



STATE OF CONNECTICUT
Office of Governmental Accountability
State Contracting Standards Board

LEGAL MEMORANDUM

TO: Gregory F. Daniels, State Contracting Standards Board (SCSB)
Executive Director

CC: SCSB Members; SCSB Staff

FROM: Aaron Felman, Esq., SCSB Staff Attorney

RE: December 8, 2023, Requests for Legal Research

DATE: January 2, 2024

Question #1 Presented: What is the legal weight given (or authoritative deference given, if any) by the SCSB to a Connecticut Office of the Attorney General's written or oral opinion?

Short Answer

While Chapter 62 of the Connecticut General Statutes does not specifically mention the legal weight or authoritative deference that should be given to the Connecticut Attorney General's (the "AG") written or oral opinions by the SCSB, other Connecticut laws contain some insight.

Discussion

Chapter 62 of the Connecticut General Statutes ("C.G.S.") created the State Contracting Standards Board (the "Board") under § 4e et seq. (the "SCSB Statute"). However, the SCSB Statute does not specifically mention the weight or deference that should be given to the Connecticut Attorney General's (the "AG") written or oral opinions by the Board. However, other Connecticut laws contain some insight.

First, C.G.S. § 3-125 outlines the duties of the AG. Within this section, the AG is mandated to "advise or give his opinion to...any state board...upon any question of law submitted to him" or her. C.G.S. § 3-125 (2023). Therefore, this section provides the legal mandate/authority necessary for the AG to provide these written or oral opinions but does not speak to the weight or deference that the Board should give to the AG's written or oral opinions. However, case law provides some insight via a longstanding common law opinion by the Connecticut Supreme Court in *Connecticut Hospital Asso. v. Commission on Hospitals & Health Care*. The Connecticut Supreme Court held that "an opinion of the attorney general is not binding on a court," but "it is entitled to careful consideration and is generally regarded as highly persuasive." *Connecticut Hospital Asso. v. Commission on Hospitals & Health Care*, 509 A.2d 1050, 1055 (1986) (quoting *Windham Community Memorial Hospital v. Willimantic*, 348 A.2d 651, 654 [1974]). However, how does this relate to the Board?

Though there is no specific mandate to follow the AG’s written or oral opinion, if the Connecticut Supreme Court’s longstanding dicta held that the AG’s written or oral opinions are highly persuasive and given careful consideration by state courts, then it is my legal opinion that the Board should follow suit with the Connecticut Supreme Court. Any divergence with the AG’s written or oral opinion by the Board should be handled carefully on a case-by-case basis.

Question #2 Presented: What is the legal weight given (or authoritative deference given, if any) by the SCSB to a written or oral opinion of the SCSB’s staff attorney?

Short Answer

Extensive legal research reveals that the courts and statutes are silent on the legal weight given or authoritative deference given by any government agency, board, commission, etc. to a cognizant staff attorney’s written or oral opinion. The Connecticut General Statutes simply do not concern themselves with these types of opinions and mainly speak to higher-level decision-making of the boards, commissions, commissioners, heads of departments, etc., not lower-level staff.

Note: Notwithstanding the preliminary research findings discussed above, more forthcoming information may be presented to the SCSB in the future as a result of research resources that have been recently made available to SCSB staff.

Question #3 Presented: What authority does the SCSB have to penalize noncompliance with the privatization contract and the contested solicitations statutes?

Short Answer

The SCSB has statutory authority to penalize noncompliance with the privatization contraction and the contested solicitations up to and including termination, provided specific due process procedures are met as discussed below.

Discussion

I. General Statutory Application

The SCSB Statute speaks to privatization contracts in C.G.S. § 4e-16, as well as contested solicitations in C.G.S. § 4e-36. However, the authority and jurisdiction of the Board is primarily limited to “state contracting agencies” throughout the SCSB Statute. The SCSB Statute defines “state contracting agencies” as those under the executive branch of the state government, specifically excluding the judicial branch, the legislative branch, the offices of the Secretary of the State, the State Comptroller, the Attorney General, and the State Treasurer. C.G.S. § 4e-1(28) (2023). Importantly, C.G.S. § 4e-1(28) specifically includes state systems of higher education

under the purview of C.G.S. § 4e-16, while being silent on the application to “quasi-public agencies” (a list of which agencies are considered “quasi-public agencies” can be found under C.G.S. § 1-120[1]). This silence tends to indicate the SCSB Statute’s highly limited scope to quasi-public agencies.

However, this silence could also indicate that the legislature intended to provide possible future flexibilities to the scope of the SCSB Statute to “quasi-public agencies” due to not specifically excluding them either under what constitutes a “state contracting agency”. This flexibility was recently exercised by the legislature by the recent enactment of Public Act 23-91 governing the Connecticut Port Authority (the “Authority”), which, until recently, was a quasi-public agency. Section 3 of Public Act 23-91 specifically made the Authority a “state contracting agency” within the authority of the Board from 2021 through 2026; however, the Authority was specifically excluded from the purview of § 4e-16 (privatization contracts statute). 2023 Conn. Acts pg. 9 Reg. Sess. Therefore, though the SCSB Statute still contains a limited scope over quasi-public agencies, Public Act 23-91 demonstrates that the SCSB Statute’s purview may change on an agency-per-agency basis regarding quasi-public agencies.

II. Broad and Specific Authorities to Penalize

The SCSB Statute is silent on specific penalties and remedies related to noncompliance with the SCSB Statute’s privatization contracts requirements and contested solicitation sections. However, the SCSB Statute does provide the Board with broad statutory authority, giving the Board “all rights, powers, duties, and authority relating to the procurement policy of the state, vested in, or exercised by any state contracting agency may also be exercised by the board”. C.G.S. § 4e-3(a) (2023). Therefore, the SCSB Statutes provide the Board with broad authority over all state contracts within any state contracting agency, as well as the same (or greater) power to engage in contracting activities per the plain meaning of this section. However, the full extent of this broad authority is not yet established as there is no case law interpreting § 4e-3(a). The Connecticut Supreme Court has repeatedly indicated that the ““deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute...has not previously been subjected to judicial scrutiny [or to] ...a governmental agency's time-tested interpretation””. *Pasquariello v. Stop & Shop Companies*, 916 A.2d 803, 808 (2007) (quoting *Sikand v. Wilson-Coker*, 888 A.2d 74, 78 [2006]). Therefore, without previous judicial scrutiny or some time-tested interpretation of this section, the Board should be cautious when interpreting the extent of the broad authority under § 4e-3(a).

III. Specific Authority to Penalize

A. Termination for Cause

The SCSB Statute authorizes the Board to terminate any contract for “cause” under C.G.S. § 4e-7(a). This subsection defines what constitutes “cause”, with the most relevant definition as “wanton or reckless disregard of any state contracting and procurement process by any person substantially involved in such contract or state contracting agency”, though the statute is silent on what constitutes “wanton or reckless disregard” in this instance. C.G.S. § 4e-7(a) (2023). However, this subsection only authorizes the Board to terminate a contract after: (1)

the Board provides fifteen (15) days' notice to the relevant state contracting agency and contractor; (2) consulted with the Attorney General; (3) the Board consults with the state contracting agency to determine the immediate impacts of the contract termination; (4) the Board and the state contracting agency jointly determine that immediate termination “will not create imminent peril to the public health, safety or welfare”; (5) the proposed termination garners a two-thirds vote by the Board’s members present and voting for that particular purpose; and (6) the Board affords the state contracting agency and the contractor opportunity for an administrative hearing pursuant to the Uniform Administrative Procedures Act. *Id.* Once the Board has accomplished the above steps outlined in C.G.S. § 4e-7(a), the Board may terminate the contract.

B. Restrict, Limit, or Terminate Contracting Authority

However, this section (§ 4e-7) provides the Board with additional remedies beyond contract termination. First, C.G.S. § 4e-7(b) provides the Board with the authority to “restrict or terminate the authority of any state contracting agency to enter into any contract or procurement agreement” if: (1) the Board determines, by a two-thirds vote by the Board members present and voting for that particular purpose, that the state contracting agency violated statutory contracting and procurement requirements and demonstrated “a reckless disregard for applicable procedures and policy”; (2) the limitation, restriction or termination of authority is “in the state's best interest”; and (3) the Board arranges for the exercise of the relevant state contracting agency’s contracting powers during the period of limitation, restriction or termination. C.G.S. § 4e-7(b) (2023). This subsection mandates that this limitation, restriction or termination remain until the Board determines that the state contracting agency has instituted corrective measures and shown compliance with procurement statutes and regulations. *Id.* Finally, if the Board determines that the employee or agent violated statutory contracting and procurement requirements and demonstrated “a reckless disregard for applicable procedures and policy”, C.G.S. § 4e-7(c) provides the Board with analogous authority, by a two-thirds vote from the Board members present and voting for that particular purpose, to “order a state contracting agency...to restrict or terminate the authority of an employee or agent to enter into any contract or procurement agreement”. C.G.S. § 4e-7(c) (2023). Therefore, this section provides the Board with authority to penalize a state contracting agency for cause in various ways. However, it should be noted that C.G.S. § 4e-7 places a high administrative burden on the Board should the Board seek to penalize a state contracting agency under this section.

C. C.G.S. § 4e-34 - Disqualification of Contractor, Bidder, or Proposer

With the recommendation of a dedicated committee of three Board members appointed by the Chairperson of the Board, the Board may vote to disqualify *any* contractor, bidder or proposer, for a period no more than five (5) years from bidding on, applying for, or participating as a contractor or subcontractor under contracts with the State of Connecticut (the “State”). C.G.S. § 4e-34(a) (2023). However, the contractor, bidder or proposer must first be given “reasonable notice” and an opportunity for a hearing before the committee may then vote on a determination and recommendation to the Board. The committee must issue a written recommendation by a two-thirds vote of the committee members present and voting for that

purpose and must issue said written recommendation no later than sixty (60) days after the hearing's conclusion.

When making their determination and recommendations to the Board, the SCSB Statute requires the committee to consider the following: (a) “the seriousness of the acts or omissions of the contractor, bidder or proposer”; and (b) any mitigating factors. *Id.* The written recommendation must state the reason(s) for the recommended action and, if the committee recommends disqualification, must also state the duration of disqualification of the contractor, bidder or proposer. Such recommendation must be sent to the contractor, bidder or proposer by certified mail with return receipt requested. *Id.* C.G.S. § 1-2b(a) provides that “certified mail with return receipt requested” be accomplished by “mail, electronic, and digital methods of receiving the return receipt, including all methods of receiving the return receipt identified” by the United States Postal Service. C.G.S. § 1-2b(a) (2023). If the committee recommends disqualification, the contractor, bidder or proposer shall have thirty (30) days to submit comments to the Board. Once the Board receives the committee’s proposed recommendation, the Board must issue a written decision either adopting, rejecting or modifying the committee's recommendation no later than thirty (30) days after the Board receives the contractor's comments, if any. C.G.S. § 4e-34(a) (2023).

In C.G.S. § 4e-34(b), the SCSB Statute enumerates eight (8) specific causes for disqualification of a contractor, bidder or proposer that the Board must consider, which primarily relates to violations of criminal, procurement, or ethical laws, as well as previous poor performance with State contracts, that tend to indicate a lack of business integrity. However, this subsection then provides a “catch-all” ninth (9th) cause for disqualification of “any other cause or conduct the board determines to be so serious and compelling as to affect responsibility as a state contractor”, then listing three (3) other specific causes or conduct that is considered “so serious and compelling as to affect responsibility as a state contractor”. C.G.S. § 4e-34(b)(9) (2023). Importantly, the SCSB Statute qualifies the above list under the 9th “catch-all” cause for disqualification with the language “but not limited to”, which tends to indicate that the SCSB Statute intends to provide the Board with considerable deference in their decision-making authority to consider other causes for disqualification that rise to the level of being “so serious and compelling as to affect responsibility as a state contractor” in this 9th “catch-all” cause for disqualification. *Id.*

The Board must send the written decision to the contractor by certified mail with the return receipt requested. This subsection goes on to specifically mention that the Board’s decision “shall be a final decision for purposes of sections 4-180 and 4-183” of the Uniform Administrative Procedures Act (“UAPA”). *Id.* Therefore, in accordance with C.G.S. § 4-183, this decision may be appealed to the Connecticut Superior Court. C.G.S. § 4-183(a) (2023).

D. Termination for Convenience & Ratification

Finally, the Board may terminate a contract after the award of a contract for “convenience” (using the federal statute terminology) when the state employee or agent who awarded the contract did not act in “bad faith”. C.G.S. § 4e-40(1)(B) (2023). The contractor awarded the contract must be compensated for “the actual expenses reasonably incurred under

the contract, plus a reasonable profit” prior to the Board’s termination. *Id.* Additionally, if the Board determines that such action is in the “best interests of the state”, the contract to be “ratified and affirmed” by the state contracting agency. C.G.S. § 4e-40(1)(A) (2023). Finally, if the state employee or agent who awarded the contract did act in bad faith, the contract may be declared “null and void”; however, if the Board determines in writing that such action is in the “best interests of the state”, the contract to be “ratified and affirmed” by the state contracting agency. C.G.S. § 4e-40(2)(A),(B) (2023). The courts provide no guidance on these sections, and the Board’s administration of this section should be consistent with other sections previously mentioned (i.e. providing notice).

E. Conclusion

However, can these sections apply to noncompliance with the privatization and contested solicitation sections of the SCSB Statute? Given the broad authority that the SCSB is granted in C.G.S. § 4e-3(a), and without any limiting statutory language, it’s my legal opinion that the Board may similarly apply these remedial penalties to such violations. However, as previously mentioned, the Board should be cautious when interpreting the extent of the broad authority under § 4e-3(a) and its application to remedial penalties for violations of these two sections.

Question #4 Presented: What is the SCSB's authority to propose legislation?

Short Answer

While there are conflicting statutory provisions in Chapter 62 regarding the SCSB’s authority to propose legislation, such conflicts would result in an unworkable result not reasonably contemplated by the Connecticut General Assembly. Therefore, relying on legal principles of statutory construction, the SCSB arguably has statutory authority under C.G.S. § 4e-1 et seq. to propose legislation.

Discussion

The primary authority that the SCSB Statute provides the Board is found in C.G.S. § 4e-10. The SCSB Statute mandates that the Board submit legislative proposals to the Governor and General Assembly that permits state contracting agencies “to carry out their functions under statutes and regulations concerning procurement”. C.G.S. § 4e-10(a) (2023). This section specifically excludes “quasi-publics, institutions of higher education, and municipal procurement processes utilizing state funds”. *Id.* Next, the SCSB Statute mandates that the Board submit legislative proposals to the Governor and General Assembly that are necessary “to apply the provisions of statutes concerning procurement to constituent units of the state system of higher education”, as well as legislative proposals “necessary to apply the provisions of statutes and regulations concerning privatization and procurement to quasi-public agencies”. C.G.S. § 4e-10(b) (2023). The final subsection of § 4e-10 mandates that the Board submit legislative proposals “necessary to apply the provisions of statutes and regulations concerning procurement to the municipal procurement processes utilizing state funds”. C.G.S. § 4e-10(c) (2023). Finally,

the SCSB Statute provides redundancy by also enumerating the authority and responsibility of the Board towards state contracting agencies as reviewing and making recommendations “concerning proposed legislation and regulations”, solidifying the Board’s important duty and authority to propose legislation. C.G.S. § 4e-4(b) (2023).

By providing the Board with authority to propose legislation governing state contracting agencies first, along with an expedited timeline for legislation in succession according to each subsection, statutory construction rules tend to indicate that the legislature intended to provide the Board with the greatest authority over proposing legislation that governs state contracting agencies. Finally, please note that despite each subsection putting specific deadlines in place that are long overdue (i.e. 2010, 2011, & 2012), tenants of statutory dictate that this section is not interpreted in a way that yields an unworkable result. C.G.S. § 1-2z (2023). Therefore, the legislature could not have intended for § 4e-10 to be construed to mean that the overdue deadlines mentioned limit the Board’s authority because this would provide an unworkable result by rendering this important section superfluous, which would be contradictory to the “Plain Meaning Rule” enumerated in § 1-2z. Therefore, the Board has a statutory mandate to propose legislation for state contracting agencies, quasi-public agencies, constituent units of the state system of higher education, and even municipalities’ procurement processes as mandated by C.G.S. § 4e-4, with an emphasis put on proposing legislation governing state contracting agencies.