

Fundamentals of Purchasing Policies and Procedures

Legal Requirements & Best Practices

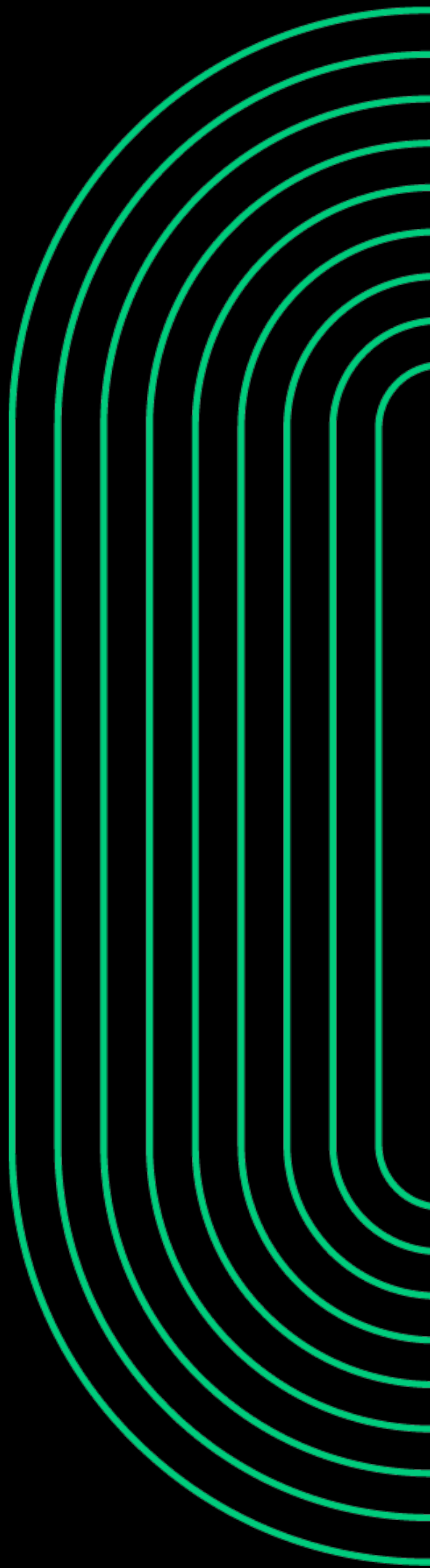
*Michigan School Business Officials
2024 Annual Conference
Session B25*

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April 24, 2024

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Today's Roadmap & Objectives

WHY (& WHAT)

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

HOW

- ❖ Overview of Policies and Procedures

OBJECTIVES

- ❖ Implementing the Law through Policies & Procedures
- ❖ Legally Required Policy Examples
- ❖ Understand Policy Issues
- ❖ Identify Best Practices



Policy & Procedure Overview

❖ What are Policies?

- Policy refers to a set of **principles** and **rules of action** that establish the school district's general operating processes.
- Policies include the directives (**express & implied**) to establish the means and methods to be used to accomplish the required operations of the school district.
- Set forth in writing in a policy manual.

❖ Are all Policies Structured the Same?

- Do policies have to repeat the law?
- Do policies draft for every possible issue?
- Flexible vs. Restrictive Policies

❖ The 3 C's for Policies

- "**Complete**" – Contain enough information to give direction on operational issues.
- "**Concise**" – provide direction without confusing or inconsistent content.
- "**Correct**" – Do not conflict with law, other policies or common sense.



Less is Generally More!

Objectives of Policies & Procedures

Policies should be a tool to be used for effective action by the school district.

❖ Objectives of Procurement Policies

- Policies should be understandable and workable.
- Define procurement objectives and best interests of school district.
- Align with Applicable Laws, although Board policies/procedures may be more restrictive.
- Policies should be flexible to allow for changes – less may often be more effective.

❖ Objectives of Procurement 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).



Policy Overview - Implementing the Law



Why Adopt Purchasing Policies?

- Required under law (Section 1274 vs. Section 1267).
- Provides staff with uniform process for procurements and bidding.

Reservation of Rights

Your Policy/Procedures should require the reservation of rights in favor of the district in bidding documents.

- Accept or Reject any and all bids in whole or in part.
- Waive any informalities or irregularities in bidding process (unless required by law).
- Accept other than the lowest bidder.

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.”**

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 **\$29,572 (*SY23-24)** 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 **\$29,572 (*SY23-24)** 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.

****NEW** State Prevailing Wage Laws**



Michigan Public Act 10 of 2023 - MCL 408.1101 et seq.

- ❖ Applies to school construction projects.
- ❖ Became effective **February 13, 2024**.
- ❖ Brought back similar requirements from prior act which was in effect from 1966-2018.

When Do Prevailing Wages Apply?

- ❖ Every contract executed between a **contracting agent** and a successful bidder as contractor and entered into **pursuant to advertisement and invitation to bid** for a **state project** which requires or involves the employment of **construction mechanics** and which is **sponsored or financed in whole or in part by the state** shall contain an express term that the rates of wages and fringe benefits to be paid to each class of mechanics by the bidder and all of its subcontractors, shall be not less than the wage and fringe benefit rates prevailing in the **locality** in which the work is to be performed.

Key Definitions

- ❖ "**Contracting agent**" means any officer, **school board**, board or commission of the state, or a state institution **supported in whole or in part by state funds**, authorized to enter into a contract for a state project or to perform a state project by the direct employment of labor.
- ❖ "**State project**" means new construction, alteration, repair, installation, painting, decorating, completion, demolition, conditioning, reconditioning, or improvement of public buildings, **schools**, works, bridges, highways, or roads authorized by a contracting agent.
- ❖ "**Construction mechanic**" means a skilled or unskilled mechanic, laborer, worker, helper, assistant, or apprentice working on a state project **but shall not include** executive, administrative, professional, office, or custodial employees.
- ❖ "**Locality**" means the county, city, village, township, or **school district** in which the physical work on a state project is to be performed.



****NEW** State Prevailing Wage Laws**

Inapplicability of Public Act 10 of 2023

- ❖ The act shall not apply to **contracts entered into** or **bids made** *before February 13, 2024*.
- ❖ The act does not apply to a state project if the state project was paid for, **in whole or in part**, from revenue from a millage that meets **both** of the following conditions:
 - The millage was authorized under the Michigan Revised School Code, 1976 PA 451, MCL 380.1 to 380.1852.
 - The millage was authorized before February 13, 2024.



Liability for Non-Compliance

- ❖ If contracting agent does not include in the contract documents or bidding form the requirement to pay prevailing wages and fringe benefits, contracting agent liable for any loss of wages or fringe benefits suffered by construction mechanics on the project as a result of contracting agent's violation of the act.
- ❖ Construction mechanic may bring court action and contracting agent may be liable for actual damages, plus interest up to 10%, costs and attorneys fees.

****NEW** State Prevailing Wage Laws**



Key Requirements to Comply with Act

- ❖ Contracting Agent, **before advertising for bids**, **must request the prevailing wages and benefits** for all classes of Construction Mechanics for the project **from the Department of Labor and Economic Opportunity** (“LEO”).
- ❖ Must **include the prevailing wages and benefits schedule** in the specifications for the work and on the bidding forms.
- ❖ If do not award the contract or begin construction **within 90 days** of the date of the State provided schedule of prevailing rates of wages and fringe benefits, must contact the State to receive a redetermination before the contract is awarded.
- ❖ Must **include** express **contract provisions**, such as:
 - The project is subject to, and contractor shall pay prevailing wages and fringe benefits to all of its construction mechanics (including subcontractors) working on the project in accordance with, Michigan Public Act 10 of 2023.
 - Require **posting** of the prevailing wages and benefits **at project site**.
 - Construction mechanics are **intended beneficiaries** of the contractual prevailing wage, fringe benefit, and nondiscrimination nonretaliation requirements may bring an action in a court against the contractor or subcontractor for damages or injunctive relief and may be awarded reinstatement, damages, actual costs and attorney fees.
 - Must require contractors provide Contracting Agent the **certified payroll records** and other records required by act and **maintain** those for a period of **3 years**.
 - Permit the contracting agent and commissioner to inspect all records and other actions reasonably required to enforce act.
 - Contracting agent may, by written notice to the contractor and the sureties of the contractor known to contacting agent, terminate the contractor's right to proceed with work if prevailing wage and/or fringe benefits have not been paid, and may proceed to complete the contract by separate agreement, and the original contractor and the original contractor's sureties shall be liable to the contracting agent for any excess costs occasioned thereby.



Procurement of Services

- ❖ No express legal requirement under State law to seek competitive bids for **services**.
 - However, Board Policy may be more stringent than the law and require bidding of services under certain situations.
- ❖ Under Federal law, if federal funding used to pay or support services (e.g., ESSER & Food Service Contracts) competitive bidding may be required depending upon dollar amount of services.
- ❖ What Effect will PERA Reform Legislation have on Privatization/Outsourcing of Non-Instructional Services?
 - Went into effect February 13, 2024.
 - Removal from Prohibited Subjects.
 - Restriction on Use of Intergovernmental Agreements.
 - Check union contract language regarding ability to outsource/privatize.
 - What are effects if not exclusive bargaining unit work?
 - Permissive Subject but could be Mandatory Subject.
 - Implementing through bargaining to Impasse.

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 **\$29,572** (FY 23-24).
- ❖ 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 require **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.



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., Michigan and/or Federal Prevailing Wage)



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.

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

❖ Waiver of RFP vs. Legal Requirements

- Bid Bond
- Familial Disclosure Affidavit
- Iran Linked Business Certification (Affidavit)

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



Implementing the Law Through Board Policies & Procedures

How do we effectively put policies into practice?

- ❖ **Annually review internal purchasing policies, procedures and processes.**
- ❖ **Annually review any purchasing forms or contracts.**
- ❖ **Consider developing internal Purchasing Manual for staff.**
- ❖ **Ensure Policies, Procedures and Purchasing Manual easily accessible to staff.**
- ❖ **Education of Staff!!!**
 - Hold staff in-service on purchasing.
 - Ensure staff understand their roles and levels of purchasing authority.
 - Make staff aware of different manners of purchasing and benefits of each.
- ❖ **Annually review anticipated needs of school district.**
 - How should we purchase? Warehouse vs. “as needed” purchases.
 - Purchasing the right product at the right time at the right price.
 - Periodically (at least annually) assess pricing.



Examples of Required Purchasing Policies

❖ Purchasing Card Policy

- Law requires Board to adopt written policy by resolution.
- Policy must contain specific detail, such as set internal controls and designate officer/employee who oversees program.

❖ Supplies Materials and Equipment Policy

- Section 1274 of Revised School Code

❖ Federal Food Service Management Company Procurements

- Written Code of Conduct (related to School Food Service)
- Small (Micro) Purchase Threshold (if different from Federal)
- Bid Protest Procedure
- Meal Charge Policy
- Bad Debt Policy

Fiscal Responsibilities

Compliance Issues

❖ Transparency!

❖ Beware of Conflicts of Interest (real & perceived).

- MCL 15.321 *et seq.*
- MCL 380.1203
- MCL 380.634 (ISDs only)
- MCL 380.1814 (all public school entities)

❖ Smell Test.

❖ Beware of “pushy” vendors.

❖ Have a process to review and approval all purchases (checks & balances).

❖ Do NOT split purchases to satisfy bidding requirements.

If confronted with potentially unlawful or non-conforming procurement, notify proper administrators and do not cover up, and contact legal counsel promptly.





Thank you!

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