

COMPETITIVE BIDDING REQUIREMENTS AND PROCEDURES

The Board of Education is required by law to award all purchase contracts for supplies, materials and equipment involving expenditures in excess of \$10,000 and all contracts for public works in excess of \$ \$35,000 to the lowest responsible bidder after advertising for sealed bids.

The Board should direct the purchasing agent to develop and implement procedures for complying with the legal requirements for competitive bidding. It is also good practice to solicit bids or quotations for purchases that involve less than the statutory dollar amounts.

The competitive bidding requirements embodied in the General Municipal Law are designed to guard against fraud, corruption, extravagance and favoritism, to foster honest competition in order to assure the prudent and economical use of public moneys in purchasing goods and services, and to provide all responsible vendors with an equal opportunity to furnish goods and services to school districts without favoritism. The bidding statutes are incorporated by reference into the Education Law and apply to all school districts.

Contract Nature and Threshold Amounts

Section 103 of the General Municipal Law sets forth the dollar threshold for application of the competitive bidding requirements. Contracts for the purchase of commodities in excess of \$10,000, and public works contracts involving expenditures for services, labor or construction in excess of \$35,000 are subject to the competitive bidding requirements. When a contract involves acquisition of both goods and services, a judgment must be made as to the primary purpose of the contract. If the services are minor, incidental or customarily provided by the vendor in connection with the goods purchased, the contract should be viewed as a purchase contract. Conversely, if the service component is extensive or predominant, or involves special skills, the contract should be treated as one for public works.

In determining the necessity for competitive bidding, the aggregate amount to be expended during the fiscal year on an item or those of a similar nature (a "reasonable commodity grouping") must be considered. For example, office supplies or art materials would constitute an appropriate grouping for bidding purposes. The requirements of the bidding statutes may not be evaded by artificially splitting contracts into purchases for sums less than the threshold amount.

Additionally, in determining whether the dollar requirements have been reached, allowances for any trade-in related to the purchase must be treated as an expenditure; the estimated gross cost of the item is controlling. Net cost is relevant only to the determination of the low bid.

Bid Specifications

Although school districts have broad discretion to set reasonable standards and limitations when preparing bid specifications, particular care and thoroughness are essential to ensure that potential bidders are not misled or confused about the specifications. Specifications should completely describe the item or services to be purchased, including size, color, weight, time of delivery and other relevant considerations. However, they may not be fixed or manipulated for the purpose of favoring a particular bidder or stifling competition.

If a brand name product represents an industry-wide standard, it may be specified as a standard of supply provided that the specifications indicate that products which are reasonably equivalent are acceptable. In addition, a brand name product may be exclusively specified if the Board adopts a standardization resolution by 3/5 vote, after determining such a requirement is necessary for reasons of efficiency or economy. The resolution should contain a statement of the reasons for its adoption. For example, it might be appropriate to designate a specific school bus make and model to permit interchangeability of parts and uniformity of maintenance procedures. Notwithstanding the adoption of a standardization resolution, compliance with competitive bidding requirements is still required. Any vendor who can furnish the specified item must be afforded the opportunity to bid.

Bidding instructions should be complete and clearly state the procedures each bidder must follow and the time fixed for receiving and opening the bids. Instructions should reserve the right of the Board to reject any and all bids or to waive minor irregularities or variances in the bid. The instructions also should state that, as required by the General Municipal Law 103-d, every bid or proposal must be accompanied by a signed statement, affirmed under the penalties of perjury, certifying that there was no collusion with any other bidder over prices in the bid nor any attempt by the bidder to restrict competition.

Bid specifications may include an escalator clause for supplies that are purchased on an ongoing basis, such as fuel oil, gasoline and milk products, to avoid the necessity of re-bidding such items, while permitting vendors to receive a price consistent with current market conditions.

At the discretion of the Board, bid specifications also may require "bid deposits" to be submitted by bidders with their bids. Customarily such deposits, when required, are fixed at an amount equal to 5 or 10 percent of the bid price. The deposit requirement has several purposes. It serves as security for the school district that the bid will be kept open for the period specified and that the bidder will enter into a contract in accordance with the specifications after an award is made. It also protects the district from the submission of bids by financially irresponsible bidders.

If no contract award is made within 45 days after bids have been received, bidders may withdraw their bids and any bid deposit must then be returned. Bid deposits are to be returned to unsuccessful bidders after a contract has been awarded by the Board. The bid deposit from the successful bidder is retained until a contract is executed or a performance bond, if required, is provided. In the event of the bidder's failure to execute a contract or meet other requirements necessary to undertake the contract, the amount of the deposit is forfeited.

Advertising for Bids

Advertisements for bids ("Notice to Bidders") must be published in one or more newspapers designated by the Board for that purpose. The notice must state the time when and place where the bids received will be publicly opened and read. It also should contain a general description of the items or equipment being sought, where and when trade-in goods, if any, may be inspected, and how formal specifications and detailed plans may be obtained.

The notice must be published at least once not less than five days before the time when bids are to be opened and read. In practice, advertisements for bids should be published several times and at least two or three weeks should be allowed between the date of first publication and the time for opening and reading of bids.

Notices, with copies of the specifications and bidding forms, may be mailed to potential vendors. Many districts maintain lists of companies to whom such notices are routinely mailed. If mail solicitation is used, the time between mailing and the bid opening date must be sufficient to permit completion and submission of the bid.

Bid Opening and Contract Awarding

Bids should be kept in a safe, locked location until the time for their opening. It is recommended that each bid be stamped with the date and time received. Bids received after the time for opening should be rejected. A record of all bids received should be maintained and presented to the Board at its next meeting.

All interested parties may be present when bids are opened and read. If no spectators are present, it is prudent for the purchasing agent or other designated official to have one or more persons serve as witnesses to the process.

Board action to award a contract or reject any or all bids is done by formal resolution at a regular or special meeting. After the bids have been opened and analyzed, and the purchasing agent has made a recommendation, the contract is awarded to the lowest responsible bidder who has met or complied with the bid specifications.

Under the General Municipal Law §104, school districts may provide a 10 percent competitive bidding price preference for recycled products. Each document printed on recycled paper must include a printed statement or symbol indicating that the document was printed on recycled paper.

The Board may waive technical or minor noncompliance with the bid specifications if it is in the best interests of the school district. However, it may not waive noncompliance which is material or substantial. The Board also may reject an apparent low bid on the ground that the bidder is not "responsible." That term has been construed by the courts and the Commissioner of Education to encompass considerations such as financial resources, accountability, reliability, skill, judgment, integrity, and moral worth. In addition, districts may consider performance, conduct and labor practices of bidders and proposed subcontractors on prior contracts, and the background of such bidders and subcontractors, including their ownership, management, affiliation, history of past performance, and compliance with relevant state and federal laws and regulations.

Determination of whether the lowest bidder is "responsible" is made by the Board in the first instance. It is a question of fact to be determined on a case-by-case basis. To assist in this decision-making process, the Board may require a bidder to submit references and it may rely on prior bad experience with the bidder, either within the district or with another municipality, in rejecting a bid. Poor performance by a contractor or vendor should be recorded at the time of occurrence by the school district. This will provide documented evidence of irresponsibility if the Board rejects a low bid in the future.

The minutes of the Board meeting at which an apparent low bid is rejected should carefully document the reasons for the Board action. The courts have held that in certain circumstances a rejected low bidder may be entitled to an opportunity to rebut a finding of non-responsibility. The Commissioner has held that a Board may not determine relative responsibility among several bidders; it must consider only the responsibility of the low bidder.

When no bids are received, the Board should usually re-advertise for bids and directly solicit bids from potential vendors. However, where the Board has taken steps in good faith to obtain bids, it may make purchases in the open market until conditions change. In case of tie bids, the Board may award the contract to one of the low bidders or reject all bids and re-advertise the purchase. Some Boards may award the contract in such an instance to the local vendor or may draw lots to eliminate the charge of favoritism. However, the contract may not be split among the tied bidders.

Exceptions to Competitive Bidding

There are several exceptions to the competitive bidding laws. For example, competitive bidding is not required under the General Municipal Law §103 when there is only one possible supplier or source from which to procure goods or services, such as in the case of a public utility or a patented item.

The competitive bid law also need not be followed if there is an emergency, accident or unforeseen occurrence or condition, which constitutes an imminent danger to public buildings or property or to the life, safety, or health of residents, and requires immediate action which cannot await competitive bidding.

Contracts for professional services and other services requiring special or technical skill, training or expertise are not deemed to be contracts for public work or purchase contracts under the General Municipal Law §103 and, thus, are not subject to competitive bidding requirements.

The courts have held that “true lease” agreements are not subject to competitive bidding requirements since they are neither contract purchases nor contracts for public work. However, the Education Law §1725 provides that leases of personal property by school districts are subject to competitive bidding requirements.

There also is a statutory exception to competitive bidding requirements which permits the purchase of surplus and secondhand supplies from the federal or state government or from any other political subdivision or public benefit corporation.

The requirement for competitive bidding does not apply to an award of a contract for the transportation of students, if such award is based on an evaluation of proposals in response to a request for proposals (RFP) in accordance with the Education Law §305. In addition, the competitive bidding requirement does not apply to annual, biennial, triennial, quadrennial or quinquennial year extensions of a contract involving either transportation of students or mobile instructional units secured either through competitive bidding or through an RFP when such extensions are made by a Board in accordance with Commissioner’s regulations.

Annual, biennial or triennial extensions of contracts to maintain and operate cafeteria or restaurant services by a private food service management company are not subject to competitive bidding so long as the extension does not extend the original contract period beyond five years from the date cafeteria or restaurant service began under the contract.

School districts also may make direct purchases of fresh farm products such as eggs, livestock, fish, dairy products, fresh fruit and vegetables without competitive bidding.

Nonetheless, even when districts are exempt from the requirements of competitive bidding, the General Municipal Law §104-b requires districts to procure goods and services in a manner which ensures the prudent and economical use of public monies. Alternative proposals or quotations must be secured by RFPs, written or verbal quotations, or other appropriate methods of procurement except for procurements through the county in which the district is located, through a state contract of items manufactured in state correctional institutions or from agencies for the blind and severely disabled. The latter instances are more fully discussed in School Policy 6731, State Contracts.

Noncompliance with Competitive Bidding Requirements

The effect of noncompliance with competitive bidding requirements, as a general rule, renders the contract in question void and unenforceable. In special circumstances where the total forfeiture penalty is so disproportionate as to shock the conscience, a court may fashion a less harsh remedy. However, such situations are not frequent and will be subjected to very careful scrutiny.

Violation of the competitive bidding laws may also subject an offender to criminal liability. It is a misdemeanor for any person or corporation to conspire to prevent or otherwise subvert competitive bidding on a contract for public work or purchase which has been advertised for bidding.

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