



Purchasing Advanced

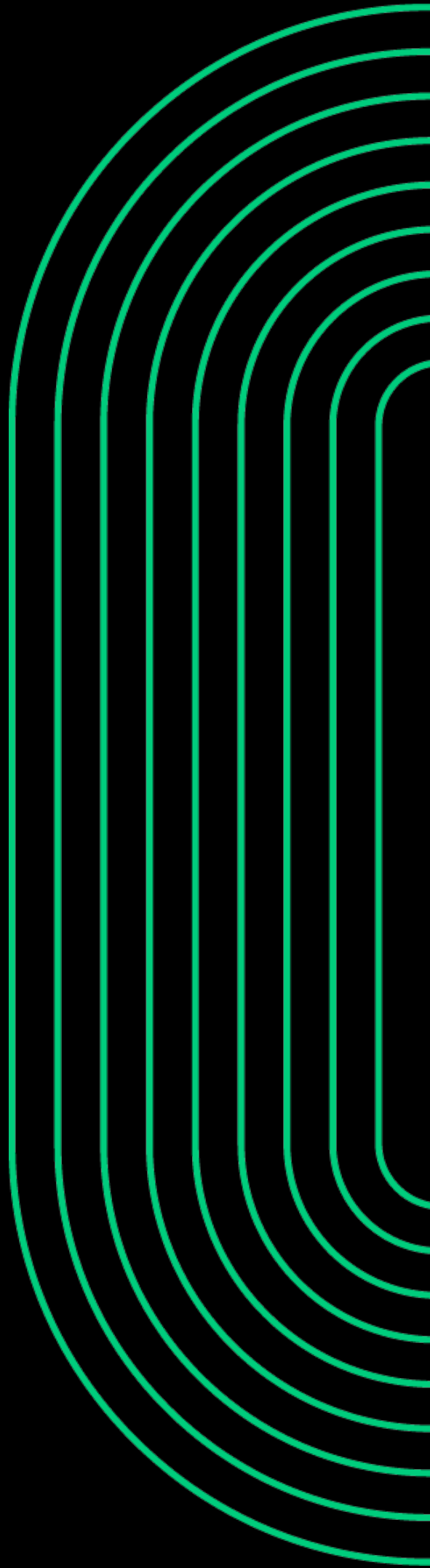
Managing Effective Procurements

Michigan School Business Officials Certification Class

Jeremy S. Motz
151 S. Old Woodward Ave., Suite 200
Birmingham, Michigan 48009
248.988.5895
jmotz@clarkhill.com



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Today's Roadmap & Objectives

WHY (& WHAT)

- The Legal Framework For Procurements – *Construction vs. Supplies vs. Services*
- Common Misperceptions of the Law
- Record Retention Overview
- FOIA Basics in 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

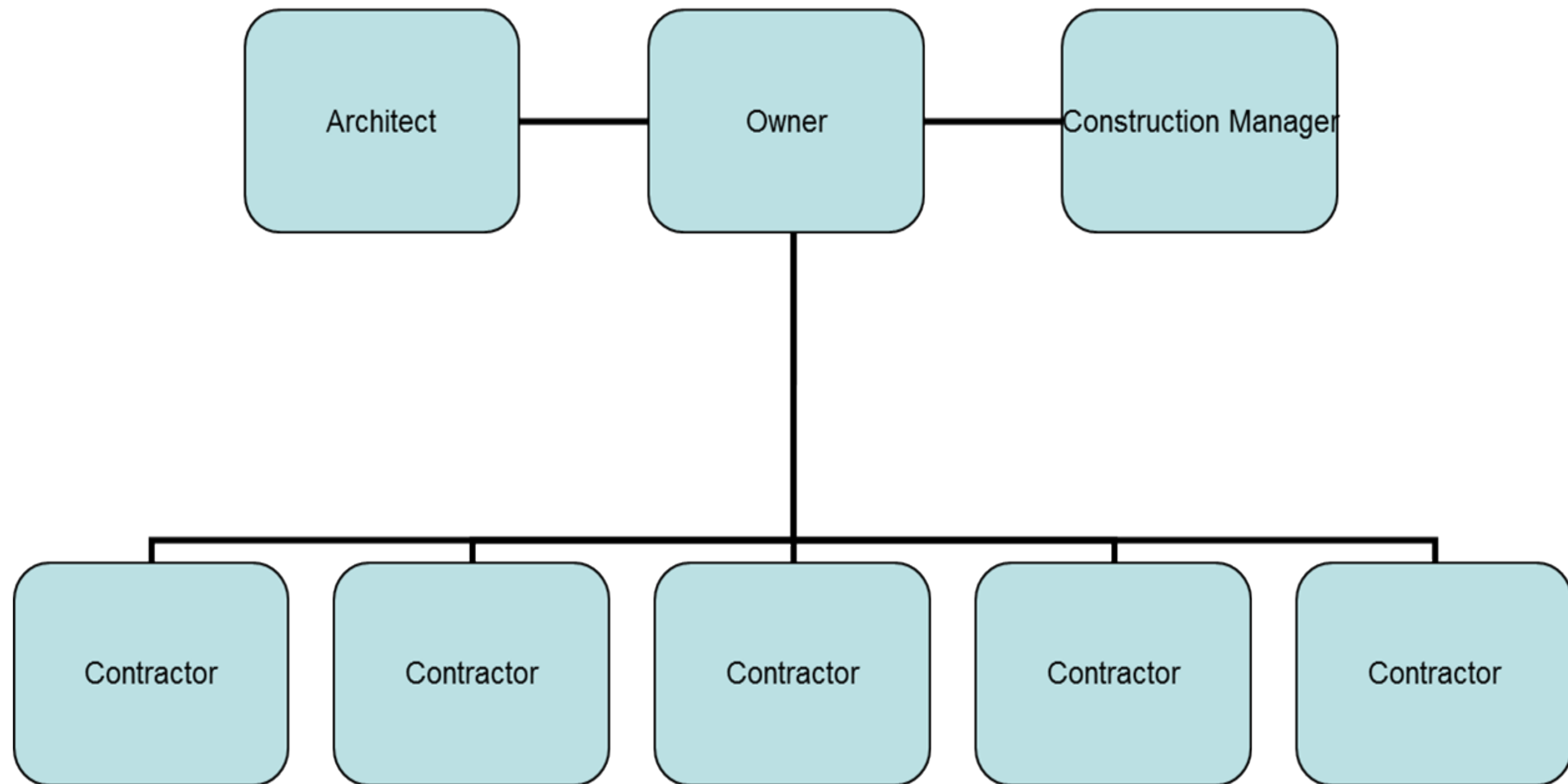
Procurement of Supplies, Materials and Equipment – MCL 380.1274

- ❖ 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

Owner with Construction Manager Delivery Method



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

Consultation with Local Agencies - MCL 380.1264

- ❖ A school district, intermediate school district, or public school academy shall not commence the **construction of a new school building** or the **major renovation** of an existing school building unless the school district, intermediate school district, or public school academy **consults on the plans for the construction or major renovation regarding school safety issues with the law enforcement agency** that is or will be the **first responder** for that school building..
- ❖ A “school building” means either:
 - A building intended to be used to provide instruction for pupils.
 - A recreation or athletic structure or field intended to be used by pupils.
- ❖ Neither “Consult” nor “Major” is defined.
- ❖ Interplay between 1263 and 1264
 - Under Section 1263, the “superintendent of public instruction” has “sole and exclusive jurisdiction” over the review and approval of plans and specifications for the construction, reconstruction or remodeling of school buildings.
 - Section 1264 requires consultation with local agency.
 - What happens if they do not agree?



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.



Construction Projects

Jurisdiction over School Construction Projects - MCL 380.1263(3)

- ❖ Requires that the design or construction of school buildings used for **instruction or non-instructional purposes** comply with requirements of School Building Construction Act. **Sole and Exclusive Jurisdiction in State Superintendent.**

School Building Construction Act – MCL 388.851 et seq.

- ❖ Monetary Threshold for Applicability - **\$15,000 (“Total Cost”)**
- ❖ All **plans and specifications** for the **construction, renovation, repair or remodeling of a school building** **must be** prepared by an **architect or professional engineer licensed in Michigan**
- ❖ Architect, professional engineer or “other person qualified to supervise construction” must supervise the construction of a school building.
- ❖ May **NOT** dispense of architect or professional engineer. Mich. Attorney General Opinion 3028 (1957).
- ❖ Authorized Department of Licensing and Regulatory Affairs (“LARA”) to administer Act and Single-State Construction Code Act.
- ❖ Design-Build – **Prohibited** except in limited energy conservation improvement projects (MCL 380.1274a)



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 **\$26,046** (FY 21-22).
- ❖ 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)



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

❖ Waiver of RPP vs. Legal Requirements

- Bid Bond
- Familial Disclosure Affidavit
- Iran Linked Business Affidavit



Record Retention Overview



Statutory Framework for Record Retention

❖ **General Rule:** A record shall not be disposed of unless such disposal is provided for in an approved retention and disposal schedule:

❖ **Records vs. Non-Records:**

- A public record is document or writing, prepared in any medium, which documents the official business of the school district. A public record may exist in a wide variety of formats, including both hard copy and electronic mediums.
- A non-record is a document or writing, prepared in any medium, which does not document the official business of the school district, such as: duplicate copies; memorandum, worksheets and internal notes that do not represent significant basic steps in preparing a public record; transmittal correspondence (including e-mails) that do not document significant activities; etc

Retention Schedules

❖ Retention and Disposal Schedules for School Districts

- General Schedules vs. Agency-Specific Schedules
- General Schedule #1 – Covers non-records of school districts.

http://www.michigan.gov/documents/hal_mhc_rms_GS1_local_110758_7.pdf

- General Schedule #2 – Covers records of school districts (Approved Dec. 7, 2010).

http://www.michigan.gov/documents/hal_mhc_rms_local_gs2_171482_7.pdf

<u>Type of Record</u>	<u>Retention Period</u>
RFPs/Bids for Services/Construction	ACT + 7 years
Act 18 Funds – Final Report	FY + 7 years
Personnel Files	ACT + 6 years (+50 if EE cited for Unprofessional Misconduct)
Contracts	EXP + 6 years
Student File (CA-60)	ACT + 60 years

Freedom of Information Act Overview



Freedom of Information Act – MCL 15.231 *et seq.*

- ❖ **PURPOSE:** Provide access to public records to allow the public to obtain full and complete information about government decision making.
- ❖ FOIA requires school districts to maintain those records which document the official business of the school district.
- ❖ Any person may request in writing to inspect, copy or receive copies of public records and in general, all public records of a public body that are properly.
- ❖ There are multiple exemptions which may allow certain public records to be withheld from disclosure. However, exceptions are narrowly construed.



Examples of FOIA Exemptions

- ❖ Information of a personal nature if disclosure is an unwarranted invasion of privacy.
- ❖ Law enforcement investigation records; student records.
- ❖ Trade secrets or sensitive documents voluntarily provided to a public body under a confidentiality agreement.
- ❖ Attorney client privileged documents.
- ❖ Competitive bids prior to their opening.
- ❖ Test questions and related documents.
- ❖ FERPA compliance.
- ❖ Security Issues.



Key FOIA Requirements

- ❖ Requires Public Bodies to establish **specific written procedures and guidelines** for FOIA requests and if do not have written procedures in place, cannot charge fees..
- ❖ Requires a separate written summary informing public on submissions, understanding responses, deposits, fees and challenges/appeals.
- ❖ If a court determines that a public body has arbitrarily and capriciously violated FOIA by refusing or delaying in disclosing or providing copies of a public record, then the fines have been raised to \$1,000.
- ❖ The total fee cannot exceed the sum of the hourly wage of its lowest paid employee capable of searching for, locating, and examining the public records in the particular instance, **regardless if that person is available or is the one that actually performs the labor.**





Thank you!

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