

PURCHASING POTPOURRI



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CLARK HILL

About the Presenter

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What's on Tap?

- **The Legal Aspects of Purchasing**
- **Supplies/Equipment vs. Construction vs. Services**
- **Different Manners of Purchasing**
- **The RFP/Bidding Process**
- **Proposal/Bid Analysis**
- **Contract Basics**
- **Purchasing Policy Overview**



This document is comprised of general information relative to the subject matters discussed herein. It is not intended to give legal advice and does not establish any attorney-client relationship. School Districts facing specific issues should seek the assistance of an attorney.

Legal Aspects Of Purchasing – MCL 380.11a

The Broad Powers under the Revised School Code – MCL 380.11a

- **General Powers School Districts**
- **School districts have express powers, and may exercise those powers that are implied or incidental to those express powers, and may also exercise a power incidental or appropriate to the performance of any function related to the operation of the school district in the interest of public elementary and secondary education within the school district.**
- **“Educational Nexus”**
- **Express Power for Purchasing:**
 - MCL 380.11a(3)(c) – “Acquiring, constructing, maintaining, repairing, renovating, disposing of, or conveying school property, facilities, equipment, technology, or furnishings.”**
 - MCL 380.11a(4) – “A general powers school district may enter into agreements or cooperative arrangements with other entities, public or private, or join organizations as part of performing the functions of the school district.”**

Legal Aspects of Purchasing – MCL 380.1274

Procurement of Supplies, Materials and Equipment – MCL 380.1274

- Board shall adopt written policies governing the procurement of supplies, materials and equipment; however, **NO SPECIFIC REQUIREMENTS FOR POLICIES.**
- Must obtain competitive bids for the purchase or any item or group of items in a single transaction costing \$23,126 or more & school board must approve purchase.
- Exceptions:
 - Purchases to State cooperative bulk purchasing program
 - Purchases of food in a single transaction costing \$100,000 or more.
- Michigan-based business preference
 - Optional and Requires additional “local policy”
 - Based upon primary contractor or 1 or more subcontractors or primary contractor
 - Cannot be used if paid with federal funds
 - “Michigan-based Business” definition
- No advertising or public bid opening required, but may follow aspects of Section 1267

Legal Aspects of Purchasing – MCL 380.1267

Construction and Repair of School Buildings – MCL 380.1267

- **Before commencing construction of new school building, or addition to or repair or renovation of an existing school building, except in emergency situations, the school district shall obtain competitive bids on all material and labor to complete construction costing \$23,126 or more.**
- **Specific Requirements for Bidding Procedures:**
 - Advertise once in local newspaper
 - Post advertisement on State website for at least 2 weeks
 - Advertisement must specify:
 - Date and Time bids are due
 - School district will not accept or consider late bids
 - Date, time and place where bids will be opened and read aloud
 - Each bid shall be accompanied by sworn and notarized familial affidavit
 - Will not accept bid that does not include sworn and notarized familial affidavit
 - A Bid Bond (5% of bid amount) is required
- **Reservation of Rights**
- **Michigan-based Business Preference (same requirements as Section 1274)**

Legal Aspects of Purchasing

Energy Conservation Projects - MCL 380.1274a

- **Projects include, but not limited to: building envelope improvements; heating & cooling; equipment upgrades; lighting retrofits; energy management systems; etc.**
- **May pay with general funds or issue bonds.**
- **Energy conservation improvements or substance removal or treatment authorized by this section is subject to the competitive bidding requirements of section 1267.**

Changes in Procedures for Posting on State Website

- **All school districts must post advertisements directly to “administrative site” of www.Buy4Michigan.com (formerly www.bid4michigan.com)**
- **Posting Procedures**
 - **Intended for solicitations over \$10,000 (per State website).**
 - **School district must fill out required forms and create an account to post.**
 - **Free training is available and may be helpful for users.**
 - **School district must post bids (and attachments) itself.**
 - **Do NOT email State anymore (will get auto response with link to forms for account).**
 - **May be used for bids other than construction.**

Legal Aspects of Purchasing – Services

General Overview

- **No requirement to seek competitive bids for services, EXCEPT:**
 1. **Food Services – Federal law and MDE requirements require specific RFP process.**
 2. **If School District elects to pursue “Best Practices” Legislation “competitive bids for non-instructional services” option.**
 3. **Privatizing non-instructional service with “unionized workforce” - must give union the “opportunity to bid on an equal basis as other bidders.” Often referred to as “outsourcing” or “privatization.”**
 4. **If your Board policy(ies) requires competitive bids for services.**

Legal Aspects of Purchasing

Iran Economic Sanctions Act - MCL 129.311 et seq. (Became effective April 1, 2013)

- An Iran linked business is not eligible to submit a bid on ANY request for proposal with a Public Entity.
- A Public Entity shall require a person that submits a bid on ANY request for proposal with the public entity to certify that it is not an Iran linked business.
- If Public Entity determines that certification is false, must give written notice to bidder of such determination and intent to not enter into, or renew, the contract.
- Bidder has 90 days to demonstrate certification was not false, and if not done, Public Entity may terminate contract and shall report bidder to State Attorney General.
- Civil penalty against bidder for non-compliance is the greater of \$250,000 or 2 times the amount of contract AND is ineligible to bid on any request for proposal for 3 years from the date of the Public Entity's determination of false certification.
- "Public Entity" definition includes a school district and an intermediate school district, and implicitly a public school academy.

BEST PRACTICE - obtain certification by requiring an affidavit in RFP documents that bidder must complete and include/submit as part of its proposal.

Legal Aspects of Purchasing



Common Misperceptions of Purchasing Laws

- No sole or single source exception to either Sections 1274 or 1267.
- Emergency Exception
 - ONLY applies to repairs to school buildings (Section 1267)
 - NO “Emergency” exception for supplies, materials and equipment purchases
- “Emergency” = failure to repair school building would have detrimental effect on building or on the health, safety or welfare of students or occupants of the school building.
- \$100,000 increased competitive bidding threshold only applies to food purchases.
- Obtaining supplies, materials and/or equipment via a cooperative/consortium bidding process is NOT always permissible and/or legally compliant.

Legal Aspects of Purchasing



Consequences for Violating the Law

- MCL 380.1815

A person who knowingly or intentionally violates the competitive bidding requirements of Section 1267, or who knowingly or intentionally permits or consents to a violation of the competitive bidding requirements of Section 1267, is guilty of a misdemeanor punishable by a fine in an amount equal to not more than 10% of the cost of the project involved in the violation or imprisonment for not more than 1 year, or both, but is not subject to the penalties of Section 1804.

- MCL 380.1804

Except as otherwise provided in [the Revised School Code], a school official or member of a school board or intermediate school board or other person who neglects or refuses to do or perform an act required by the [Revised School Code], or who violates or knowingly permits or consents to a violation of the [Revised School Code], is guilty of a misdemeanor punishable by a fine not more than \$500.00, or imprisonment for not more than 3 months, or both.

Legal Aspects of Purchasing

- **Bid Bonds**
 - Required for Section 1267 and 1274a, but may use under Section 1274 or other bidding
 - 5% of bid amount
 - Bid bond, certified check, cash
 - Must be filed with Board

 - **Performance and Payment Bonds (MCL 129.201 *et seq.*)**
 - Applies to projects to construct, repair, or alter public buildings (including schools)
 - Applies only if contract amount exceeds \$50,000
 - Bonds must be at least 25% of contract amount
 - Must be issued through licensed surety
- *** School districts may require performance and/or payment bonds in other types of contracts.

**TO BID OR NOT TO BID ...
That is the Purchasing Question.**

Mandatory vs. Non-Mandatory Items

The following chart is a summary of the general legal requirements for procurements exceeding the applicable monetary threshold.

Supplies/Equipment	Construction	Services
Comply with District Policy	Advertisement in Newspaper	Iran Linked Business Affidavit
Do NOT split purchases	Post on Buy4Michigan.com	Union Equal Opportunity to Bid*
Iran Linked Business Affidavit	Bid Bond	Familial Disclosure Affidavit
Familial Disclosure Affidavit	Performance and Payment Bonds*	Bid Bond
Bid Bond	Familial Disclosure Affidavit	Performance Bond
Performance Bond	Iran Linked Business Affidavit	Food Service - MDE Process*
Board Approval	Board Approval	Board Approval
	Architect/Engineer Required*	

KEY: **Mandatory** / **Optional but Best Practice** / **Wholly Optional**

Different Manners of Purchasing

Purchasing Cards



- Should be used for small dollar purchases.
- Convenient for staff and provides administrative cost savings (and maybe rebates).
- Credit Card Transactions Act – MCL 129.241 *et seq.*
 - Permits the establishment of credit card arrangements by school districts.
 - Requires Board to adopt written policy by resolution.
 - Written Policy must:
 - Set internal controls and designate officer/employee who oversees program.
 - State cards can only be used for official business.
 - Require users to submit specific records and documentation of use.
 - State user is responsible for protection/custody and must notify if stolen.
 - State user must return card upon termination.
 - Require approval of statements before payment and payment within 60 days.
 - State disciplinary procedures for unauthorized use.
 - Credit Limit for all cards cannot exceed 5% of total budget for current fiscal year.
- MCL 380.1254 – Expense reimbursement and Credit Card Usage.

Different Manners of Purchasing

Cooperative vs. Consortium Purchasing

- Board Policy should authorize use of cooperative purchasing groups.
- Understand who conducts cooperative bidding and their processes.
- Review group bidding documents to ensure compliance with law and policies.

Lease vs. Purchase

- Review “Total Cost” (Unit Cost, Delivery, Installation, Useful Life, Residual Value).
- “True Lease” vs. “Installment Purchase Agreement” (nominal buy-out cost).
- MCL 380.1274(6) – May use leases to acquire equipment for school purposes.

Purchase Orders

- Purchase Orders (POs) and Blanket Purchase Orders (BPOs) in General
 - Often used as “contract” to purchase supplies.
 - Beware of “fine print” and review terms. This IS a Contract!
 - Monitor use and clearly indicate who is authorized to use.
 - Develop school district unique and standardized PO and BPO with each vendor.

The Bidding Process

Types of Bidding/Solicitation

- Request for Qualifications (RFQ)
 - Typically used to determine qualified bidder pool for services.
 - Beware under Section 1267
- Request for Quotes – “Quote Bidding”
 - Informal
 - Used for small dollar amount purchases (under State threshold)
- Invitation/Request for Bids/Proposals (IFB/RFB or IFP/RFP)
 - All very similar in nature and intent.
 - Used for construction, supplies, materials, equipment and services.
 - Need clear, well defined specifications.
 - Typically uses public bid opening (required for construction).
 - Award to lowest responsible bidder, based upon price and other related factors.
 - May allow vendors to present a “program” or “turn-key solution” (services).

Designing the Solicitation Documents

- Understand applicable statutory provisions and Board policies and procedures.
- **DO NOT** simply cut and paste from other solicitation documents!!!!
 - Verify the need for every provision/term/specification.
 - Make sure all provisions are on point and needed.
 - Thoroughly review entire documents and cross-reference all citations/references.
- Develop Specifications for Product or Service desired.
 - Involve key stakeholders (beware of using vendors)
- Key components of solicitation document
 - Instructions to Bidders
 - Parameters of submission of bid/proposal
 - Specifications or service parameters
 - Contractual terms and conditions
 - Pricing Parameters
 - Proposal forms and Attachments

Designing the Solicitation Documents

Key Components of the RFP would include:

- Reserve rights in favor of school district
 - Right to accept or reject any or all bids in whole or in part
 - Right to waive irregularities or informalities (cannot waive legal requirement though)
 - Right to award contract to other than lowest bidder
- Require any exceptions to be clearly set forth in bid/proposal
- Specify solicitation/RFP and bidder's bid/proposal will be incorporated into contract
- Require references
- If unique item/product, include "or substantial equivalent" language
- If services, clearly define scope of services
- If equipment or technology, address delivery, installation, maintenance and warranties

Designing the Solicitation Documents

Contractual Terms and Conditions

This section would include provisions such as:

- **Term and Termination**
- **Governing Law**
- **Payment Terms**
- **Warranties**
- **Insurance (review with insurance carrier)**
- **Bonds (bid, performance, payment)**
- **Indemnification (general, environmental and/or intellectual property)**
- **If services, may require fingerprinting and criminal background checks**
- **Incorporate RFP and Proposal by reference or will lose protections**

*****Attach form of contract to RFP*** Beware – DO NOT simply use existing or old contract!!**

Designing the Solicitation Documents

Pricing Parameters

- Clearly specify how pricing must be presented
- Unit pricing
- Alternates (beware of “voluntary” alternates)
- Not-to-exceed amounts
- Include Proposal Pricing Form

Proposal Forms and Attachments

- Pricing Form
- Form of Contract
- Specifications
- School District specific background information needed by vendors
- Familial Disclosure Affidavit
- Iran Economic Sanctions Act Affidavit

Addenda to the RFP/Solicitation Documents

- Use to Clarify Items of, or Add Items to, RFP/Solicitation Documents.
- Beware of extensions of time (especially in construction context).

Analysis of Bids/Proposals

Due Diligence

- OAG 4371, in essence, suggests a due diligence requirement of the Board to determine the abilities of any prospective contractor and to make the award, if any, to the lowest responsible bidder.

- Due Diligence Criteria for Determining the Lowest Responsible Bidder
 - Did contractor submit bid/proposal in proper format?
 - Did contractor submit all required forms with bid/proposal?
 - Did products/services proposed meet specifications?
 - Price
 - References
 - Reputation
 - Ability to Perform Project (Size, Experience, Capacity etc.)
 - Years in Business

Analysis of Bids/Proposals

Who should perform due diligence?

- **Business Official or Purchasing Agent?**
- **Architect?**
- **Construction Manager or Owner's Representative?**
- **Consultant?**

Query on Due Diligence

- **If the low bidder provides school district with performance bond from a responsible surety, has the school district ensured the low bidder is the "lowest responsible bidder?"**

Analysis of Bids/Proposals

Post Bid Opening Negotiations

- Generally, cannot engage in negotiations through which a bidder, other than the low bidder, may become the low bidder.
- Lasky v. City of Bad Axe 352 Mich. 272 (1958)
 - Any substantial variation from specifications will destroy competitive character.
 - A variation is substantial if:
 - Affects amount of bid, or
 - Gives the bidder an advantage or benefit not allowed to other bidders, or
 - Is an element considered in fixing the price.
- Accordingly, under Lasky, it is inappropriate for the Board to negotiate with and obtain concessions from one of several competitive bidders, after sealed bids are opened and before any bid is accepted, and then accept the amended bid without offering the other bidders an opportunity to amend their bid, when the concessions are tantamount to a substantial variation to the bid.
- Any such contract is a nullity and not enforceable by either party.

Analysis of Bids/Proposals

Acceptance of Bids/Proposals

- **Before presentation to Board or acceptance:**
 - **Ensure all specifications and parameters are correct.**
 - **The contract is in executable form (and appropriate provisions addressed).**
 - **Bonds, Insurance and other forms secured.**

- **Bid should be in form necessary for approval, subject to either:**
 - **Contractor executing attached contract, or**
 - **Contractor executing contract that is:**
 - **Negotiated by school district administration and within defined parameters; and**
 - **Final contract approved by legal counsel.**

Legal Challenge to Low Bidder – Bid Protests

- Great Lakes Heating v. Troy School District 197 Mich. App. 312 (1992)
 - Trial Court cannot disturb the decision of school Board on a bid unless there has been:
 - Fraud, or
 - Abuse, or ← Collectively referred to as a “violation of the public trust”
 - Illegality.
- Under Great Lake Heating, courts will presume that the school Board acted in good faith:
 - To minimize delay in construction projects, and
 - To limit the expenditure of legal funds, and
 - To discourage litigation.
- Heaney General Contracting v. Clinton Community Schools (2000)
 - Generally, a disgruntled bidders do not have standing to sue a school district.
 - Supplementation of timely bid which was incomplete was not acceptance of “late bid.”
 - Section 1267 does not address “informalities” procedures so Board may set own standards.
- To obtain injunctive relief against school district award contract to another bidder, disgruntled low bidder must allege that in addition to monetary damages (i.e., lost profits) it would be irreparably harmed (i.e., damage to business reputation).

Contract Basics

- **Beware of Letters of Intent**
 - **Could create “contract” where none was intended**
- **Beware of the POs**
 - **Is a contract**
 - **If not attached to a contract, address basic terms of PO**
 - **Beware of conflicts between contract and PO**
 - **Develop standard PO school district will accept, including standard terms**
- **Some Standard Contract Terms to watch out for:**
 - **Term and Termination**
 - **Payment Terms**
 - **Insurance**
 - **Limitations of Liability (watch out of tort issues)**
 - **Indemnification (general, environmental and intellectual property)**
 - **Warranties**
 - **Delivery and Acceptance**
 - **Damages**

Implementing the Law

Board Purchasing Policies

- Why Adopt Purchasing Policies?
 - Required under Section 1274 (but not expressly under Section 1267).
 - Provides staff with uniform process for procurements and bidding
- Objectives of Board Policies
 - Defines procurement objectives and best interests of school district.
 - Track Michigan Law
 - Law sets the floor for compliance – Board policies may be more restrictive.
 - Policies should be flexible – less may often be more effective.
 - Flexibility allows for change if new requirements arise.
 - Should require “reservation of rights” in all school district procurements.
 - Be cautious of requirement to bid services (unless required by law).

Implementing the Law

Administrative Procedures

- Objectives of Administrative Procedures
 - Supplement Board policies and further define policy objectives
 - Address detailed protocol for all aspects of purchasing
 - Address requirements of the law
 - Section 1274 vs. Section 1267
 - Set more restrictive thresholds for certain purchases
 - Implement these wisely
 - Detail various compliance requirements
 - Define roles and authority in purchasing

Reservation of Rights

- Your Policy/Procedures should require the reservation of rights in favor of the district in bidding documents.
 - Accept or Reject any and all bids in whole or in part.
 - Waive any informalities or irregularities in bidding process (unless required by law).
 - Accept other than the lowest bidder.

Implementing the Law

How do we effectively put policies into practice?

- **Annually review internal purchasing polices, procedures and processes.**
- **Annually review any purchasing forms or contracts.**
- **Consider developing internal Purchasing Manual for staff.**
- **Ensure Policies, Procedures and Purchasing Manual easily accessible to staff.**
- **Education of Staff!!!**
 - **Hold staff in-service on purchasing.**
 - **Ensure staff understand their roles and levels of purchasing authority.**
 - **Make staff aware of different manners of purchasing and benefits of each.**
- **Annually review anticipated needs of school district.**
 - **How should we purchase? Warehouse vs. “as needed” purchases.**
 - **Purchasing the right product at the right time at the right price.**
 - **Periodically (at least annually) assess pricing.**

Implementing the Law

Compliance Issues

- **Transparency!**
- **Beware of Conflicts of Interest (real & perceived).**
- **Smell Test.**
- **Beware of “pushy” vendors.**
- **Have a process to review and approve all purchases.**
- **Checks and Balances**
- **Do NOT split purchases to satisfy bidding thresholds.**

Dealing with potentially unlawful or non-conforming purchase

- **Notify proper administrators and do not cover up.**
- **Contact legal counsel.**

Dos and Don'ts of Purchasing

1. **Make sure your Bid/RFP is in compliance with State Law and Board Policy.**
2. **Don't cut and paste!**
3. **Don't let the favored vendor drive the deal.**
4. **Rely upon your professionals in selecting a bidder: Determination of the lowest responsible bidder.**
5. **Remember that competitive bidding is intended to protect the taxpayer and not the bidder.**
6. **Beware of post-bid opening negotiations.**
7. **Attach the proposed contract to the RFP.**
8. **Beware of the P.O. (Purchase Order).**
9. **Beware of the letter of intent: It is a contract.**
10. **Have legal counsel review contracts prepared by vendors.**
11. **Don't allow your Board to simply accept bid.**
12. **Beware of bid rigging practices.**

THANK YOU! Any Questions?



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