



Top 11 Public Bidding Questions

Section 10-20.21 of the School Code requires school districts to publicly bid contracts for the purchase of supplies, materials and work and to award the contract to the lowest, responsible and responsive bidder. When applying the public bidding law to purchases and contracts, school business officials must be mindful of the nuances and complexity of the law. The following are common questions or problems that school business officials may face when addressing the School Code's bidding requirements, as well as practical solutions.

1. Is public bidding required for cooperative purchases?

No, for two reasons. First, Section 10-20.21(c) of the School Code contains a bidding exception for cooperative master contracts authorized by the Illinois State Board of Education, which currently only includes US Communities. Second, the Governmental Joint Purchasing Act, 30 ILCS 525/1, et seq., allows school districts to make cooperative purchases of equipment, supplies and services without public bidding as long as the cooperative is operated by a governmental entity and follows a competitive selection process.

The State of Illinois has a cooperative purchasing program called the Joint Purchasing Program that is administered by the Illinois Department of Central Management Services. Under this program, the state's procurement officers prepare specifications, evaluate bidders, select the highest-quality bid, check references and negotiate all pricing. School districts and other municipalities are able to take advantage of the state's purchasing power by participating in the Joint Purchasing Program, procuring goods and services from the awarded vendors.

2. Do school districts have to publicly bid student transportation contracts?

Yes, student transportation contracts, regardless of the type of vehicle (bus or taxi) must be publicly bid. However, districts have much more discretion when awarding transportation contracts. Due to recent changes to the School Code, transportation contracts are awarded by first considering

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the bidder or bidders most able to provide safety and comfort for the pupils, stability of service, any other factors set forth in the request for proposal regarding quality of service and then price.

3. Should you have a mandatory pre-bid meeting?

Mandatory pre-bid meetings can be critical in certain public bidding situations to answer bidders' questions, gauge bidders' interest in your project and preemptively solve problems with your project plans and specifications. They ensure that all prospective bidders hear the same information with regard to the project parameters. Pre-bid meetings are especially helpful when the contract is for construction, custodial and maintenance or landscaping services. Bidders can be given the opportunity to visually examine the premises, ensuring more accurate bids and reducing the possibility of non-performance or change orders. After the meeting, the school district should prepare a written list of all questions and answers from the meeting and distribute the list to all potential bidders who attended.

4. What is the best practice on handling pre-opening bid questions?

The primary concern of the bidding statute is maintaining fairness and transparency in the bidding process. Oral questions and answers concerning the bid requirements or scope of contract can jeopardize these goals if the questions and answers are not provided to all bidders. The school district should require all bidders to submit questions in writing by a certain date and then distribute written answers to all potential bidders.

School districts should also require contact information from all potential bidders who pick up the bid packet so that the school district can distribute the list of questions and answers and school initiated pre-bid addendums or changes, to all potential bidders. If the school district posts bid packets on its website, it should similarly require bidders to submit their contact information before downloading the bid packet.

5. Should school districts require a bid bond?

Although not legally required, school districts should require a bid bond, usually in the range of five to ten percent of the bid amount, rather than a cash deposit. The bid bond provides assurance that the successful bidder will agree to sign the contract at the price included in the bid. Bid bonds also can prevent frivolous bids because a bidder is unlikely to walk away from the contract if it feels that its bid is too low, or the contract terms are too harsh. Requiring bid bonds from sureties with a minimum bond rating can also help screen potential bidders as highly rated sureties are unlikely to issue bid bonds to companies without sufficient financial security or with negative project history.

6. What do you do if the district receives a bid after the time set for the bid opening?

It is the duty of the bidder to submit the bid within the time frame and location established by the district. If a school district receives a late bid it can reject the bid as "non-responsive" due to the bidder's failure to comply with the bid instructions. A school district can, however, accept a late bid if there is evidence that it was actually submitted before the bid opening and that no fraud, collusion or favoritism existed. This could occur if the delay was due to common carrier such as UPS or FedEx, or if a school district employee placed the bid in an incorrect location. If the school district receives a late bid and chooses to open it, the district should immediately notify all other bidders and schedule a time to publicly open and read aloud the late bid.

7. Can a bidder submit mandatory additional terms and conditions?

No, if a bidder includes mandatory additional terms and conditions with a bid, the school district can reject the bid as "non-responsive." "Responsive" means strict compliance with the bid documents and instructions. A bid with a



material variance is one that gives the bidder a competitive advantage over other bidders and therefore must be rejected.

Although school districts cannot waive material variances in the bid, they may decide to waive non-material variances. If a bidder simply proposes alternate terms and conditions of the contract or alternate materials or products, the district can disregard the proposed alternate terms and conditions and enforce the bid per the school district's bidding instructions.

8. What happens if the low bidder has a bid mistake?

If a bidder makes an error in its bid, school districts must decide whether to hold the bidder to its bid or allow the bidder to withdraw its bid due to the mistake. Illinois case law holds that a bidder is entitled to rescind its bid due to the bidder's unilateral mistake only where:

- The mistake relates to a material feature of the contract.
- The mistake occurred notwithstanding the exercise of reasonable care.
- The mistake is of such serious consequence that enforcement of the contract would be unconscionable.
- The other party suffers no change in position because it can award the contract to the next lowest, responsive and responsible bidder.

Courts have held that a mistake in the magnitude of ten percent of the total value of the bid can be viewed as a "material mistake." The school district may seek to enforce the bid, as submitted, but should consider the risk that the bidder will not be able to perform the contract at the bid price and quality.

9. Do alternates count when determining the lowest bidder?

Alternates can come into play and create a problem where there could be multiple, different low bidders. To keep the bidding process fair to all bidders, districts should indicate to bidders exactly how the lowest bid will be determined: based on the lowest, cumulative bid, including the base bid and all applicable alternates, or only the lowest base bid. If alternates will be included in the lowest bidder determination, school districts should create a confidential list prior to the bid opening that prioritizes alternates that will be included, depending on available funds.

10. How do you determine if the low bidder is "responsible?"

Whether or not a bidder is "responsible" is determined based on the bidder's past history with your district and/or projects/contracts performed for other entities. A school business official, or his or her designee, should always review and investigate the low bidder's bid documents, references and past projects. Conducting a thorough check of references as well as a check of the internet and the Illinois Department of Labor's suspended contractors listing can often expose questionable bidders. Other potential disqualifying factors include unresolved defects, unpaid liens or significant missed project deadlines or other material project problems. "Responsible" is a pass/fail determination. All that is required is that the bidder is deemed "responsible" and not "more responsible" than a different bidder or "very responsible."

11. Can school districts negotiate a lower price with the low bidder?

Yes, additional savings may be negotiated so long as the negotiations relate only to a reduction in price to the school district. Once the bidding process produces a lowest responsible bidder, the district may negotiate a post-bid, pre-award price concession from the low bidder in the absence of favoritism, improvidence, fraud or corruption. In fact, Illinois law explicitly states that it is not a criminal offense "to negotiate with the lowest responsible bidder a reduction in only the price term of the bid." School business officials may not, however, negotiate the scope of the contract terms, as this may materially alter the bid process and create a potential claim by other bidders that the process was not fair.

Finding Clarity

Public bidding is a complicated process and can be filled with many potential problems. Hopefully you now have some clarity on common bidding problems. However, it is recommended that you consult with your school attorneys with specific bidding problems.