

# Processing and Evaluating Bids



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**CLARK HILL**

## About the Presenters



**Dana L. Abrahams, Esq.**

Clark Hill PLC

151 S. Old Woodward Ave., Suite 200

Birmingham, Michigan 48009

248.988.5840

[dabrahams@clarkhill.com](mailto:dabrahams@clarkhill.com)

Bio: [www.clarkhill.com/people/dana-l-abrahams](http://www.clarkhill.com/people/dana-l-abrahams)



**Jeremy S. Motz, Esq.**

Clark Hill PLC

151 S. Old Woodward Ave., Suite 200

Birmingham, Michigan 48009

248.988.5895

[jmotz@clarkhill.com](mailto:jmotz@clarkhill.com)

Bio: [www.clarkhill.com/people/jeremy-s-motz](http://www.clarkhill.com/people/jeremy-s-motz)

## What's on Tap?

- **The Legal Aspects of Purchasing**
- **The Bidding Process**
- **RFP Development Overview**
- **Proposal/Bid Intake & Analysis**
- **Bid Protests**
- **Contracts Overview**
- **Accepting/Rejecting Proposals/Bids**



*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 Framework – General Procurement Powers

## 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 Procurements – Construction Projects

## 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 **\$23,881** 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 for 1267(5)(late bids) & 1267(6)(reject all and re-bid)**
- **Michigan-based Business Preference**





# Legal Aspects of Procurements – Construction Projects

## **\*\*NEW\*\*** Procedures for Posting on State Website (Effective October 27, 2017)

- The **NEW** state website for posting is SIGMA VSS ([www.michigan.gov/sigmavss](http://www.michigan.gov/sigmavss)) (formerly [www.buy4michigan.com](http://www.buy4michigan.com))
- Posting Procedures
  - School district must create an account MIlogin (in addition to SIGMA) to post.
  - Old information will not transfer.
  - Process to obtain “security clearance” and obtain access can take a week or more.
  - School district must post bids (and attachments) itself.
  - May be used for bids other than construction.

## 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.**

# 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

*Performance and Payment Bonds are required for all School Construction procurements in excess of the \$50,000 threshold, but School districts may require performance and/or payment bonds in other types of procurements/contracts.*

# Legal Aspects of Procurements – Supplies/Materials/Equipment

## 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 **\$23,881** or more & school board must approve purchase.
- Exceptions:
  - Purchases through State cooperative bulk purchasing program
  - Purchases of **food** in a single transaction costing \$100,000 or less.
- 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 by state law (but check Board Policy)



# Overview of Procurements under Federal Awards/Programs

- **Uniform Procurement Guidance/Rules**

- 2 CFR Part 200.317-200.326
- Procurement procedures must reflect State law requirements, provided they also conform to federal law and regulations

- **Competition Required**

- Micro-Purchases (<\$3,500) do not require informal (quotes) or competitive process
- Small Purchases (<\$150,000) require quotes for adequate number of qualified sources
- Formal Bidding (>\$150,000) requires sealed bids
- *But school district must still comply with Section 1274 for bidding (\$23,881)*

- **Require Certain Processes and Contract Provisions (below is not exhaustive)**

- Sealed Bids or Competitive Proposals
- Contract Remedies (if contract over \$150,000)
- Termination (Cause and Convenience) if contract over \$10,000
- Buy American in Food Contracts (see also MCL 388.1764c)
- Davis-Bacon Federal Prevailing Wage in Construction Projects

## Legal Aspects of Purchasing – Services

- **No requirement to seek competitive bids for services, EXCEPT:**
  - Food Services (FSMC & VMC) – Federal law and MDE requirements require specific RFP process. (**\$150,000** Small Purchase Threshold)
  - Federal funding paying for services and Federal law requires competitive bidding.
  - Privatizing or outsourcing non-instructional service with “unionized workforce” - must give union the “opportunity to bid on an equal basis as other bidders.”
  - Required by Board Policy
- **However, utilization of a competitive bidding process to secure services often provides benefits to the School District, such as:**
  - Transparency
  - Obtain Competitive Pricing
  - Secure correct “contractor fit” for project
  - Secure best terms and conditions for school district and project
- **Professional Services & Outsourcing/Privatization RFPs/Procurements are very unique depending upon the Service. Can be difficult to obtain “apples to apples” proposals/bids.**

# Legal Framework – Iran Sanctions Certifications

## 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.**
- **Length on State Website and in Newspaper.**

# 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.**



# 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 SIGMA VSS/MILogin	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**

# To Bid or Not To Bid....That's The Purchasing Question

- **Considerations for bidding even if not required by law or policy:**

- Multiple players in marketplace
- Cost reductions
- Large contract size/value
- No cooperative contracts applicable/available
- Desire set long-term pricing



- **Advantages to using competitive bidding when not required:**

- Save time and money by securing pricing once
- Have prices and preferred vendor(s) in place
- Secure best possible prices and terms and conditions for school district
- Vet vendor/contractor in advance
- Transparency

# Questions.....



## 10 Minute Break.....



# The Bidding Process





# The Bidding Process

## Types of Procurement/Solicitation Processes

- **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

- **Compile a Team**
  - Administrators/Staff
  - Experts (beware of using vendors)
  - Legal Counsel
  - End-Users
- **Team Members Key for Creating Necessary Specifications**
  - Understanding what product/service is needed
  - Create proper specifications that will solicit responsive proposals/bids
  - Include any variations or options of the product/service that is desired
- **Determine the Best Procurement Vehicle**
  - Review applicable laws
  - Review School District Policy and Procedures
  - RFP vs. Quotes vs. Cooperatives

# Designing the Solicitation Documents

- ❑ **DO NOT simply cut and paste from other solicitation documents!!!!**
- ❑ **Key Components 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
  - Include clearly defined pricing parameters

\*\*\*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**

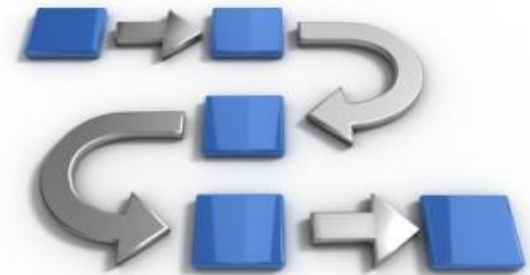
# Managing the RFP Process

- **Managing Overall Timeframe and Due Date**
  - Time to develop RFP (include any necessary approval timing).
  - Time RFP should (or must) be “on the street”.
  - Beware of timing when changing DUE DATE for bids/proposals at last minute.
- **Maintain a consistent process. Treat all bidders fair and equal.**
- **Consider a “pre-bid” meeting for complex procurements.**
- **Document processes:**
  - Sign-in sheets.
  - Maintain minutes from meetings if questions asked and answered.
- **Have defined process for Requests for Clarification and Responses.**
  - Make all information available to all bidders even if they did not submit Request for Clarification.
  - Maintain record of Requests for Clarification and Responses.
- **Issue Addenda to RFP when necessary.**



# Proposal/Bid Intake

- **Time-stamp all proposals/bids**
- **Store in secure location until opening**
- **Do not accept late proposals (return unopened)**
- **Proposal/Bid Opening**
  - Best Practice is to have two school district representatives handle opening
  - If public opening, read appropriate pricing categories aloud
- **Required Forms/Documents**
  - Pricing Form(s)
  - Affidavits
  - Bonds & Insurance
- **Pricing Form Issues**
  - Filled out incorrectly.
  - Mandatory vs. Voluntary Alternates.



# Proposal/Bid Intake

- **Waivers and Reservation of Rights**

- Which of the following can you legally waive:
  - Bid Bond?
  - Familial Disclosure Affidavit?
  - Iran Sanctions Affidavit?
  - RFP Requirement?
- Be consistent in application of waivers.

- **What should we do if information/documents cannot be located in proposal?**

- Beware of disqualifying bidder during bid opening.

- **Documentation:**

- Use of Tally Sheets?
- Beware of FOIA Issues



# 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

- **What School District Personnel Should Perform Due Diligence?**
  - Business Official or Purchasing Agent
  - Team Members who assisted in RFP development
  - Interview Committee/Team
- **What Outside Experts Could Aid in Due Diligence?**
  - Architect?
  - Construction Manager or Owner's Representative?
  - Consultant?
  - Legal Counsel
- **How to address issues when lowest responsible bidder is not the lowest monetary bid**
  - Need to document reasons
- **Ensure all Required Forms/Documents are included**
  - Pricing Form(s)
  - Familial Disclosure & Iran Linked Business Affidavits

# 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.**

# Legal Challenge to Low Bidder – Bid Protests

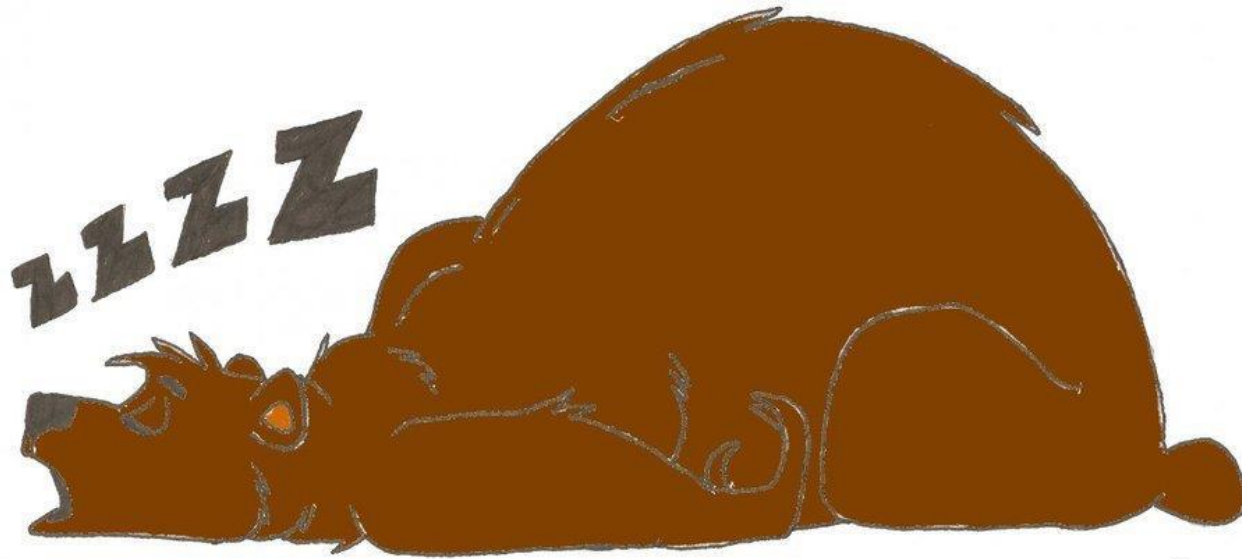
- **Great Lakes Heating v. Troy School District 197 Mich. App. 312 (1992)**
  - Trial Court cannot disturb the decision of school Board on a bid unless there has been:
    - Fraud, or
    - Abuse, or ← Collectively referred to as a “*violation of the public trust*”
    - Illegality
- **Under Great Lake 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).**



# Questions?



## 10 Minute Break.....



## Analysis of Bids/Proposals - 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!**

## Analysis of Bids/Proposals - Contract Basics

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**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 and subject matter of contract
- Consideration—Invoicing & Payment Terms
- Term and Termination
- Representations and Warranties—What are they? How long do they last?
- Risk Allocation—(indemnification, limitation of liability, insurance, damages, remedies, disclaimers, waivers, etc.)
- Conditions for Performance (delivery, set up, scope of services etc.)
- Governing Law and Venue
- Boilerplate provisions
- Signatures

# Analysis of Bids/Proposals - 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.





# Acceptance of Bids/Proposals

- **Rejection of bid/proposal**
  - Prices too high?
  - Some vs. all
  
- **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



## THANK YOU! Any Questions?



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