

# Developing and Managing RFPs

## *Legal Requirements of Bidding & Procurements*

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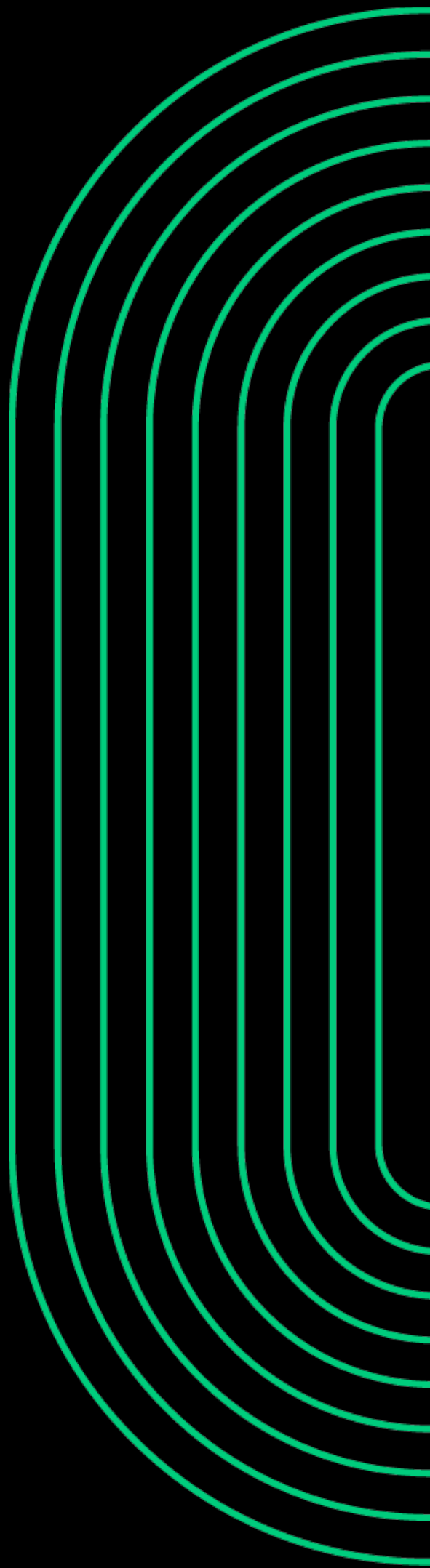


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# Today's Roadmap & Objectives

## 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 **\$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 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., Michigan and/or 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, but Federal regulations may apply depending upon funding source and procurement process requirement..
- ❖ **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

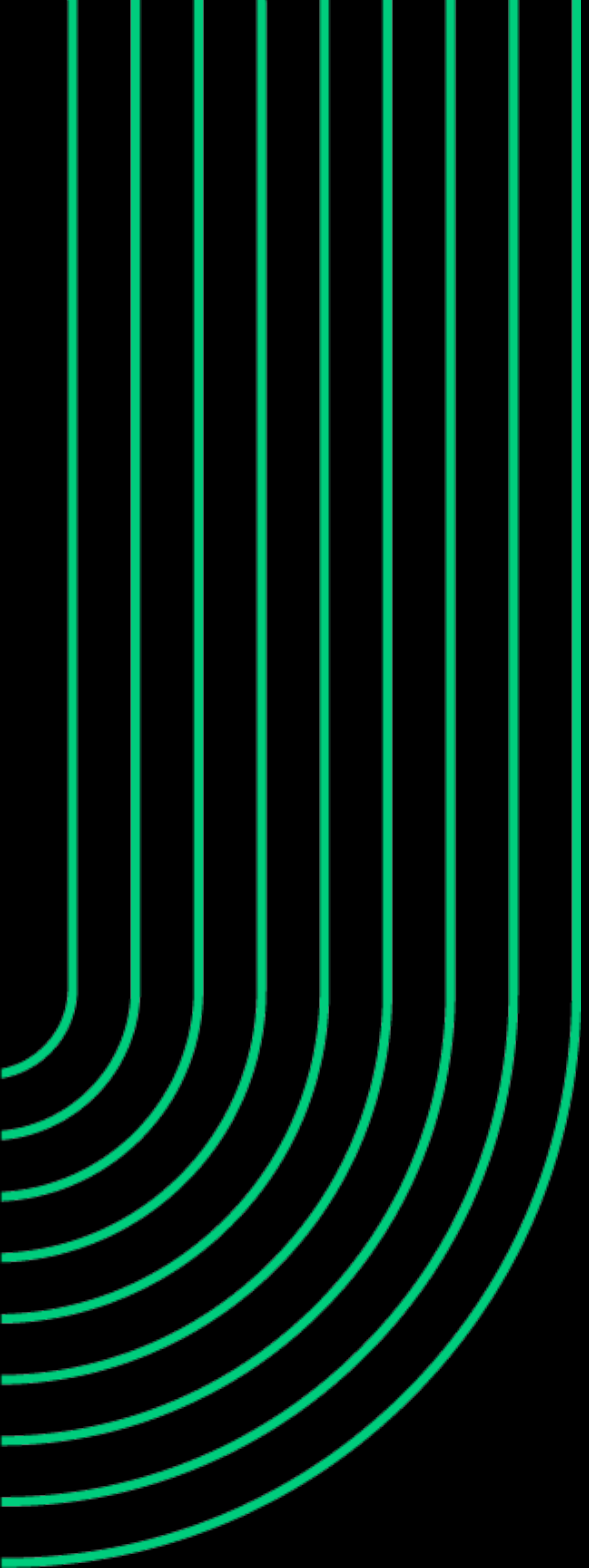
- Has changed from “Buy4Michigan” to “SIGMA VSS & MILogin”
- Can be lengthy process to obtain login credentials

## ❖ 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**



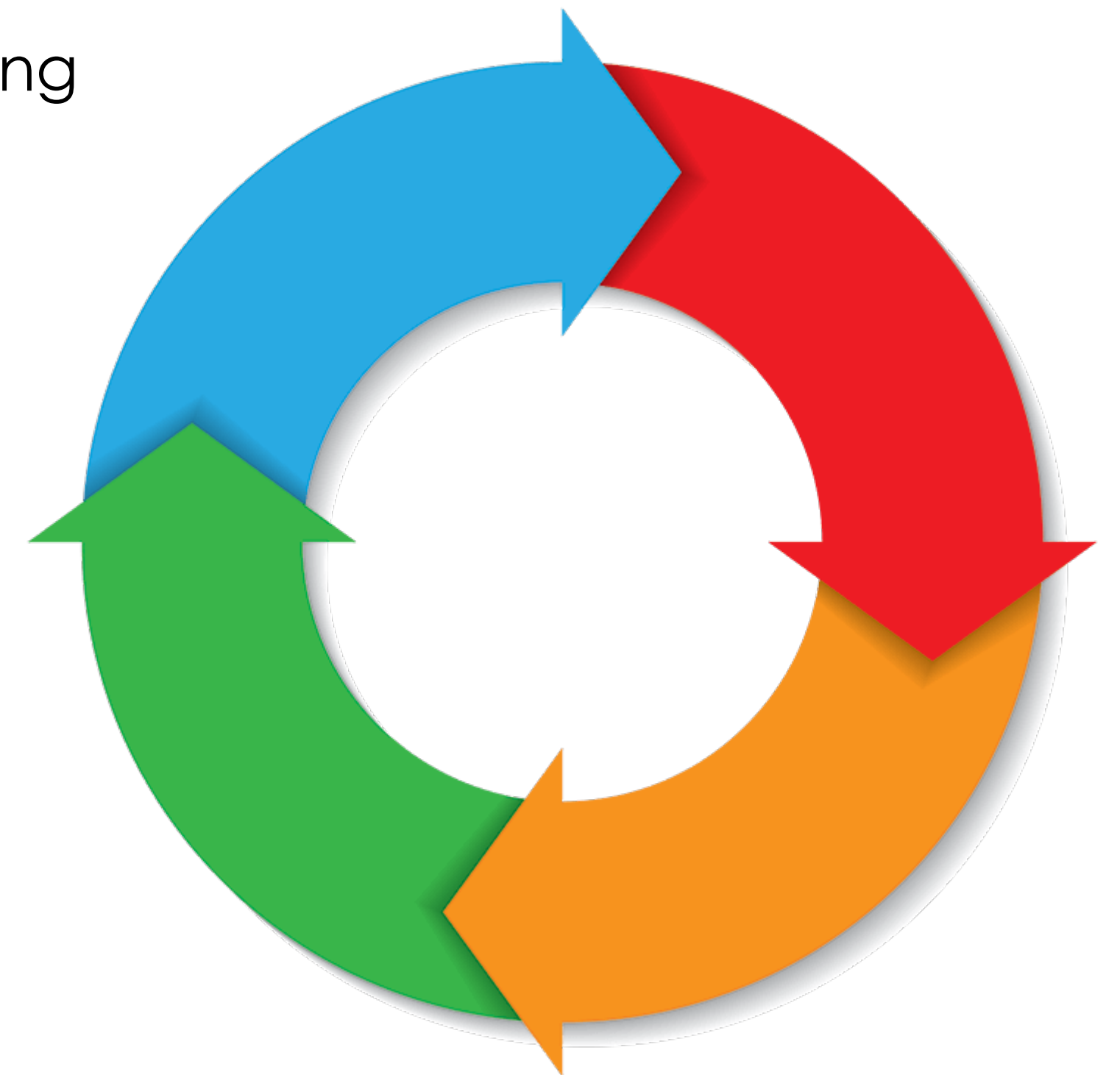


# Proposal/Bid Analysis



# 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?

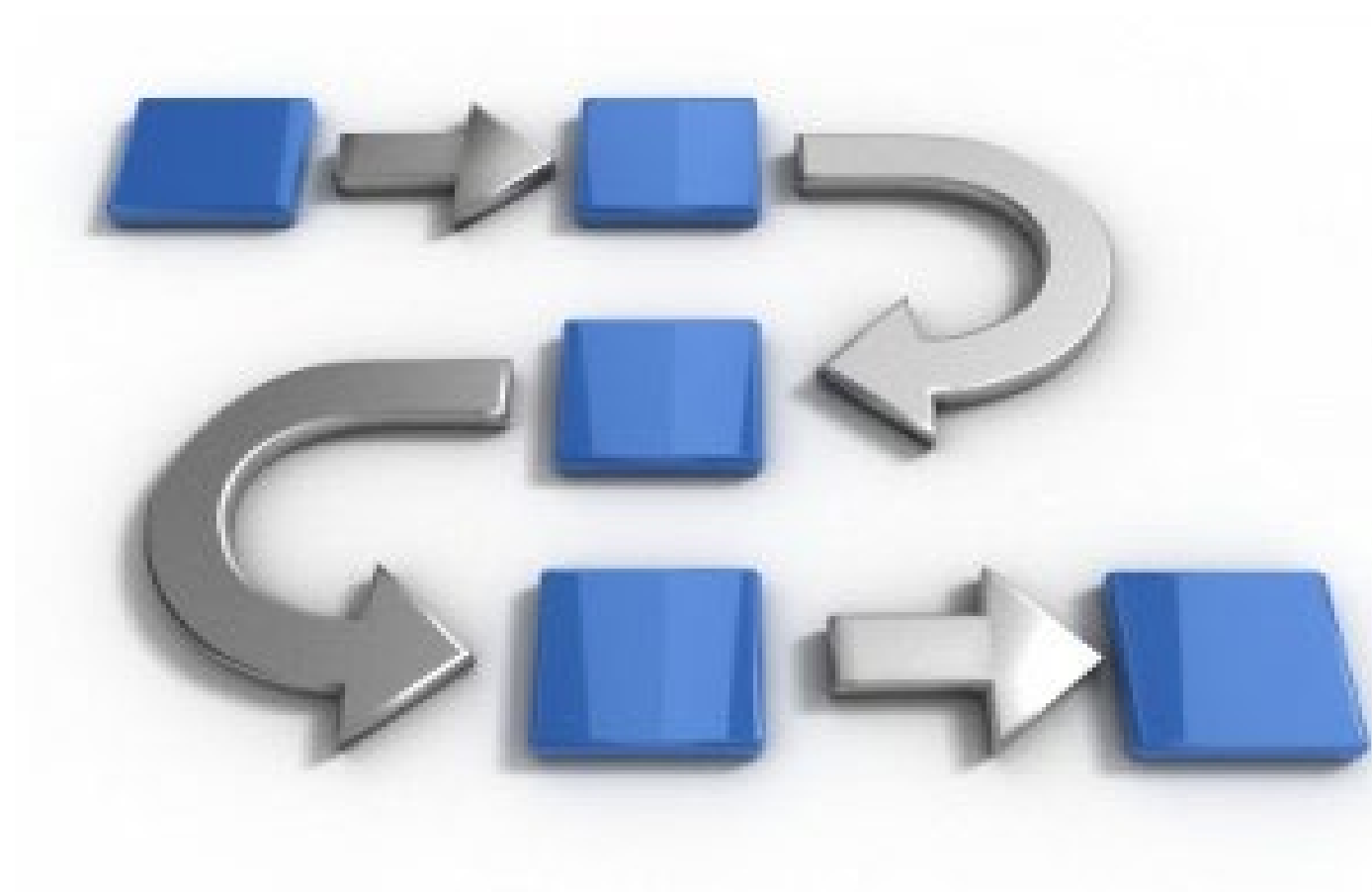
- Beware of disqualifying bidder during bid opening.

## ❖ Documentation:

- Use of Tally Sheets?
- Beware of FOIA Issues

## ❖ Electronic Bidding Issues:

- Electronic Bids and Submission
- Virtual Bid Openings



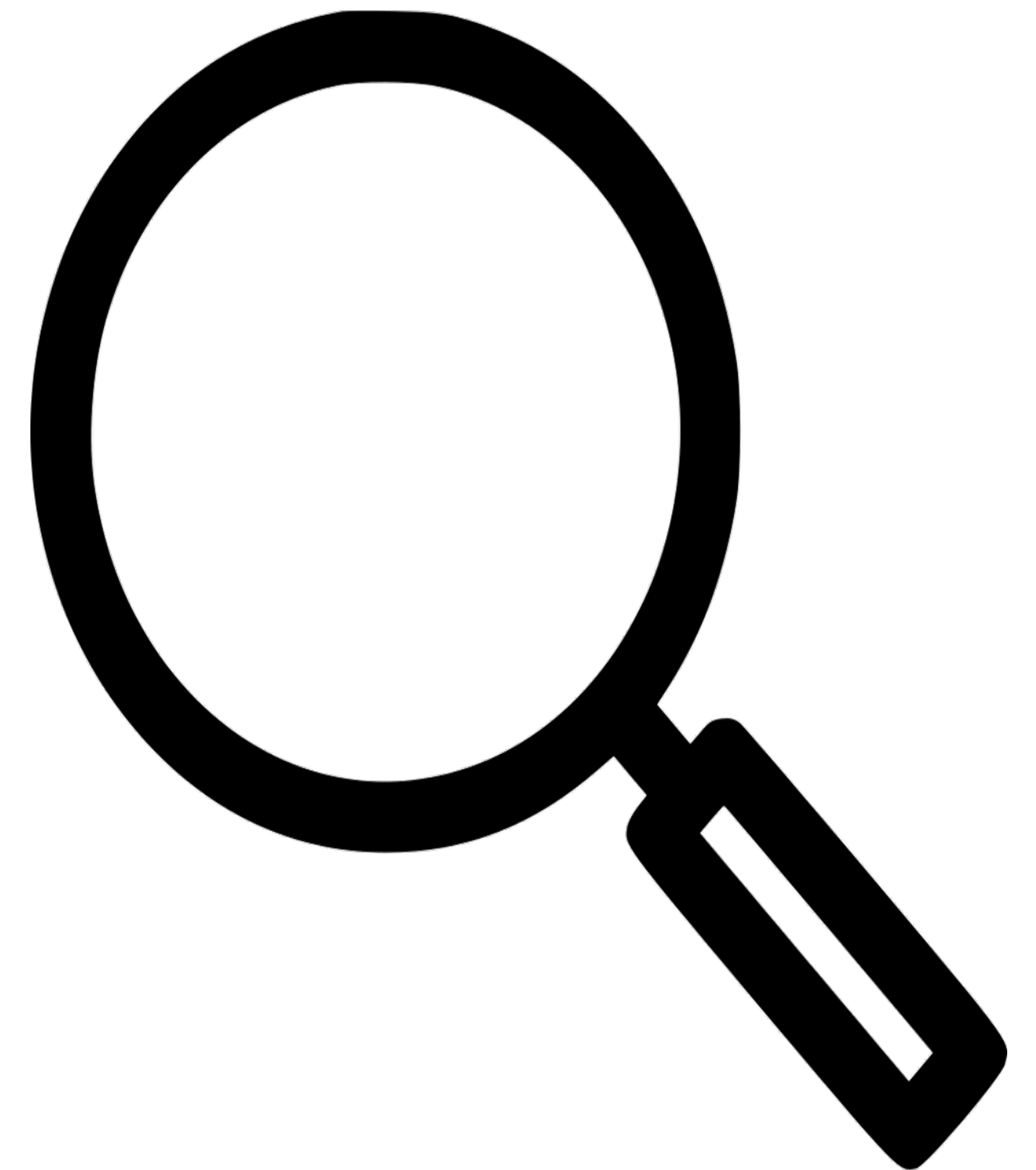
# Analysis of Bids/Proposals

## ❖ 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?
  - Do 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      ← 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).

# Things to Remember....



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- ❖ **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**

*This document is not intended to give legal advice and does not establish any attorney-client relationship. It is comprised of general information only. A School District facing specific issues should consult with its attorney.*

