

**STATEMENT OF MOORE COUNTY BOARD OF EDUCATION
CHAIR HELENA WALLIN-MILLER
REGARDING BIDDING FOR
THE NEW SOUTHERN PINES ELEMENTARY SCHOOL PROJECT
APRIL 12, 2019**

I write to set the record straight on a recent sequence of events relating to bids for the construction of the new Southern Pines Elementary School that has garnered some attention on a local radio station and in social media. While most of these events have been explained in detail in multiple recent public meetings before the Moore County Board of Education and Board of County Commissioners, there have also, regrettably, been false and unsubstantiated claims that the administration of Moore County Schools “lied” about these events in a March 5 presentation to the County Commissioners. Additionally, questions have been raised about how and why the Moore County Schools ended up contracting with the second-lowest bidder on this project, the extent to which the Board of Education was involved in that decision, and whether the school system should have made a claim on a bid bond for that project. I also will address these questions in this statement.

The facts, as verified by our staff and legal counsel and as reflected in the attached documents, are as follows:

On February 26, 2019, Moore County Schools staff opened bids for the Southern Pines Elementary School project. All bids came in over budget. The apparent low bidder was Clancy & Theys Construction Company, with a bid of \$29,847,979 (base bid and accepted alternates). The second lowest bidder was Monteith Construction Company, with a bid of \$30,966,000 (base bid and accepted alternates), and the third lowest bidder was J.M. Thompson, with a bid of \$31,367,840 (base bid and accepted alternates).

On February 27, the architect supervising the project sent a letter via email to a Clancy & Theys representative to let him know that the company was the apparent low bidder on the project and to ask for confirmation of the company’s willingness to enter a contract at the bid price. The architect also noted that, because the bid was over budget, representatives of the school system and the contractor would need to engage in further discussions about “value engineering” certain items to reduce the overall contract cost. The letter included a preliminary list of potential savings through value engineering as a starting point for these discussions. The email and attached letter did not, as some may have inferred, constitute a formal rejection of the bid - it simply notified the contractor that value engineering negotiations would be needed to try to bring the project under budget. All of this is ordinary business for construction projects of this nature.

Information about the bid opening, including the fact that all bids were over budget and that the parties would pursue value engineering to reduce costs, was shared with County Manager Wayne Vest. Meanwhile, Moore County Schools and Clancy & Theys representatives continued their good faith discussions on value engineering options. Clancy & Theys indicated that it would need until approximately March 7 to assemble all of the information requested. Moore County Schools staff planned to present the bid tabulations to the Board of Education at its March 4 meeting, on

the understanding that a contract award could not be considered until the Board of Education's regular March 11 business meeting in light of the ongoing work to reduce project costs through value engineering.

At approximately 2:30 p.m. on March 4 – about 30 minutes before the beginning of the work session – Moore County School's Executive Officer for Operations, John Birath, received a call from a Clancy & Theys representative notifying him that the company had discovered a mathematical error of approximately \$1,400,000 in its bid computations and would need to withdraw its bid. Mr. Birath briefed a school system attorney by phone and Superintendent Grimesey in the parking lot just before the meeting. Without time to verify the information received from Clancy & Theys, update their presentation, or explore the district's legal and practical options, Dr. Grimesey and Mr. Birath notified the Board that they had just been contacted by Clancy & Theys and received unfortunate news related to the Southern Pines Elementary School bids, that their presentation may no longer be valid, and that they would not be prepared to proceed with the planned presentation until the March 11 regular business meeting. The Board voted unanimously to table the discussion until the March 11 meeting.

After the work session, Clancy & Theys representatives explained to Mr. Birath that they had discovered the mathematical error while pouring over bid information to look for costs savings through value engineering. They further explained that, because of this significant error, they could not perform the work for the bid cost. Faced with a sudden and unexpected crisis, Mr. Birath contacted the second low bidder, Monteith Construction, to confirm that its bid was valid and that it was still available to perform the work if awarded a contract by the school board.

In a subsequent conversation with Monteith on March 5, a Monteith representative confirmed to Mr. Birath that Monteith could do the work for its bid price. But he also explained that Monteith faced a deadline to submit a bid later that day on another project. Due to staffing limitations, the Monteith representative stated that the company could not do both projects at the same time and would need to make a choice. While Monteith would prefer to accept a contract for the Southern Pines Elementary project than to put in a bid in hopes of securing another project, the company would need assurances by noon that day (March 5) that additional funding was available to cover the bid price, if needed after efforts were made to reduce costs through value engineering. Absent such assurances, the company would pass on the potential contract with Moore County Schools to put in a bid, by deadline, for the other project.

Also on the morning of March 5, Clancy & Theys sent a formal letter to Mr. Birath officially notifying the school system that it was withdrawing its bid. This letter was sent in response to the email and letter from the project architect on February 27. The letter stated that Clancy & Theys was not able to perform the work at a reduced price. The letter added that Clancy & Theys' bid was null, void, and withdrawn pursuant to G.S. 143-129(b). Mr. Birath shared the letter with Dr. Grimesey, and the two discussed the situation. The cost difference between Monteith and the next lowest bidder, J.M. Thompson, was \$401,840, and the County Commissioners were scheduled to meet later that morning. Failure to secure funding to exceed the original budgeted costs from the Commissioners that very day and to relay that information to Monteith would therefore lead to an immediate \$401,840 in added project costs. Alternatively, Moore County Schools could reject all bids and re-bid the project. That approach, however, was counter-productive for several reasons.

First, the fact that bids already had been opened and were public records made it unlikely that new bids would come in lower, since prospective bidders would already have a good sense of what their competitors may propose. Indeed, it was quite possible that bids would come in even higher than before, further exacerbating an already difficult situation. Second, it was expected that some of the former bidders – including Monteith – would not be able or willing to submit a new bid, thus reducing the pool of responsible, reliable, potential bidders. Third, to rebid the project would take at least four weeks, and the project was already on a very tight timeline for a scheduled August 2020 opening. A delay in school opening was a very real possibility, and an unacceptable one. In addition to imposing a significant hardship for students and their families, opening the school after the beginning of the school year would significantly increase costs and burdens for furnishing and equipping the building – work that is normally done over summer months. It also would result in added inflationary costs. For all these reasons, Dr. Grimesey and Mr. Birath concluded that they could not recommend that the Board re-bid the project.

Under these dire circumstances, Dr. Grimesey and Mr. Birath made the sound decision to ask to be heard by the County Commissioners to seek additional funding and avoid the prospect of an additional \$401,840 cost escalation that would occur at noon that day if Monteith withdrew from consideration. The County Manager agreed to present this request to the Commissioners, and Mr. Birath headed over to the county office at that time. With little time and no opportunity to update the full Board at a properly noticed meeting, Dr. Grimesey called me, as Board Chair, to let him know what he was doing. I fully supported, and still fully support, his decision.

Mr. Birath met with the County manager, the Chair and Vice-Chair to provide them a quick overview of the issues with the bids. The Commissioners agreed to add this item to their agenda and heard from Dr. Grimesey and Mr. Birath. During this public discussion, which is available on video at the County Commissioners’ website for anyone who cares to view it, Dr. Grimesey and Mr. Birath made all of the points noted above and answered questions from the Commissioners. Far from telling any “lies,” they carefully laid out the facts and asked for the Commissioners help to keep a regrettable situation (the withdrawal of the lowest bidder) from getting even worse (the withdrawal of the second-lowest bidder). After hearing the presentation and having the opportunity to ask questions, the Commissioners voted unanimously to approve the additional funding needed to secure a contract with Monteith. Mr. Birath notified Monteith of this decision immediately after the meeting, just before the noon deadline.

On March 5 and March 6, Mr. Birath also engaged in discussions with the system’s legal counsel, who consulted with legal counsel for Clancy & Theys on the purported bid withdrawal and the legal basis upon which it was based. In follow up to these discussions, a Moore County Schools attorney emailed a Clancy & Theys attorney on March 7 to request that Clancy & Theys submit written documentation regarding the bid mistake that had previously been discussed with Mr. Birath by phone.

Later on the morning of March 7, the Clancy & Theys attorney responded with a written explanation and a spreadsheet showing how the mathematical error was made. The email and spreadsheet explained that the estimator who prepared the bid inadvertently failed to account for six line items of material project work that was required by the bid documents to be included when totaling the project costs. The omitted items were: (1) \$425,000 for all of the exterior concrete;

(2) \$505,884 for landscaping and irrigation; (3) \$95,335 for fencing; (4) \$7,000 for termite control; (5) a \$300,000 owner's contingency; and (6) \$100,000 allowance to cover lighting and sound at the gym platform. The total for these items, which were inadvertently omitted from the bid price, was \$1,432,335 – far more than the difference between the Clancy & Theys and Monteith bids.

The next day (March 8), the school system's lawyer replied that he did not believe that Clancy & Theys could "withdraw" its bid under the bid withdrawal statute based on the information presented. Citing that law, he explained that a request to withdraw a bid based on the contractor's mistake must be made within 72 hours (3 days) of bid opening and must be shown to be a good faith mathematical error based objective evidence drawn from the original work papers and documents used to prepare the bid. In this case, however, the contractor first gave notice that it needed to withdraw its bid on March 4, 2019, 144 hours (6 days) after bid opening, when it noticed the error while working on value engineering. Further, the documentation provided was not sufficiently detailed to prove the nature of the error. Without waiving the school system's rights to contest Clancy & Theys' actions, our attorney notified Clancy & Theys' attorney that a meeting would be held on Wednesday, March 13, in Raleigh to discuss the matter. He further directed Clancy & Theys to bring clear and convincing documentation of the nature and source of the bid error to the meeting.

On March 11, the Board of Education held its regular business meeting. During closed session, the Board Attorney thoroughly briefed the Board on the legal issues related to the Clancy & Theys bid issues, including issues related to its bid bond. While I will not waive attorney-client privilege by revealing the substance of these discussions, Board members had ample opportunity to discuss the potential arguments and defenses related to bid acceptance, bid withdrawal, contract award, and bid bond issues and gave clear instructions and authority to its superintendent and attorneys with respect to the handling of these matters.

During the open session portion of the meeting, Dr. Grimesey and Mr. Birath fully briefed the Board on the factual background related to Clancy & Theys' bid, including the March 5 letter formally withdrawing its bid, the subsequent phone conversations with Monteith, and the March 5 presentation to the Commissioners. Dr. Grimesey and Mr. Birath noted that value engineering discussions with Monteith were ongoing, as they continued to actively work to bring down project costs. They therefore recommended that the Board table action on award of the construction contract to a special called meeting on March 18. The Board voted unanimously to approve this request, and several Board members specifically complimented Dr. Grimesey and Mr. Birath on their fast action to keep Monteith available and avoid further increases in project costs.

On March 13, representatives for Clancy & Theys and for Moore County Schools met in Raleigh to discuss the matter of Clancy's bid. At the meeting, Clancy & Theys provided extensive documentation drawn from the original work papers used to prepare the bid that left no doubt about the nature and extent of its innocent, good faith, error. After conferring with legal counsel and with Dr. Grimesey, Mr. Birath emailed Clancy & Theys with the school system's decision in this matter. Echoing what the school system attorney had said just days before, Mr. Birath noted that "the statute does not allow you to withdraw the bid because the withdrawal was not made within 72 hours of the submission of the bid." However, Mr. Birath continued, given that the bid price was based on a \$1,432,335 good faith mistake, he would recommend that Clancy & Theys' bid be

rejected as “non-responsive” and that the contract be awarded to Monteith as the next lowest bidder.

On March 18, Dr. Grimesey and Mr. Birath again provided a detailed update on the Southern Pines Elementary School project at the Board of Education’s special called meeting. Included in this update was a discussion of the March 13 meeting in Raleigh; the determination by staff and legal counsel that the Clancy & Theys error was truly a good faith, innocent omission; a description of how \$925,447 was cut on project costs through value engineering with Monteith Construction Company and a reduction in the contingency; and a formal recommendation to deem Clancy & Theys’ bid non-responsive and award the construction contract to Monteith Construction Company, the project’s lowest responsive and responsible bidder. The Board unanimously approved the recommendation, with several Board members again specifically complimenting Dr. Grimesey and Mr. Birath for their fast action to avoid further increases in project costs.

The argument that Dr. Grimesey and Mr. Birath “lied” to the County Commissioners appears to be based on the fact that the March 5 letter from Clancy & Theys did not specifically reference a “mathematical error” in bid calculations, as Dr. Grimesey and Mr. Birath stated at the March 5 Commissioners’ meeting. As noted previously, however, Clancy & Theys representatives did make this specific assertion to Mr. Birath by telephone on March 4 and March 5, in writing on March 7, and in its in-person meeting with Moore County Schools representatives on March 13. There is simply no doubt that the company *did* make a mathematical error, and a significant one, in putting together its bid.

As for concerns as to whether, and to what extent, the Board of Education was aware of relevant events, the timeline set out above shows that Board members were kept fully apprised by staff and legal counsel of all relevant issues in this matter. I have no concerns of any kind related to administration’s communication with the Board and respect for the Board’s authority on these matters.

Finally, concerns have been raised regarding whether Moore County Schools should have pursued a claim on Clancy & Theys’ bid bond in order in light of its \$1,432,335 mistake in formulating its bid. Several points are worth considering with respect to this question.

First, it is important to understand that forfeiture of the bond of this nature is not an easy, automatic process. Given the dollar amount, it is highly unlikely that the bond would be paid without protracted, and expensive litigation.

Second, it is far from clear that Moore County Schools would have succeeded in the event of litigation. While the bid withdrawal statute does require notice of withdrawal to be submitted within 72 hours of bid opening, there is simply no question that the main criterion of the bid withdrawal statute – that the mistake be made in good faith and established by objective evidence – was fully met. Courts asked to decide matters such as these are entitled to, and do, consider the “equities” of the situation and strive for fundamental fairness in their decisions. It is simply not a given that the school system could recover on a \$1,432,335 claim when its *only* argument would be that a bidder discovered an innocent mistake within 6 days rather than 3 of the bid opening, especially given that the bidder was notified the day following the bid opening that the project was

over budget. More importantly, the bid withdrawal statute is not the only possible way to analyze the issues presented. In particular, the March 5 letter from Clancy & Theys cited another statute (not the bid withdrawal statute) in formally announcing that the company's bid was "deemed null and void." That statute, G.S. 143-129(b), provides that if the "lowest responsible bids are in excess of the funds available for the project," the public body can award the contract to that bidder with value engineering, "if such bidder will agree to perform the work...at the negotiated price within the funds available." In the event of litigation, the low bidder could have argued that it never agreed to perform the work at a reduced price and therefore could reject a contract award without jeopardizing its bid bond.

Finally, in order to pursue Clancy & Theys' bid bond, Moore County Schools would first have needed to award the contract to that company at their bid price (knowing that it had underbid by nearly a million and a half dollars and sent a letter to the school system rejecting a contract) and afforded an opportunity to perform. In many ways, this could be the worst-case scenario for the reasons described by the UNC School of Government in this blogpost, [Low Bidder Limbo: When the Low Bid is Too Low](#). As stated in the blogpost, "Some readers may wonder why you should care if the bidder has made a mistake. If you award the contract to them at this low price, doesn't that mean you've save your taxpayers hundreds of thousands of dollars? Maybe, but there are substantial risks. The bidder may be unable to perform the work at that price, and may instead perform badly, stop performing altogether, attempt to increase the bid price through change orders, or even go bankrupt – which will result in delays, higher costs, and bigger headaches for you."

Indeed, the action taken by the Board of Education in this matter is consistent with School of Government's guidance in this publication, which recommends that "too low" bids that do not substantially meet the bid specifications and cannot or will not be withdrawn should be rejected as "non-responsive" if the irregularity (the difference between the bid and the specifications) would give an "unfair advantage" to the bidder if the owner were to ignore it. In this case, it would clearly have given an unfair advantage to the lowest bidder to award it a contract over other bidders when it had failed to account in its bid total for \$1.4 million worth of concrete, landscaping, irrigation, fencing, termite control, and owner-required contingencies required by the bid specifications.

In sum, all of the information presented by our administration to the Board of Education, the County Commissioners, and the public was – to the best of my knowledge and based on a thorough review of these matters with staff and legal counsel – entirely fair and accurate and consistent with our high standards for integrity and transparency. Further, the Board of Education has been kept fully informed over issues related to the Southern Pines Elementary School project and greatly appreciates the work done by Dr. Grimesey, Mr. Birath, and other staff to manage project costs and keep the project on schedule for an August 2020 school opening. Finally, I believe the administration and Board made fair and fiscally sound decisions in rejecting the "too low" bidder as non-responsive and awarding the contract to the second-lowest bidder consistent with the UNC School of Government in the blogpost linked above.

I hope that this lengthy explanation will put the rumors and innuendo to rest so that the Board, staff, and general public can turn their full attention to important matters of governance. We have done much important work in recent months and years but have much more to accomplish. Working together in partnership with our County Commissioners and our broader community, we

will build safe and well-designed new schools, fill them with bright pupils and creative teachers, and continue to find ways to improve educational outcomes for our students while always being good stewards of public funds. We are grateful for the support we have received, and continue to receive, from our Commissioners and our community, and look forward to continuing to work on these endeavors together.