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Competitive bidding

For most purchases, school boards are not required to use competitive bidding. However, Ohio law requires boards of education to advertise and take competitive bids for certain construction, repairs and improvements of school property and for the purchase of school buses. These procedures are designed to preserve the integrity of public contracts and are strictly construed and enforced by the courts. The legislative intent of competitive bidding is to provide for open and honest competition in bidding for public contracts and to hold the public, as well as bidders themselves, harmless from any kind of favoritism or fraud (Bd. of Edn. v. Sever-Williams Co., 22 Ohio St.2d 107 (1970)).

This fact sheet is designed to address the most frequently asked questions about Ohio's competitive bidding law. This information is of a general nature. Readers should seek the advice of legal counsel with specific legal problems or questions.

Which purchases must be bid?

There are two situations in which Ohio law requires boards of education to competitively bid.

First, boards of education must solicit bids to "build, repair, enlarge, improve or demolish any school building" if the cost of the work is over \$50,000 (Ohio Revised Code (RC) 3313.46).

Second, boards of education must competitively bid any contracts for the purchase of school buses (RC 3313.172, 3327.08).

Do federal laws and regulations ever require competitive bidding?

While this fact sheet focuses on competitive bidding requirements in Ohio law, there also are situations when boards of education must competitively bid purchases because of federal requirements. For example, when purchasing foods and supplies, including management company services, boards of education must competitively bid if the cost is over \$150,000 (7 Code of Federal Regulations (CFR) 3016 and 2019; Ohio Department of Education (ODE) Office of Child Nutrition, Summary of Federal Procurement Standards).

Another example occurs when districts have received federal grant funds. Districts must competitively bid purchases over the simplified acquisition threshold of \$150,000 when using federal grant funds (see, among others, 2 CFR 200.88 and 200.320). More information about competitive bidding requirements related to federal grants is available from ODE's Office of Grants Management.

Which purchases are not required to be bid?

Everything else. For example, a school district can purchase without competitive bidding:

- any motor vehicles except school buses;
- services, except food services as required by federal regulations;
- insurance;
- fuel;
- textbooks;
- computer hardware and software used for instructional purposes;
- educational materials used in teaching;
- any item that is available and can be acquired only from a single source (the

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board must adopt a resolution by a two-thirds vote that this is the case).

Board policies may require obtaining quotes for some of these purchases even though the law does not require competitive bidding. A best practice is to solicit quotes from at least three sources. This helps ensure that the board is getting the best price and avoid claims of favoritism.

Are there purchasing programs school districts can use that do not require competitive bidding?

Yes, there are several purchasing programs school districts and educational service centers (ESCs) can use that do not require competitive bidding:

- The Ohio Department of Administrative Services (DAS) operates the Cooperative Purchasing Program (RC 125.02). DAS negotiates standard contract terms with vendors for a variety of services, supplies, materials and equipment. Any school district or ESC that joins the Cooperative Purchasing Program can purchase these items on the state's negotiated terms without competitive bidding (RC 125.04). More information about the Cooperative Purchasing Program, including how to apply, is available from DAS.
- School districts and ESCs can make purchases through a regional planning commission without competitive bidding (RC 713.23).
- ESCs are permitted to enter into service contracts with other Ohio political subdivisions. If an ESC enters into a contract with a board of county commissioners or township trustees, the contract is not subject to competitive bidding (RC 3313.846).
- Neither school districts nor ESCs must competitively bid contracts when purchasing or installing energy conservation measures on installment payment or shared-savings contracts (RC 3313.372, 3313.373).

How is the \$50,000 threshold for competitive bidding calculated?

The board must evaluate the total cost associated with a project to determine if the project cost will exceed the threshold and competitive bidding will be required. The district cannot break the project into pieces to keep individual contracts under \$50,000 and evade the competitive bidding requirements (*State ex rel. Kuhn v. Smith*, 92 Ohio Law Abs. 527, 194 N.E.2d 186 (C.P. 1963)). Districts also cannot evade the competitive bidding requirement by purchasing only the project materials and having district employees supply the labor (1951 Ohio Attorney General Opinions (Atty.Gen.Ops.) No. 51-200).

What if the total cost associated with a project is less than \$50,000?

If the total cost of a project is \$50,000 or less, the law does not require the district to follow competitive bidding procedures. In that case, the law does not specify any particular method or procedure for purchasing. OSBA recommends that boards use a procedure that will result in the receipt of quality work at a fair price. The board has discretion to determine how it will build, repair, enlarge, improve or demolish school property. The board could provide the materials and have the work performed by its own personnel, or it could contract with a person or firm to supply the materials and/or labor. The board also could solicit bids or quotes for the work. As always, the board should review board policy for any requirements to obtain quotes for goods and services below the competitive bidding (or \$50,000) threshold.

If competitive bidding is required, what guidelines must be followed?

There are three main guidelines for competitive bidding:

- information for potential bidders;
- bid advertisements;
- bid submissions.

What information should be provided to potential bidders?

Unless the board determines that other available information is sufficient to inform potential bidders, the board is required to have an architect or engineer prepare:

- full and accurate plans suitable for use of mechanics and other builders in the construction, improvement, addition, alteration or installation;
- details to scale and full-sized, drawn so that they are easily understood;
- definite and complete specifications of the work to be performed, together with directions that will enable a competent mechanic or other builder to carry them out and afford bidders all needful information;
- an estimate of costs;
- a life-cycle cost analysis;
- any other data that is required by the Ohio Facilities Construction Commission (RC 3313.46, 153.01(A)).

Even if the board makes a determination that other available information is sufficient and plans do not need to be drawn up by an architect or engineer, the services of an architect, engineer or surveyor still will be needed on construction projects.

Note: Boards should consider carefully before deciding to use brand names in specifications. The intent of the bidding statute is to provide for

open and honest competition in bidding for public contracts. If specifications are too limiting, this may discourage competition and may be struck down by courts.

How should the board advertise for bids?

There are three ways the board can advertise for bids:

- The board may place the advertisement in a newspaper of general circulation in the district once each week for two consecutive weeks before the date specified by the board for receiving bids (RC 3313.46(A)(2)). Also, the board can run the notice in trade papers and post it on the board's website.
- The board may place the advertisement in a newspaper of general circulation in the district for one week and post the notice on its website. The board may eliminate the second newspaper notice provided that the first newspaper notice had these elements:
 - ◆ It was published at least two weeks before the opening of the bids.
 - ◆ It included a statement that the notice was posted on the board's website.
 - ◆ It included the board's website address.
 - ◆ It included instructions on how the notice may be accessed on the board's website.
- The board may advertise for bids under an abbreviated process provided by RC 7.16. Under RC 7.16, the entire advertisement must be published the first time in a newspaper of general circulation. It may be made in a preprinted insert in the newspaper. The second publication may be made in abbreviated form in the newspaper and on the newspaper's website. No further newspaper publication is required provided that the abbreviated notice met these requirements:
 - ◆ It was published in the same newspaper as the first publication of the notice and on that newspaper's website, if the newspaper has one.
 - ◆ It included a title, a summary paragraph or statement clearly describing the specific purpose of the advertisement and a statement that the entire advertisement was posted on the state's public notice website, <http://publicnoticesohio.com> (RC 125.183).
 - ◆ It included the Internet addresses of <http://publicnoticesohio.com>, the state public notice website and of the newspaper's and district's websites (if the advertisement was posted on those websites).
 - ◆ It included the name, address, telephone number and email address of the school district responsible for publication of the advertisement.

How must bids be submitted?

The law requires that all submitted bids must be sealed. Each bid must contain the name of every interested person. Each bid also must be accompanied by a bid guarantee in the form of either a bond for the full amount of the bid or a certified check, cashier's check or letter of credit equal to 10% of the bid (RC 153.54). The bond must be issued by an insurer authorized to do business in Ohio. The board must reject any bid if the bond is issued by a company that is not licensed to do business in Ohio.

When should bids be opened?

Bids must be opened at the time and place specified in the advertisement unless the board does either of the following:

- Extends the time for the opening of the bids.
- Issues a modification of the plans, specifications or cost estimates within 72 hours before the time set for the opening of bids. In this case, the board must extend the time for opening bids for one week (RC 153.12). The board also must furnish notice of the modifications to anyone who already has obtained plans for the project. However, no further advertisement for bids is required.

Because a public agency cannot waive a time limitation on the submission of bids, a board of education may not accept a bid that was submitted late (1965 Ohio Atty.Gen.Ops. No. 65-223).

Are there rules regarding the acceptance of bids?

Yes. The board shall accept only the "lowest responsible bid" (RC 3313.46(A)(6)). The board has the option of rejecting all the bids if none are acceptable. If two or more bids are equal and are lower than any others, the board may accept either. However, the board may not divide the work between two equal bidders. The board may not accept a bid if the board's estimate of costs is exceeded by more than 10% (RC 153.52).

After opening the bids, how long does the board have to enter into a contract?

The board has 60 days from the date bids are opened to award and execute a contract with the successful bidder. Before entering into a competitively bid contract, the treasurer must obtain a statement from the successful bidder stating whether it has paid all personal property taxes owed. If the bidder indicates that payments are delinquent, the treasurer must furnish a copy of the statement to the county auditor within 30 days of its receipt and a copy of the statement must be incorporated into the contract (5719.042). The successful bidder also must file a performance bond for the full amount of the contract with the treasurer to guarantee

performance of the contract and indemnify the board.

How should the district determine the 'lowest responsible' bidder?

Determining the lowest responsible bidder would seem to be a fairly easy process: the district should select the responsible bidder that has submitted the lowest bid. However, the statute does not define the term "responsible." Fortunately, the courts have furnished some guidance. To determine which bidder has submitted the "lowest responsible bid," a board may consider any of the following attributes about the bidders:

- general ability and capacity to carry on the work;
- equipment and facilities;
- promptness;
- the quality of work previously done by bidder;
- suitability to the particular task;
- personal qualities such as skill, integrity and judgment (*Hudson v. Bd. of Edn.*, 41 Ohio App. 402, 407 (4th Dist.1931); *State ex rel. Dale v. Columbus Bd. of Edn.*, 9 Ohio Dec. 336, 338 (C.P.1899)).

What alternate standards may a board adopt to determine the lowest responsible bidder?

School districts have used the lowest responsible bid standard for many years. However, districts also can use the "lowest responsive and responsible bidder" standard for greater control over the bidding process.

Pursuant to RC 9.312, a board of education may, by resolution, adopt a policy requiring each competitively bid contract to be awarded to the "lowest responsive and responsible bidder." A bidder on the contract shall be considered "responsive" if its proposal responds to bid specifications in all material respects and contains no irregularities or deviations from the specifications that would affect the amount of the bid or otherwise give the bidder a competitive advantage. To determine if a bidder is "responsible," consider the experience of the bidder, its financial condition, conduct and performance on previous contracts, facilities, management skills and ability to execute the contract properly. A board of education may request additional financial information from an apparent low bidder after it opens all submitted bids. This information generally must be kept confidential, and it is not a public record under RC 149.43. A possible disadvantage to this standard is that it creates a hearing right for rejected bidders (RC 153.52 uses the "lowest responsive and responsible bidder" standard for labor and materials contracts.).

When may a school board deviate from the competitive bidding procedure?

A board can deviate from the statutory competitive bidding procedure in cases of urgent necessity or for the security and protection of school property (RC 3313.46(A)). The statute provides no definition of "urgent necessity" or "for the security and protection of school property." When reviewing a board's decision to declare an urgent necessity, a court will not substitute its judgment for that of the board. However, it will examine if the board abused its discretion or there was fraud or bad faith. To meet this exception, a board must rely on more than convenience or ordinary necessity; an urgent necessity is something that cannot wait (Anderson, Section 6.23). Examples of urgent necessity include:

- replacing a roof blown off by a tornado;
- repairing a boiler that breaks down in January;
- hiring a contractor one week before school starts to complete a building after the original contractor defaults on the contract.

If a board decides to declare a case of urgent necessity, it should adopt a resolution stating the facts on which the decision is based and the procedures the board will follow.

What about reverse auctions?

A board of education may pass a resolution to purchase supplies and services by using a "reverse auction" (RC 9.314). A reverse auction is a purchasing process in which vendors submit proposals competing to sell services or supplies via the internet. A board of education may adopt rules on the use of reverse auctions to obtain necessary goods and services.

Boards desiring to use the reverse auction process must develop a request for proposals listing the goods or services sought and the relative importance of price and other factors. The board gives notice of the request for proposals according to the rules it adopts. The school district may conduct discussions with responsible offerors to ensure responsiveness to the solicitation, and it must treat offerors fairly and equally when discussing proposals.

The board may award a contract to the offeror whose proposal is most advantageous as determined by the board, taking into account the price and other evaluation criteria as set forth in the request for proposals. Boards must keep a record of the basis on which a contract is awarded and may require a performance bond or other surety as set forth in rules that the board adopts.

When the board is required to follow competitive bidding laws, a purchase made by reverse auction satisfies that requirement. However, the law specifically provides that a board cannot use a reverse auction to purchase supplies or services

if the contract is for the design, construction, alteration, repair, reconstruction or demolition of a building, drainage system, water system, ditch, sewer or any other structure or works of any kind (RC 9.314(B)(2)).

Can a bidder withdraw a bid?

A bidder for a contract can withdraw its bid from consideration if all of the following apply:

- the price bid was substantially lower than the other bids, provided the bid was submitted in good faith;
- the reason for the price bid being substantially lower was a clerical mistake as opposed to a judgment mistake and actually was due to an unintentional substantial arithmetic error or an unintentional omission of a substantial quantity of work, labor or material;
- notice of a claim of right to withdraw is made in writing within two business days after the conclusion of the bid opening procedure (RC 9.31).

Note: A bid cannot be withdrawn when the result would be awarding the contract to another bid submitted by the same bidder.

If a bid is withdrawn, the board may award the contract to the next lowest bidder or reject all bids and start the bidding process over. If the board elects to resubmit the project for bidding, the withdrawing bidder is required to pay the costs connected with the bidding procedure.

The information contained in this fact sheet is designed to provide authoritative general information. It should not be relied upon as legal advice. If legal advice is required, the services of an attorney should be obtained.