

Task Force on Mandate Waivers  
*A report to the Governor &  
General Assembly*

February 2009



Gerald L. Zahorchak  
Secretary of Education  
*Chair*

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**Task Force on Mandate Waivers  
Report to the Governor and General Assembly**

Act 61 of 2008 established a task force to investigate the impact on taxpayers of mandate waivers granted for Sections 751 and 751.1 of the Pennsylvania School Code. Over the past six months, the Task Force on Mandate Waivers has worked tirelessly to gather testimony and examine evidence on the potential benefits of mandate waivers with emphasis on those seeking relief from the multiple-prime bidding requirement for school construction projects. As the chair of the task force, I am pleased to transmit the following report as well as a series of recommendations for strengthening the program.

The report is divided into four parts, beginning with a review of the mandate waiver law as it intersects with school construction issues. This section includes summary data on mandate waivers issued under Section 751 and a discussion of the application and approval process for these waiver requests. The second section of the report reviews the task force's efforts and the limitations of the available data on this work. The report continues with a set of recommendations concerning Section 751 waivers as well as dissent language when there was variance of opinion among task force members. Finally, the report includes an appendix of data files and other resources that informed the task force's deliberations.

The list of task force members on the following page does not include three former members who made important contributions to our work. On behalf of the task force, I wish to acknowledge the efforts of Senator Raphael J. Musto and former Representative Jess Stairs, as well as the leadership of the late Senator James Rhoades. In addition, we extend our thanks to the dozens of stakeholders who participated in our meetings through public comment.

While the work of this task force is complete, the Department is committed to gathering additional data on school construction projects bid and built with waivers of the multiple-prime requirement. We look forward to communicating the results to the Governor and General Assembly on a regular basis. Finally, many members of the task force believe that there remains a need for in-depth examination of a broad range of issues related to school construction, including project financing. School district leaders need more and better information to support long-term planning and financing for construction projects, and we urge the Governor and General Assembly to lead the way.

Sincerely,



Gerald L. Zahorchak  
Secretary of Education

# *Task Force Members*

The Honorable Robert E. Belfanti, Jr.  
*Chair, House Labor Relations Committee*

The Honorable Paul I. Clymer  
*Minority Chair, House Education Committee*

The Honorable Gene DiGirolamo  
*Minority Chair, House Labor Relations Committee*

The Honorable Andrew Dinniman  
*Minority Chair, Senate Education Committee*

The Honorable John R. Gordner  
*Chair, Senate Labor & Industry Committee*

The Honorable Jeffrey Piccola  
*Chair, Senate Education Committee*

The Honorable James R. Roebuck, Jr.  
*Chair, House Education Committee*

The Honorable Mary A. Soderberg  
*Secretary, Governor's Office of the Budget*

The Honorable Christine M. Tartaglione  
*Minority Chair, Senate Labor & Industry Committee*

The Honorable Sandi Vito  
*Acting Secretary, PA Department of Labor & Industry*

The Honorable Gerald L. Zahorchak  
*Secretary of Education*

# *I. Review of Mandate Waiver Law and Program*

In May 2000, the Department of Education’s Mandate Waiver Program was enacted as part of the Education Empowerment Act. 24 P.S. § 17-1705-B *et seq.* The Mandate Waiver statute provides that school districts (later expanded to include intermediate units and career and technology centers) may apply to the Secretary of Education for a waiver of certain School Code provisions if the waiver will enable the applicant “to improve its instructional program or operate in a more effective, efficient, or economical manner.” 24 P.S. § 17-1714-B.

The following are the most common categories of waivers requested since the inception of the law: construction (school facilities), purchasing (supplies and equipment for school operations), certification/eligibility, and alternative education; or an unclassified category that covers several types of unique opportunities. Many statutes, regulations, and standards can not be waived, including those protecting students’ health and safety, civil rights, certain special education and teacher certification provisions, prevailing wage, collective bargaining, and federal regulations. Additionally, no waivers are granted retroactively. When the Department grants a waiver, it requires the applicant to ensure that the waiver is consistent with the terms of any court order, collective bargaining agreement or contract by which the applicant is bound.

The Department grants mandate waivers provided that certain criteria are met. First, the Department requires the submittal of a standardized mandate waiver program application which is made available to the public on the agency’s website. The waiver application must contain factual information establishing that the waiver will enable the applicant district, intermediate unit, or career and technology center to operate more efficiently or economically. By law, the application must be adopted by the board of directors, and establish that the applicant will operate in a “more effective, efficient or economical manner” under the waiver. 24 P.S. 17-1714-B (a) & (c).

Approval of a mandate waiver application requires consent of the relevant program office<sup>1</sup>, the Department’s Office of Chief Counsel, and the Secretary of Education. If approved, the school district or entity is required to provide the Department with an evaluation of the waiver three years from the date of implementation; a copy of the current evaluation form is included in the appendix (see “*evaluation.PDF*”). When the evaluation indicates improvement in student performance, instructional program or

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<sup>1</sup> For each category of waiver request (e.g., construction, alternative education, etc.), the appropriate program area staff apply a specific review procedure to ensure the application meets the requirements of the law as applicable to the subject area.

school operations, the waiver will be renewed by the Department and remain in effect unless rescinded by the local school board.

If an application is rejected, the Department provides an explanation in its denial letter to the applicant; these applications can not be resubmitted unless they are modified. Common reasons for denial of a waiver include: 1) provision is ineligible for waiver by law; 2) procedural irregularities in the application process; 3) 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.

## **SECTION 751 WAIVERS**

Section 751 (24 P.S. 7-751) is the School Code provision for which school districts most frequently seek relief through the Mandate Waiver Program. Of the 774 mandate waiver applications since July 2000 through December 2008, 303 (nearly 40%) have been for Section 751 waivers that pertain to work performed in the course of school construction projects. They can be divided into two general categories: (1) requests to raise one or more of the several dollar thresholds found in Section 751 which, if exceeded, trigger competitive bidding and other contractual mandates; and (2) requests for relief from Section 751's multiple prime contractor requirement.

### **1. Threshold Waivers**

The cost thresholds located in Section 751 apply to school construction work in the following ways:

- For contracts exceeding \$ 4,000, price quotations from three or more contractors must be solicited.
- For contracts exceeding \$10,000, bids must be advertised and contracts awarded to the lowest responsible bidder.
- For construction work which is less than \$5,000 in cost or value, school maintenance personnel may complete the work.

School districts often seek relief from these thresholds through the Mandate Waiver Program. In waiver applications, districts have argued that these dollar amounts have not been adjusted for inflation since their enactment. As of January 2009, the Department has received a total of 175 waiver applications for the Section 751 thresholds adjustments, approving 130.

### **2. Multiple Prime Contractor Waivers**

Section 751's "multiple prime contractor requirement" is a legal mandate under which school districts must bid construction projects with a minimum of four prime contracts (e.g., general, plumbing, heating, electrical, etc.) and award a contract to the successful bidder for each prime. Many school districts report that compliance with this

mandate is burdensome and would prefer to combine contracts or award a single prime contract for their construction projects, or at least have that option.

The Department grants waivers of the multiple prime contractor requirement provided that certain criteria are met. As discussed above, the Department requires the submittal of a standardized mandate waiver program application as well as a cost estimate from the district that details project costs with and without the waiver. The application must also include a letter from a non-district source – usually an architect – indicating how the waiver will result in projected savings. Finally, the Department will not grant a waiver to allow for a single prime contractor unless the contract is competitively bid.

Multiple prime contractor waivers are among the Department’s most popular requests. From 2000-2008, the Department received 128 applications to waive multiple prime bidding, of which more than 80 were approved. Of the 128 applications, 117 were for projects eligible for state reimbursement (PlanCon<sup>2</sup>). In these applications, districts provided initial estimated savings ranging from \$4,000 to \$28.3 million.

There exists widespread difference of opinion with regard to multiple prime contractor waivers. In 2001, shortly after the Secretary of Education issued the Department’s first multiple prime waiver, a group of Pennsylvania contractors brought suit in Commonwealth Court to stop the Department from granting any additional waivers. The Commonwealth Court ruled in the contractors’ favor in two cases decided in 2003 and 2004. The court’s ruling in both of these matters was that the Secretary of Education lacked the statutory authority to waive the multiple prime contractor requirements on school construction projects.

The Rendell Administration authorized the Secretary to pursue a Supreme Court appeal of the Commonwealth Court rulings. On November 21, 2007, in *Mechanical Contractors Association v. Pennsylvania Department of Education and the School District of Philadelphia*, 934 A.2d 1262 (Pa. 2007), the Supreme Court reversed the lower court and decided that multiple prime contractor waivers were indeed allowed under the law. During the time the lower court’s rulings were in effect, the Department did not receive or process waivers of the multiple prime bidding requirement. After the Supreme Court issued its ruling, the Department was again able to consider these waiver requests using the criteria described above.

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<sup>2</sup> “PlanCon” is short for Planning and Construction Workbook which serves the following purposes: (1) document a local school district’s planning process; (2) provide justification for a project to the public; (3) ascertain compliance with state laws and regulations; and (4) establish the level of state participation in the cost of the project. School districts must complete the PlanCon process to be eligible for state reimbursement.

## *II. Review of Work Plan*

The Task Force on Mandate Waivers held five meetings between September 2008 and January 2009 to gather testimony from stakeholders, examine data on school construction projects financed with state funds, and discuss whether waivers of multiple prime bidding result in savings to taxpayers. This section of the report provides an overview of the task force's efforts and highlights resources that informed its recommendations.

### **Public Comment**

Every task force meeting included an opportunity for public comment and the task force was pleased to hear from more than 40 individuals, including both general and specialty contractors, state labor leaders, attorneys, design professionals, school district administrators and leadership of state-level education associations.

Proponents of multiple prime mandate waivers offered arguments including...

- *Ease of management: the district has a single point of contact for all facets of construction – accountability for the project is located solely with the general contractor, rather than among several primes.*
- *Improved communication and coordination means fewer conflicts and change orders during construction, and lessens the likelihood of litigation against the district.*
- *Project is more likely to be completed on schedule.*

While waiver opponents argued...

- *Fewer construction companies are bondable for the cost of an entire school construction project – which decreases competition and increases costs.*
- *After being awarded the contract, general contractors will “bid shop” to get the best deal from subcontractors, but do not pass those savings on to the district and taxpayers.*
- *Districts have not proven that single prime contracting saves money.*

Materials submitted by testifiers were shared with task force members and posted to the task force website for public review. A list of testifiers (including affiliation, if known) is included in each set of meeting minutes. The task force is grateful for the significant, first-hand experience that the public brought to our meetings.

### **Data Analysis**

Act 61 required the task force to “investigate the impact on taxpayers of mandate waivers” by reviewing “data from completed school construction projects with state



funds.” The scarcity of projects that satisfied these criteria emerged as a significant challenge: since the passage of the Education Empowerment Act in 2000, districts and career and technology centers (CTCs) have requested 128 waivers of the multiple prime bidding requirement, of which 117 were for projects eligible for state reimbursement. Of the 80 applications ultimately approved, fewer than two dozen projects have been completed with final cost data reported to the Department of Education.

Task force staff sought to determine which type of bidding produced a more reliable estimate of final project cost and employed an approach used by Brian Becker in his 1995 study of single versus separate prime contracting. Becker gathered cost data for both single- and separately-bid projects from a national sample as well as select state-level samples and compared the data using several ratios, including final-to-bid cost.

Similarly, task force staff gathered PlanCon data (estimated cost at bid and final cost) from projects built with a waiver of the multiple prime bidding requirement as well as similar multiple prime projects. This analysis was not an effort to determine which type of bidding results in a less expensive build, as it is difficult (if not impossible) to attribute fluctuations in bid to final cost to the type of bidding. Every construction project is unique, and any number of factors (e.g., change orders, site problems, labor disputes, shipping delays, litigation) can influence final project cost. Becker made note of this challenge in his study and acknowledges that “cost comparison between single and separately bid jobs will likely reflect differences beyond simply the fact that the jobs were bid differently” (p. 15).

In establishing sets of single and multiple prime projects for comparison, staff controlled for key factors such as region of the state, year construction began, and type of construction (new, addition, alteration/renovation). In addition, staff compared projects of similar size (architectural area and approximate number of students) and attempted to control for local wealth (expenditures per average daily membership). Ultimately, seven single prime projects were compared to similar multiple prime projects.

Results of the comparisons are as follows:

- Upon completion, three (3) single prime projects were more over budget than their multiple prime comparison. The amount over budget ranged from 4.9% to 19.8%, with an average of +13.0%.
- Three (3) multiple prime projects were more over budget than their single prime comparison. The amount over budget ranged from 4.7% to 17.1% over budget, with an average of +9.7%.
- The final and seventh review was between Spring-Ford Area School District (single prime) and Quakertown Community (multiple prime). Both projects were completed under budget, with Spring-Ford under by -0.6% and Quakertown Community by -1.9%.

A chart detailing the ratio analysis is included in the appendix.

### **Case Studies**

In addition to the quantitative analysis described above, task force staff sought to gather more detailed information through case studies of school districts that have recent experience with both forms of contracting. Once again, the small sample of single prime projects proved challenging: only a handful of districts met the criteria by completing at least two reimbursable school construction projects within the past ten years, one of which built single prime. Equally challenging was the lack of quality mandate waiver evaluations and PlanCon Part J filings for many of the projects. Task force staff acknowledged that the Department has not been forceful in requiring districts to submit these documents and therefore sees this as an obvious area for improvement.

Three districts – Central Bucks, Great Valley, and Kiski Area – agreed to participate in the case studies, but administrative office turnover in Kiski made it impossible to secure answers to all questions by our deadline. Task force staff developed a case study intake form, circulated the draft form to both Department staff and task force members, and incorporated many suggested changes. The form asked district officials to:

- Compare and contrast their experiences with single and multiple prime projects;
- Provide documentation associated with the district’s application for a multiple prime waiver and subsequent evaluation; and
- Detail change orders and identify the initiating party.

Staff from Central Bucks and Great Valley attended the December 22, 2008 meeting of the task force to discuss their responses in greater detail and take questions from task force members. The task force is grateful to Scott Kennedy (Central Bucks) and Chuck Linderman, Richard Krumrine, and David Renn (Great Valley) for contributing to our process. Their completed case studies and attachments are included in the appendix.

#### **Case Study of Central Bucks School District**

Central Bucks School District is the third largest in the state: over the last 15 years, the district has constructed seven new schools and completed additions and renovations to several others as its enrollment has nearly doubled. Central Bucks has significant experience with both single and multiple prime contracting, and district staff believe that multiple prime contracting waivers have generated considerable savings.

Comments by Scott Kennedy, the district’s chief operating officer, included:

- *“The multiple prime method produces more change orders and potential controversy during the project. This is due to the multiple prime contractors’ inability to plan and coordinate their work.”*

- *“The benefit of our recent single prime projects was improved project management, fewer conflicts [among] the contractors during the project, and increased quality of work.”*

#### Case Study of Great Valley School District

Great Valley is another fast-growing, suburban Philadelphia district. The district’s Director of Business Affairs, Chuck Linderman, has experience with both single and multiple prime contract bidding and offered the following observations:

- *“The use of single prime construction shortened the construction timeline. We believe that the quality of construction is also greater, because there was a single source of responsibility.”*
- *“A single prime project makes it much more feasible for a district employee to handle compared to four or more contracts. Hiring an independent contractor to perform construction management and supervision could cost at least 2% of the construction cost.”*

## IV. Recommendations

At the close of its work, the Task Force on Mandate Waivers passed<sup>3</sup> six recommendations that address a host of issues – from the bidding process for school construction projects, to the need for more meaningful reporting following their completion. Three recommendations – two relating to evaluation and reporting, the other requiring more transparency as projects are awarded to subcontractors – passed with unanimous votes. The task force was proud to reach consensus on these questions.

Final, agreed-upon language for all recommendations is listed in italics below, along with comments provided by both supporting and dissenting members. Roll call votes for each recommendation are footnoted.

### **Recommendation #1**

*Any and all future waivers of multiple prime construction issued by the Department will be limited to the extent that districts must solicit single prime bids as well as multiple prime bids, with the district utilizing the least expensive/most responsible bid option.*  
(Vote: Yes, 9; No, 2)<sup>4</sup>

Supporting Opinion, offered by Secretary Soderberg, Secretary Vito, Secretary Zahorchak, Senator Dinniman, Senator Tartaglione, Representative Belfanti, Representative Clymer, Representative DiGirolamo and Representative Roebuck:

The task force was charged with reviewing whether or not waivers allowing for single prime construction of schools result in more cost effective or more efficient projects. The task force collected and analyzed a great deal of information from various sources involved in school construction. That information does not provide conclusive evidence that single prime construction is either less expensive or more efficient. The Department's own review of PlanCon data shows examples of projects that are well run and others that are problematic, regardless of the use of single or multiple primes.

While numerous groups and individuals have offered anecdotal evidence and testimonials supporting either single or multiple primes, there is no way to document the benefits of either approach as compared to the other method. This is due to the unique nature of each project and the fact that projects have most

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<sup>3</sup> **Participants in the voting of January 12, 2009:** Representative Paul Clymer; Representative Gene DiGirolamo; Vicki DiLeo (for Representative Robert Belfanti); Senator Andrew Dinniman; Nichole Duffy (for Mary Soderberg, Secretary of the Budget); Senator John R. Gordner; Donald Kockler (for Senator Christine Tartaglione); Senator Jeffrey E. Piccola; Chris Wakeley (for Representative James Roebuck); Sandi Vito, Acting Secretary of Labor and Industry; Gerald Zahorchak, Secretary of Education

<sup>4</sup> **Recommendation 1:** Yes: Belfanti/DiLeo, DiGirolamo, Clymer, Dinniman, Roebuck/Wakeley, Soderberg/Duffy, Tartaglione/Kockler, Vito, Zahorchak; No: Gordner, Piccola

often been bid using either single or multiple primes, not both. The only truly comparative data came from a few school districts that bid the same project using both single and multiple primes. In those cases, multiple primes were less expensive and the school districts have consistently opted for the lower price and built the projects using the multiple prime approach.

Dissenting Opinion, offered by Senator Gordner and Senator Piccola:

Those who did not support this recommendation did so because they felt such matters should be decided locally by elected school board members and should be based on the many unique circumstances relevant to the 501 school districts and individual projects. While both senators noted that districts are encouraged to solicit both single and multiple prime bids for building projects, they had concerns about an additional state mandate that would require school districts to do so. Additionally, the task force was presented with no data to either support or oppose this recommendation based upon costs to districts. At the December meeting of the task force, an official from the Great Valley School District testified that he estimated an additional cost of about \$10,000 per project to prepare and review dual bids; however, the task force lacks specific cost information to make a decision on this matter.

### **Recommendation #2**

*Amend the School Code so that no school district shall receive a mandate waiver if it is delinquent in filing an evaluation of a previously granted waiver under Section 751 or 751.1 or its final PlanCon filing, as applicable. In addition, PlanCon reimbursement will be withheld for districts that fail to file reports as required, until such time as the reports are adequately filed. The Department of Education is encouraged to conform its policy to act in the manner recommended here. (Vote: Yes, 11; No, 0)*

### **Recommendation #3**

*The evaluation form for 751 and 751.1 waivers should be revised to collect additional information on savings, project chronology, conformity with the Uniform Construction Code, and information regarding change orders (to include rationale for those change orders). The due date for the evaluation remains three years from the date of waiver approval, with additional reports submitted every year thereafter until the project is completed. (Vote: Yes, 11; No, 0)*

### **Recommendation #4**

*The Department should provide assistance to districts in collecting data allowing for an accurate analysis and comparison to be completed on costs/savings of single prime vs. multiple prime contracting for similar projects. Subsequently, the Department would*

*determine the most appropriate way to report and present the information to the General Assembly and interested school districts. (Vote: Yes, 6; No, 5)*<sup>5</sup>

Dissenting Opinion, offered by Senator Dinniman, Senator Tartaglione, Representative Belfanti, Representative DiGirolamo and Representative Roebuck:

The “no” votes on this recommendation are based solely on the substitution of the word “similar” for “same” in line 3 of the recommendation. The initial recommendation by Representative Clymer proposed data collection and analysis based on the “same” project; Senator Gordner recommended the substitution of “similar.” The dissenting members believe the task force should have voted on the question of “similar” vs. “same” prior to voting on acceptance of the recommendation.

The task force received numerous comments that no two school construction projects are alike. Differences include geography, timing, size of the projects, site conditions, completeness of architect plans, financial stability of the contractors involved, and many other factors. The Department’s own attempt to analyze “similar” projects for the task force not only failed to demonstrate any benefit of choosing single over multiple prime construction, it also showed that there is a tremendous number of variables when comparing one construction project to another. Dissenting members believe the task force’s adoption of the recommendation to require that waiver projects be bid using both single and multiple primes is, in large part, because the only valid comparison between the two approaches is for the “same” project.

### **Recommendation #5**

*Update bid thresholds as follows:*

- 1. Work completed by school personnel from \$4,000 to \$25,000;*
- 2. Any project not completed by school personnel and costing between \$10,000 and \$25,000 can only be completed after the district obtains three competitive quotes;*
- 3. Projects costing more than \$25,000 should require the district to advertise and solicit bids;*
- 4. Each of the three thresholds should be automatically updated annually based on the Building Cost Index used to update Act 34 thresholds. (Vote: Yes, 6; No, 5)*<sup>6</sup>

Dissenting Opinion, offered by Secretary Vito, Senator Tartaglione, Representative Belfanti, Representative DiGirolamo and Representative Roebuck:

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<sup>5</sup> **Recommendation 4:** Yes: Clymer, Gordner, Piccola, Soderberg/Duffy, Vito, Zahorchak; No: Belfanti/DiLeo, DiGirolamo, Dinniman, Roebuck/Wakeley, Tartaglione/Kockler

<sup>6</sup> **Recommendation #5:** Yes: Clymer, Dinniman, Gordner, Piccola, Soderberg/Duffy, Zahorchak; No: Belfanti/DiLeo, DiGirolamo, Roebuck/Wakeley, Tartaglione/Kockler, Vito

Proposals to increase the bid thresholds as included in this recommendation have been introduced during, at least, the last two legislative sessions in both the House and Senate; none were enacted. While it is within the task force's mission to recommend changes on any waiver issued under Sections 751 and 751.1 of the School Code, the task force completed no data collection or analysis on this issue prior to being presented with the proposed recommendation. Even the discussion of the recommendation was remarkably short compared to many of the other recommendations. The "no" votes on this recommendation reflect the complete lack of any study by the task force on this matter prior to recommending that the legislature reverse its previous stance on the issue.

### **Recommendation #6**

*Require prime contractors on school construction projects bid using a waiver of 751 to identify on bid forms those subcontractors with work (including labor and materials) exceeding \$10,000. On these projects, the prime contractor shall be required to employ the subcontractors identified on the bid form. All subcontractors so identified shall be paid directly by the district for labor and material costs as certified by both the prime contractor and subcontractor. (Vote: Yes, 11; No, 0)*

# *Acknowledgments*

The task force gratefully acknowledges the contributions of the following staff:

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