local government through an intergovernmental agreement?
- d. What if the District wishes to hire an outside company to augment its workforce, but no layoffs will result? (See 10-22.34c(b))
- e. What if the District successfully outsources, then wishes to re-bid after the first contract expires?

3. Required Notices

- a. **10-22.34c(a):** 90 days written notice to the affected employees
 - i. What date should be used as the end of the 90 day period? (Last day of employment? Approval of contract?)
 - ii. Is the 90-day notice required if no layoffs will result? (See 10-22.34c(a))
- b. **10-22.34c(a)(6):** Notice of public hearing either on or before soliciting bids or 30 days before entering contract, whichever is greater
 - i. Must the notice be published in a newspaper?
 - ii. What must the notice say?

- c. **105 ILCS 5/10-23.5:** 30-day reduction-in-force notices – typically satisfied by 90 day notice at (a) above

4. **Bargaining**

- a. **10-22.34c(a)(1)-(2):** Must wait until current collective bargaining agreement expires (or consider need to maintain status quo if new bargaining unit has formed and negotiations are underway)
- b. ***Illinois Educational Labor Relations Act:*** Subcontracting typically affects wages, hours and other terms and conditions of employment and is a mandatory subject of bargaining, both with respect to the decision itself and to its impact.
 - i. ***Community Unit School District No. 5 v. IELRB***, 2014 IL App (4th) 130294: The *School Code*'s outsourcing provision did not supplant or preempt the board's duty to bargain over subcontracting. An employer's ability to outsource, or threaten outsourcing, is part of the bargaining process, is an important weapon in negotiations, and is not "inherently destructive" of employees' collective bargaining rights. (Reaffirmed the requirements for good faith bargaining in the subcontracting context as stated in *SEIU Local No. 316 v. IELRB*.)
 - ii. ***SEIU Local No. 316 v. IELRB***, 153 Ill. App. 3d 744 (4th Dist. 1987): In the subcontracting situation, standards of good faith bargaining are assessed in light of the fact that the employer is considering a decision which, although it drastically affects its employees, also involves a policy and inherent management function. The requirements for good-faith bargaining on the decision to subcontract are notice of the consideration of a subcontract, before it is finalized, meeting with the union to provide an opportunity to discuss and explain the decision, providing information to the union, and giving consideration to any counterproposals the union makes.
 - iii. ***City of Belvidere v. ISLRB***, 181 Ill.2d 191 (1998): An employer's unilateral subcontracting decision is a mandatory subject of bargaining when the subcontracting (1) involved a departure from previously established operating practices, (2) effected a change in the conditions of employment, or (3) resulted in a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit. In this case, the city's contract with an ambulance services company was not a mandatory subject of bargaining because the company here was hired to perform services the city's EMT's were not qualified to perform.

- iv. *Metropolitan Alliance of Police and Village of Steger*, 31 PERI 157 (ILRB 2015): Even if the union had notice of subcontracting and demanded to bargain, the employer did not commit an unfair labor practice by unilaterally subcontracting after the union failed to provide bargaining dates, a counterproposal, or a request for information.
- v. *Illini Bluffs Support Staff*, 14 PERI 1038 (IELRB 1998): The district did not need to bargain over its decision to outsource immediately a special education route for a student who required a bus aide when the district did not have an available aide on staff. However, the employer was required to bargain over its decision to continue subcontracting the route over an extended period and also should have negotiated over the effects of its decision.
- vi. *Decatur Federation of Teaching Assistants*, 7 PERI 1001 (IELRB 1990): The district's assignment of summer teacher aide work to certificated staff could constitute a mandatory subject of bargaining if it resulted in a significant impairment of the aides' reasonably anticipated work opportunities.
- vii. *Fenton Community High School District No. 100*, 5 PERI 1004 (IELRB 1988): The district's unilateral contracting with a social worker from its special education cooperative involved bargaining unit work and, therefore, the District should have provided the union with notice and an opportunity to bargain the decision.
- ix. *Lake Zurich School District No. 95*, 1 PERI 1031 (IELRB 1984): The district's economically-motivated decision to subcontract was not unlawful retaliation where there was no evidence of antiunion animus or pretext, despite the employer's decision to subcontract being made shortly after the union organized and requested recognition.

5. Solicitation of Bids

- a. **10-22.34c(a)(3)**: Laundry list of special requirements for outsourcing bids
 - i. **10-22.34c(a)(3)(B)**: Requires comparable benefits package
 - A. Does it include wages? (legislative history)
 - B. What is a "comparable" pension plan? (legislative history)
 - C. Does the comparable benefits package have to be provided to ALL company hires, or just former district employees?
 - ii. **10-22.34c(a)(3)(C)**: Requires list of employees and their wages

- iii. **10-22.34c(a)(3)(D):** Requires minimum 3-year cost projection
 - A. Using generally accepted accounting principles
 - B. Which the third party is prohibited from increasing if the bid is accepted
 - C. For each and every expenditure category and account
 - D. What about overhead and profit? Whose costs are to be itemized – the contractor’s or the district’s?
- iv. **10-22.34c(a)(E)-(F):** Requires employee criminal/disciplinary/DCFS background information
- b. **10-22.34c(a)(7):** Contractor must offer available positions to qualified district employees
- c. **105 ILCS 5/10-21:** Due advertisement, sealed bids, notice of public opening

6. Cost Comparisons

- a. **10-22.34c(a)(3)(D):** Bid must include a minimum 3-year cost projection as noted above
- b. **10-22.34c(a)(4):** Board must provide a cost comparison, using generally accepted accounting principles, of “each and every expenditure category and account” for outsourcing vs. maintaining work in-house.
 - i. How can the bid documents be designed to facilitate this comparison?
 - ii. **105 ILCS 5/29-5 (for transportation only):** impact of outsourcing on State transportation claim
- d. **Use of cost comparisons in negotiations**