

Developing and Managing RFPs

Legal Requirements of Bidding & Procurements

**Michigan School Business Officials
2023 Annual Conference
Session F22**

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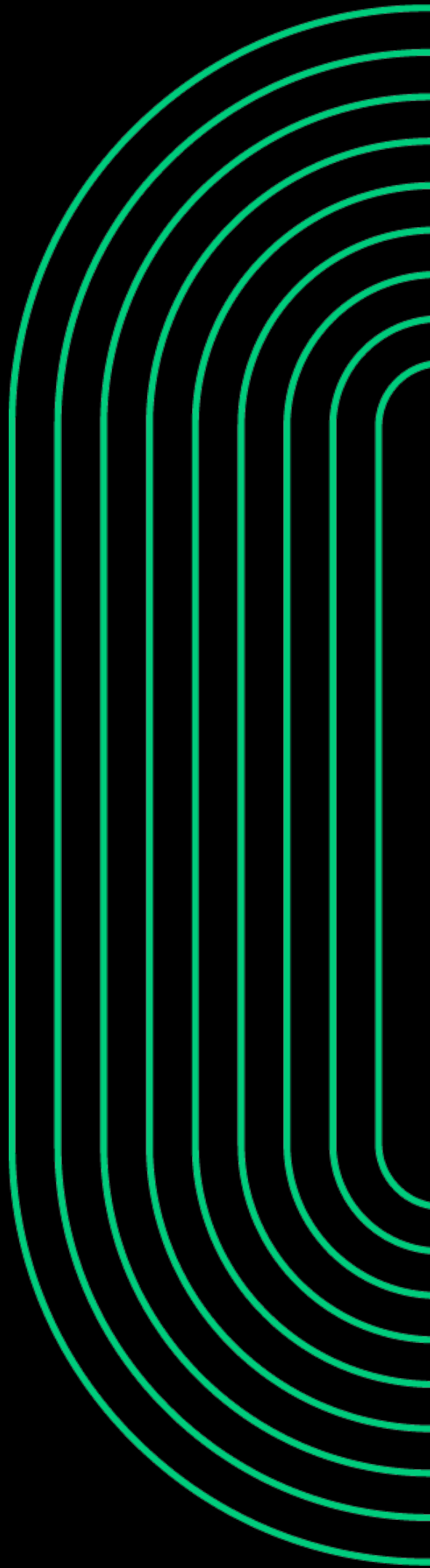


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April 27, 2023

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Today's Roadmap & Objectives

WHY (& WHAT)

- The Legal Framework For Procurements – *Construction vs. Supplies vs. Services*

WHEN

- RFP Process & Timing for Procurements

HOW

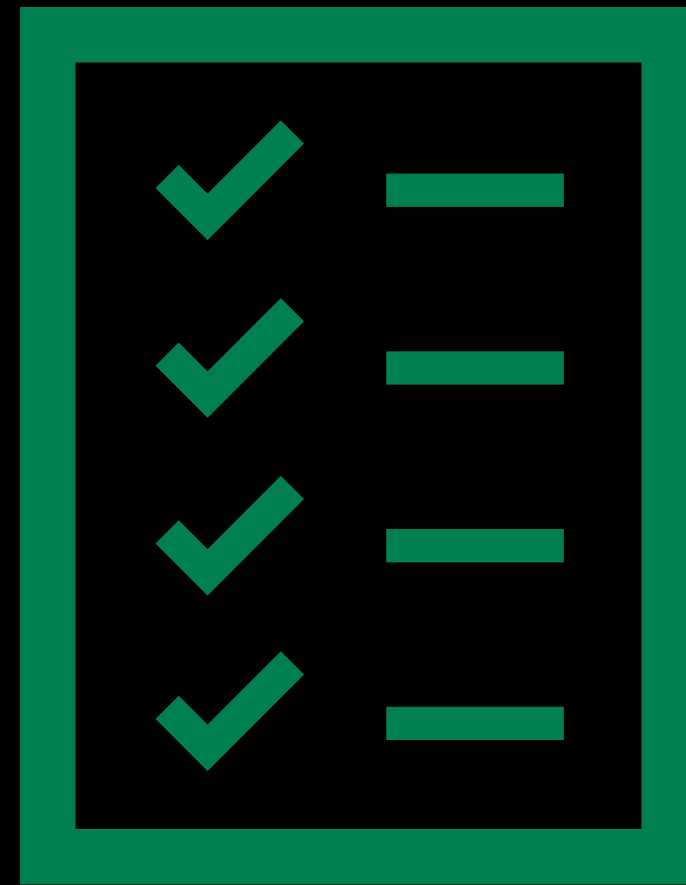
- Developing the Procurement Documents
- Managing the RFP Process

Objectives

- Identify the Drivers and Key Issues Behind Procurements
- Recognize Problematic Areas
- Understand RFP & Contracting Basics
- Identify Best Practices



Legal Framework for Procurements



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 Powers for Procurements and Contracting:
 - ❖ 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.”



Supplies/Materials/Equipment

Procurement of Supplies, Materials and Equipment – MCL 380.1274

- ❖ Requires Board to adopt written policies governing the procurement of supplies, materials and equipment. However, there are no specific requirements as to the contents of these Section 1274 purchasing policies under State law.
- ❖ Also requires that the school district: **(1) obtain competitive bids** for the **purchase of any item or group of items** in a single transaction costing **\$28,048 (*SY22-23)** or more; and **(2) have school board must approve purchase**.
- ❖ Statutory Exceptions to above competitive bidding rule:
 - Purchases to 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) but must consider Federal regulations if purchase funded via Federal funds.



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 repairs in emergency situations**, the school district shall obtain competitive bids on all **material and labor** to complete construction costing **\$28,048 (*SY22-23)** 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 (same requirements as Section 1274)



Construction Projects

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.
- ❖ Energy conservation improvements or substance removal or treatment authorized by this section is **subject to the competitive bidding requirements of section 1267**.

Contractor's Bond for Public Buildings and Works Act – MCL 129.201 et seq.

- ❖ Monetary Threshold for Applicability - **\$50,000 (“Contract Amount”)**
- ❖ Requirement for **Performance Bond**
 - Protects Owner if Contractor does not perform
 - Must be **at least 25%** of Contract Amount
- ❖ Requirement of **Payment Bond**
 - Protects materialmen/suppliers and subcontractors against non-payment by contractor since lien on public property is prohibited.
 - Must be **at least 25%** of Contract Amount
 - Surety must be licensed in Michigan

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.



Procurement of Services

- ❖ No express legal requirement under **State law** to seek competitive bids for services. However, exceptions apply:
 - Federal funding used to pay or support services (ESSER & Food Service Contracts).
 - 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 may be advantageous:
 - 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.



Federal Regulations - Procurements

What is required under the Uniform Grant Guidance (UGG)?

- ❖ Procurement standards apply to: (i) supplies, materials & equipment; (ii) construction **and** (iii) services.
- ❖ School district must maintain records sufficient to detail the history of procurement, including:
 - Rationale for the method of procurement.
 - Selection of contract type and basis for contract price.
 - Contractor selection or rejection.
- ❖ Must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement (**lowest responsible bidder**). Cannot award to debarred contractors.
- ❖ All procurement transactions must be conducted in a manner providing **full and open competition** to engage responsible contractors with ability to perform successfully.
- ❖ A **Contractor that develops or drafts** invitation for bids or request for proposals **must be excluded** from competing for such procurements.
- ❖ Must **not preclude potential bidders** or place unreasonable requirements on contractors to qualify to do work.
- ❖ Geographic preferences are not allowed (i.e., Michigan-based preference).



Federal Regulations - Procurements

When is competitive bidding required?

- ❖ School districts must have and use documented procurement procedures, consistent with State, local, and the applicable federal regulations of the UGG.
- ❖ Under State law (and local policy) bidding threshold is **\$28,048** (FY 22-23).
- ❖ Under Federal law:
 - Micro Purchases Threshold (**\$10,000**) – If under MPT, do not require informal or competitive process.
 - Simplified Acquisition Threshold (**\$250,000**) – If over MPT but under SAT, require quotes from adequate number of qualified sources.
 - Formal Bidding – If over SAT, require sealed bids.
 - Must ensure objective contractor performance and eliminate unfair competitive advantage.
- ❖ Non-competitive Procurements allowed in limited circumstances.
 - Acquisition of property or services, the aggregate dollar amount of which does not exceed the MPT.
 - The item is available only from a single source.
 - Emergency for the requirement will not permit a delay resulting from publicizing a competitive solicitation.
 - After solicitation of a number of sources, competition is determined inadequate.

Federal Contracting Requirements

What provisions must be in the contract and when?

- ❖ Depending on type and value of contract, various provisions must be included in the contract.
 - Contracts for more than the SAT must address administrative, contractual, or legal remedies in instances where contractors violate or **breach contract terms**, and provide for such sanctions and penalties as appropriate.
 - All contracts in excess of \$10,000 must address **termination for cause and for convenience by the school district**, including the manner by which it will be effected and the basis for settlements.
 - All construction contracts must include the **equal employment opportunity clause**.
 - All construction contracts in excess of \$2,000 must requirement **FEDERAL PREVAILING WAGES** be paid and require documentation of compliance.
 - All contracts in excess of \$100,000 that involve the employment of mechanics or laborers must include a provisions relating to “**Wage and Hour**” and payment of overtime.
 - Contracts in excess of \$150,000 must contain a provision that requires the contractor to comply with all applicable standards, orders or regulations under the **Clean Air Act and the Federal Water Pollution Control Act**.
 - Contracts exceeding \$100,000 must require contractors to certify compliance with the Byrd Anti-Lobbying Amendment.
 - All construction or facility improvement contracts exceeding the SAT must require a **bid bond** (5%) and **performance and payment bonds** (100%).

Iran Sanctions Certifications

Iran Economic Sanctions Act - MCL 129.311 et seq.

- ❖ 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.



Violating the Law!

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**

Also, remember funding source may require additional compliance (e.g., Federal Prevailing Wage)



Board Policies & Procedures

❖ 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

- Define procurement objectives and best interests of school district.
- Track Applicable Laws although Board policies/procedures may be more restrictive.
- Policies should be flexible to allow for changes – less may often be more effective.
- Be cautious of requirement to bid services (unless required by law).

❖ Objectives of Procedures

- Supplement policy with detailed protocols.
- Address more restrictive bidding threshold if desired.
- Define roles and authority in procurements.
- Set protocol for procurements (important for Federal procurements).

ALWAYS CHECK WITH POLICIES/PROCEDURES TO ENSURE COMPLIANCE!



Common Misperceptions of the Law

- ❖ 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.
- ❖ Obtaining supplies, materials and/or equipment via a cooperative/consortium bidding process is NOT always permissible and/or legally compliant.
- ❖ \$100,000 increased competitive bidding threshold only applies to food purchases.

Common Misperceptions of the Law

❖ State Website Posting Requirements for Construction

- Has changed from “Buy4Michigan” to “SIGMA VSS & MILogin”
- Can be lengthy process to obtain login credentials

❖ Length on State Website and in Newspaper

❖ Due Dates and Late Bids

❖ Licensed Architects/Engineer required for construction projects over \$15,000 regardless of bidding requirements



The Bidding Process



To Bid or Not To Bid....

❖ **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 to set long-term pricing

❖ **Advantages to using competitive bidding even 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



Timing for the RFP Process

❖ General Considerations

- When must construction/services start?
- When is supply/equipment needed?
- What review/approval process is required by Board of Education?
- What contractor vetting process will be used?
- How long should RFP be “on the street?”

❖ Supplies/Materials/Equipment

- Purchase at the right time.

❖ Construction

- Design (and local consultation) and State Approval Process.
- Lead time contractors need to secure construction components.

❖ Services

- Architects vs. Construction Managers vs. Custodial vs. Transportation
- How long do service contractors need to implement services?



Designing the Solicitation Documents

- ❖ Understand applicable statutory provisions and Board policies and procedures.
- ❖ DO NOT simply cut and paste from other solicitation documents!!!!
- ❖ Develop **Specifications** for Product or Service desired (beware of using vendors)
- ❖ Key Components would include:
 - **Reservation of 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**



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 Proper Procurement Vehicle

- Review applicable laws
- Review School District policy/procedures
- RFP vs. Quotes vs. Cooperatives

❖ Address Proper Contracting Issues

- What contract provisions are required?
- What type of contract is best suited for procurement
- Incorporate RFP and Proposal by reference or will lose protections.
- Advise that school district **include a form of contract in the RFP.**
- Advise that school district **DOES NOT simply use existing or old contract.**



Managing the Procurement Process

❖ Managing the 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

❖ Documenting the Process:

- Sign-In Sheets
- Maintain Minutes from meetings if have Q&A sessions.

❖ Have a defined process for Requests for Clarifications and Responses

- Make all information available to all bidders even if they did not submit Request for Clarification
- Maintain record of all Requests for Clarifications

❖ Issue Addenda when necessary

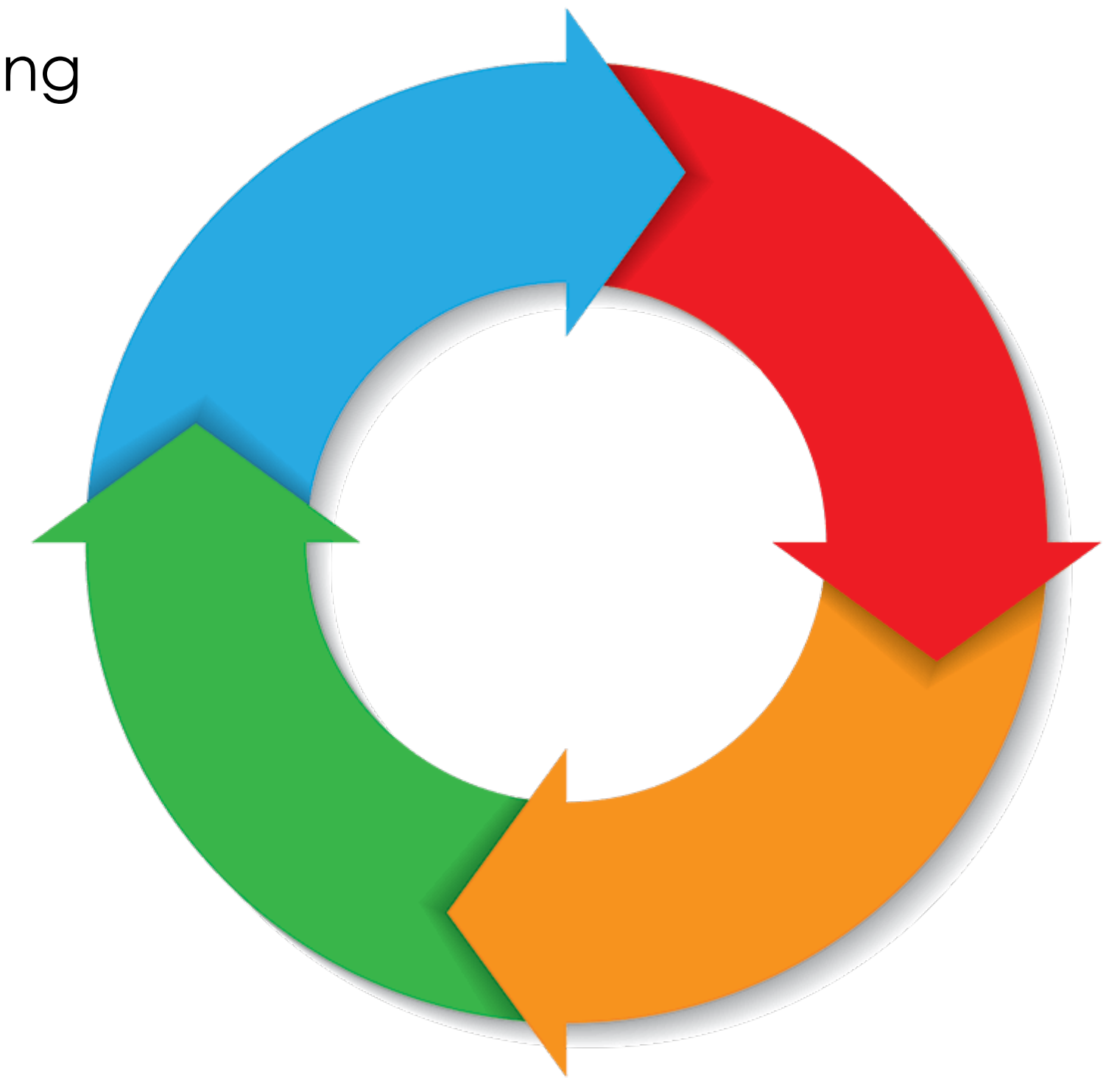


Proposal/Bid Analysis



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?

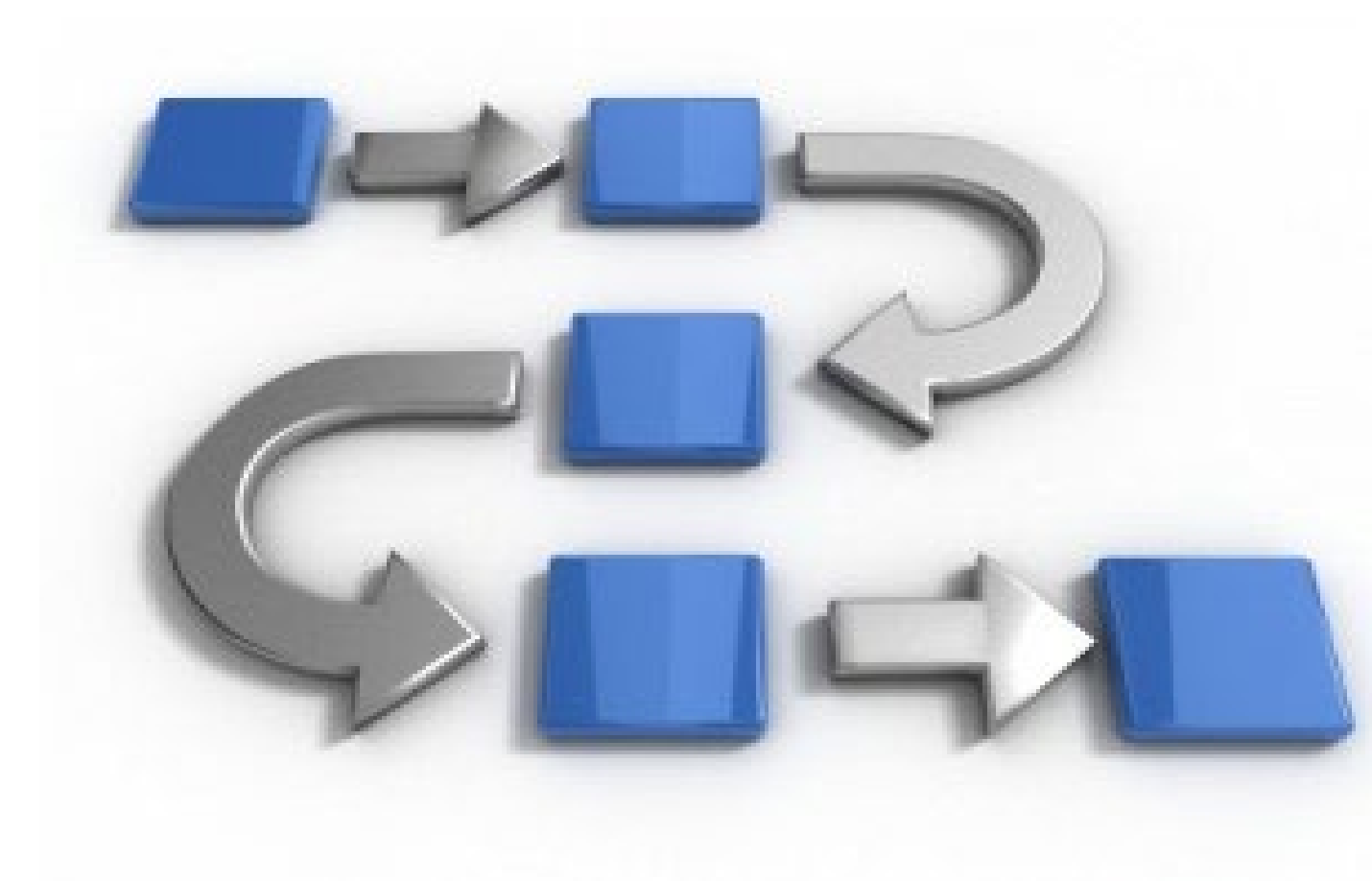
- Beware of disqualifying bidder during bid opening.

❖ Documentation:

- Use of Tally Sheets?
- Beware of FOIA Issues

❖ Electronic Bidding Issues:

- Electronic Bids and Submission
- Virtual Bid Openings



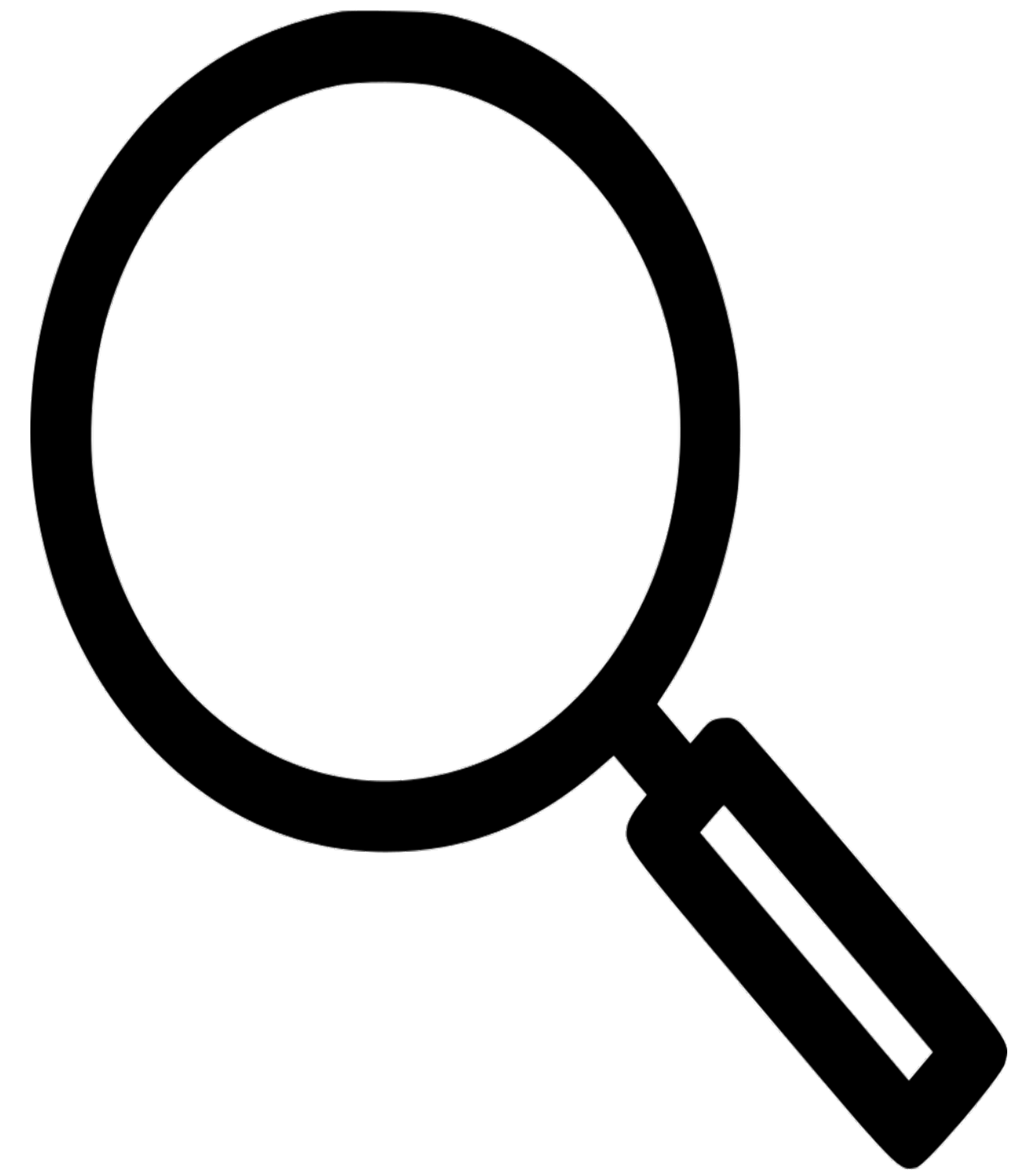
Analysis of Bids/Proposals

❖ 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



Analysis of Bids/Proposals

The Various Stages of the Analysis

❖ **The Preliminary Analysis** *(Determining Initial Criteria)*

- Have they provided all forms?
- Are they an eligible entity (debarment etc.)?
- Are any clarifications needed (some or all vendors)?

❖ **The Technical Analysis** *(Meeting Specification of Deliverables)*

- Do they demonstrate proper specifications/scope of work?
- Are they capable of performing the work?
- Are staff qualified? Financially viable?
- Able to provide insurances/bonds etc.?

❖ **The Pricing Analysis** *(Establishing costs)*

- Are there errors in pricing?
- Missing any services or components of the work?
- Are there extras, exceptions or conditions to pricing?
- Who is lowest responsible bidder?



Analysis of Bids/Proposals

Performing the Proper 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
- ❖ How do we address issues when lowest responsible bidder is not the lowest monetary bid?
 - Need to document reasons

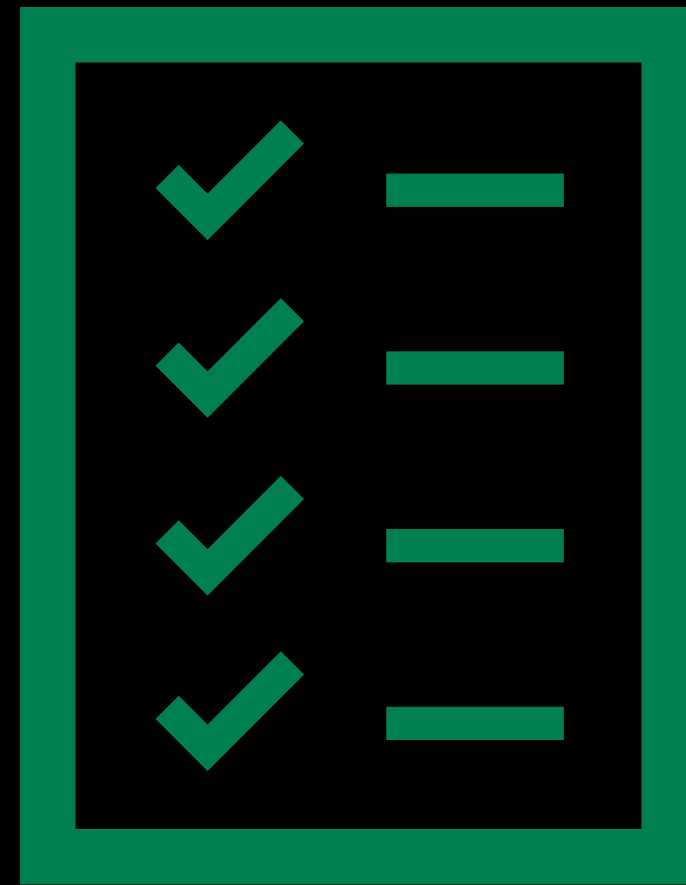


Post Bid Opening Negotiations

- ❖ 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.



Accepting & Rejecting Proposals/Bids



Accepting & Rejecting 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.



Challenges & Bid Protests



Challenges & 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
 - Illegality.

← Collectively referred to as a “**violation of the public trust**”

❖ 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).



Things to Remember....



Things to Remember...

- ❖ **Understand the legal requirements for each procurement**
 - Supplies/Equipment vs. Construction vs. Services
 - Are Federal Regulations Applicable?
- ❖ **Be sure the information in various sections of RFB/RFP are consistent. Don't cut and paste!**
- ❖ **Provide clear and sufficiently detailed specifications to receive desired services or deliverables desired at fair price. Omit unnecessary details that limit competition.**
- ❖ **Rely upon your professionals in selecting a bidder: Determination of the lowest responsible bidder.**
- ❖ **Pay attention to timing for procurement, award and contract start dates.**
- ❖ **Include a form of contract in the RFB/RFP where possible. Beware of P.O. issues.**
- ❖ **Establish procurement process/rules and follow them.**
- ❖ **Beware of pushy vendors and do not let favored vendor drive the deal.**
- ❖ **Remember that competitive bidding is intended to protect the taxpayer and not the bidder.**
- ❖ **Don't allow your Board to simply accept bid.**





Thank you!

Legal Disclaimer

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