

July 28, 2008

Dr. Gerald Zahorchak  
Secretary of Education  
PA Department of Education  
333 Market St.  
Harrisburg, PA 17126-0333

Dear Secretary Zahorchak:

We are writing in opposition to the moratorium placed on the granting of waivers under section 17-17140B of the School Code for local education agencies to authorize single prime contract procedures in school construction projects.

As you know, the Education Empowerment Act mandate waiver language provides: "Except as otherwise provided in this section, the board of school directors may adopt a resolution to apply for a waiver to any provision of this act...if the waiver will enable the school district to improve its instructional program or operate in a more effective, efficient or economical manner."

Since the adoption of this section, scores of school districts have used it to realize substantial efficiencies. Perhaps the greatest savings have been in school construction projects that have sought and been granted waivers from the School Code multi-prime construction requirements. Simply put, allowing local education agencies to utilize single prime contracts offers districts a more progressive option and creates an opportunity for significant taxpayer savings. A November 2007 survey conducted by the Pennsylvania Economy League of Southwestern Pennsylvania found that, of all the respondents who received a Separations Act waiver from 2001-2003, all reported improved efficiencies and cost savings from using the single prime system. In that survey, district savings ranged from \$8,000 to \$2,500,000.

It was this kind of evidence that led the two study groups which have looked at this issue to recommend retention of the single prime construction contract mandate waivers. The first was the School Construction Task Force convened by Secretary of Policy Donna Cooper. The second was Governor Rendell's Act 1 Task Force on School Cost Reduction.

Given this history, it is particularly unfortunate that you would choose to unilaterally issue a moratorium on the granting of waivers for single prime construction contracts. Local education agencies clearly have the right to seek waivers to the separate contract provisions of the School Code. And you clearly have the authority to grant such waivers [*Mechanical Contractors Assoc. of Eastern Pennsylvania, Inc. v. Dept. of Educ.*, 932 A.2d 1262 (Pa. 2007)]

Indeed, under the act, “if the Department disapproves the application for waiver, the basis for the department’s disapproval shall be transmitted to the board of school directors. The board of school directors may submit a revised application for a waiver.” This suggests that the review of each application for a waiver is individual, and the decision to grant or withhold approval of the application is based on that application’s ability to demonstrate that the waiver will “enable the school district to improve its instructional program or operate in a more effective, efficient or economical manner.” This judgment cannot be made on a general basis, applicable to all school districts. The moratorium, currently in place, effectively excludes from eligibility for waiver a provision of the School Code which Pennsylvania’s highest court has specifically found to be subject to waiver.

Furthermore, the denial of mandate waivers filed before the moratorium notification and denial of future waivers based on the moratorium is inconsistent with the PDE-published criteria. The Department’s website says mandate waivers may be denied if

- Provision is ineligible for waiver by law
- Procedural irregularities in the application process
- Application requests relief from a mandate that is not a provision of the School Code, a regulation of the State Board of Education or a standard of the Secretary of Education

Until the Legislature amends the waiver provisions of 17-1714-B, or the waiver provisions sunset in 2010, we ask that you continue to apply the law as written, continue to receive waiver applications relating to the School Code multiple prime construction requirements, and continue to approve such applications where they show that they will enable the district “to operate in a more effective, efficient or economical manner.”

We know that there are people who would like to revisit the inclusion of the Separations Act in the waiver provisions of Section 17-1714-B. They are actively working to reverse the Supreme Court’s holding in *Mechanical Contractors* and to remove the department’s authority to waive the School Code Separations Act requirements. Your moratorium effectively accomplishes their goal without legislative approval.

We oppose the legislative repeal of the right of local education agencies to request and your authority to grant waivers for single prime contracts either in law or by administrative procedures inconsistent with the mandate waiver program statutory language. We would welcome the opportunity to discuss this issue with you at your convenience.

Sincerely,

Stinson Stroup, Exec. Dir.  
PA Association of School Administrators

Jay Himes, Exec. Dir.  
PA Association of School Business Officials