

CONTRACTS 101



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CLARK HILL

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What's on Tap?

- **The Legal Aspects of School Business**
- **Contract Law Basics**
- **Contract Provisions – Why? & When?**
- **Sample Contract Review**
- **RFP Basics**



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 situation, 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

- Often referred to as “outsourcing” or “privatization”

- No requirement to seek competitive bids for services, EXCEPT:
 - Food Services – Federal law and MDE requirements require specific RFP process.
 - If School District elects to pursue “Best Practices” Legislation “competitive bids for non-instructional services” option.
 - Privatizing non-instructional service with “unionized workforce” - must give union the “opportunity to bid on an equal basis as other bidders.”

- Issues with RFPs for Non-Instructional Services
 - Facing 2 fronts (legal and political)
 - Misconceptions and combating them
 - Timing of entire process – do not rush, plan ahead

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.

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

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.

Contract Basics

A contract must include certain elements to be considered valid and enforceable and failure to include the essential elements may run the risk that a court will set aside a potentially advantageous contractual arrangement or to complete the terms of the contract with provisions other than those desired by one or more of the parties.

Four Essential Elements to a Contract

- **Parties competent to contract**
- **Proper subject matter**
- **Mutuality of Agreement (Offer and Acceptance)**
- **Legal Consideration**

Contract Basics

To have an effective contract, you should always keep in mind that the purpose of a contract is not to entertain, inform, or convey theories. Rather, the purpose of a contract is to accurately set forth the intent and agreement of the parties to the contract.

Keys to an Effective Contract

- **Clarity** – Understand the factual and legal context of the transaction.
- **Proper Form** – Not all contracts look alike!
- **Proper Structure** – Utilize appropriate terms and conditions.

Not all language in forms (even the “boilerplate” provisions) should automatically be inserted into each contract, as they may not apply and could even be adverse to the party’s interests.

Many people think or expect that there is a form contract for every type of deal.

BUT.....THERE ISN'T!

Contract Basics

Not all contracts will follow exactly the same template or format, but in general, most contracts should contain certain basic provisions.

Common Basic Contract Terms:

- Parties
- Recitals—the background setting the stage
- Subject—the objectives of the contract (e.g., sale of goods, lease of land, etc.)
- Consideration—payment terms
- Representations and warranties—statements of fact concerning matters related to the subject matter, providing a context to clarify the intent of the parties
- Risk allocation—the ways the parties allocate risks to achieving the subject of the contract (e.g., indemnification, limitation of liability, insurance, damages remedies, disclaimers, waivers, etc.)
- Conditions
- Performance
- Dates and term
- Boilerplate provisions
- Signatures

Contract Basics

Contract Drafting and Negotiation Basics:

- Understand the parties
- Understand the subject matter
- Understand the purpose for the contract
- Understand the underlying drivers of the contract (was there an RFP etc.)
- Keep drafts non-binding

Negotiations will often focus on these concerns so it is imperative that they be understood and are able to be conveyed to the School District's legal counsel.

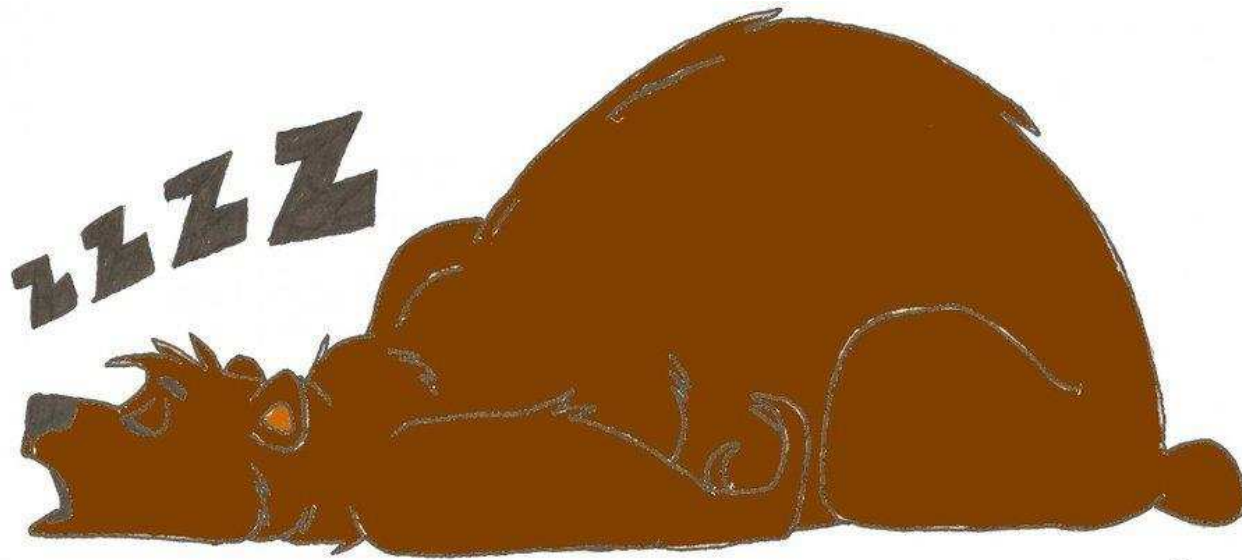
Even if a form can be found for a particular transaction, it still needs to be carefully reviewed so that the key issues and proper considerations that need to be addressed are completed in the correct manner and context.

Contract Basics

Different Types of Contracts:

- Letters of Intent
- Purchase Orders (PO) and Blanket Purchase Orders (BPO)
- Real Estate
- Construction
- Technology
- Supplies
- Equipment
- Services
- Leases
- Options
- Cooperative Agreements

10 Minute Break.....



Contract Provisions – Why? & When?

- ❑ **Recitals**
 - Explain basic premises of formation of contract.
 - Explain understanding of the parties.
- ❑ **Term**
 - Initial Term length
 - Renewal Terms
- ❑ **Termination**
 - For Cause
 - For Convenience
- ❑ **Consideration**
 - Total Amount
 - Installments

Contract Provisions – Why? & When?

- ❑ **Subject Matter**
 - Type of supplies/goods/equipment
 - Scope of Services/Obligations
- ❑ **Invoicing and Payment**
 - Frequency of Invoicing
 - Frequency of Payment
 - Ability to Dispute Payment
- ❑ **Insurance**
 - Commercial General Liability
 - Workers' Compensation
 - Commercial Automobile
 - Umbrella Liability
 - Professional Liability
 - Theft/Employer Liability

Contract Provisions – Why? & When?

- ❑ **Indemnification**
 - General
 - Environmental
 - Intellectual Property
- ❑ **Representations and Warranties**
 - Level of services
 - Length of warranty
 - Remedy for breach of warranty
- ❑ **Confidentiality**
 - Disclosure of information
 - FERPA
 - HIPAA

Contract Provisions – Why? & When?

- ❑ **Limitation of Liability**
 - Contractual Liability
 - Tort Liability
 - Services vs. Goods vs. Technology
- ❑ **Governing Law**
 - Michigan Law
- ❑ **Venue**
 - State or Federal Court
 - County or District
- ❑ **Delivery**
 - Terms (FOB etc.)
 - Risk of Loss

Sample Contract Review

CONTRACT FOR SALE AND PURCHASE

Party: [REDACTED] a/c [REDACTED]

to [REDACTED] a/c [REDACTED]

to [REDACTED] a/c [REDACTED]

Notwithstanding to the effect that this and the Substitution in the following provisions concerning
form and content of the contract shall be the Standard Form Contract Terms and Conditions of the
Association of Professional Estate Agents (APEA) as published in the APEA Handbook.

1. DESCRIPTION

(a) Legal description of the property (if applicable) [REDACTED] County, in the
apportioned parcels with the area of [REDACTED] sq. m.

(b) Street address of any of the Property [REDACTED]

(c) Particulars of any other [REDACTED]

(d) Particulars of any other [REDACTED]

2. PURCHASE PRICE [REDACTED]

3. PAYMENT

(a) Deposits to be paid in cash [REDACTED] in the amount of [REDACTED] £

[REDACTED]

(b) Balance to be paid [REDACTED] in cash [REDACTED] £

(c) [REDACTED]

(d) [REDACTED]

(e) [REDACTED]

(f) [REDACTED]

(g) [REDACTED]

(h) [REDACTED]

(i) [REDACTED]

(j) [REDACTED]

(k) [REDACTED]

(l) [REDACTED]

(m) [REDACTED]

(n) [REDACTED]

(o) [REDACTED]

(p) [REDACTED]

(q) [REDACTED]

(r) [REDACTED]

(s) [REDACTED]

(t) [REDACTED]

(u) [REDACTED]

(v) [REDACTED]

(w) [REDACTED]

(x) [REDACTED]

(y) [REDACTED]

(z) [REDACTED]

4. [REDACTED]

5. [REDACTED]

6. [REDACTED]

7. [REDACTED]

8. [REDACTED]

9. [REDACTED]

10. [REDACTED]

11. [REDACTED]

12. [REDACTED]

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98. [REDACTED]

99. [REDACTED]

100. [REDACTED]

10 Minute Break.....



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).

RFPs for Services

- **Keys to Successful Privatization Process**
 - **Having a plan for success**
 - **Communication**
 - **Do NOT just use form RFP from shelf or another district**
 - **Involve legal counsel (for bidding and labor issues)**
- **Understanding the RFP (and the process)**
 - **Scope of Services desired**
 - **Equipment and Supplies Issues**
 - **What vendors/contractors are available to perform the desired service(s)?**
 - **Analysis of proposals is very complex – the devils are in the details.**

THANK YOU! Any Questions?



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