

- ▶ follow any other reasonable procedure.

● The statute provides no definition of “urgent necessity” or “for the security and protection of school property.” Thus, a court will not substitute its judgment for that of the board, but it will look to see if the board abused its discretion or if there was fraud or bad faith.

- ▶ to meet these exceptions, a board must rely on more than convenience or ordinary necessity, an urgent necessity is something that cannot wait (*Anderson*, Section 6.23);

- ▶ thus, getting that hallway painted will not be considered urgent.

● Examples of urgent necessity:

- ▶ roof blown off building by tornado;
- ▶ boiler breaks down in January;
- ▶ original contractor starts job, defaults on contract, condition of building requires early completion (school starts next week).

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

RC 125.04 — Known as Ohio’s Cooperative Purchasing Program, this statute provides that a school district may participate in specified state purchasing contracts. Purchases made by boards under this statute are exempt from any competitive bidding required by law for the purchase of supplies, services, materials and equipment.

For additional information on this program, write to: the Cooperative Purchasing Coordinator, Office of State Purchasing, Ohio Department of Administrative Services, 4200 Surface Road, Columbus, OH 43228-1395, or call (614) 752-0003.

RC 713.23 — Purchases may be made through a regional planning commission. Purchases of supplies, services, materials and equipment made by a school board using this procedure are exempt from the competitive bidding requirements.

RC 3313.372, 3313.373 — Energy Conservation Measures. The competitive bidding requirements are waived if 2/3 of the board vote to enter into an installment payment contract for the purchase and installation of energy conservation measures. Also, if the board enters into a shared-savings contract, that contract is

not subject to competitive bidding.

Reverse auctions

RC 9.314 — Whenever any political subdivision determines that the use of a reverse auction is advantageous to the political subdivision, the political subdivision, in accordance with this section and rules the political subdivision shall adopt, may purchase services or supplies by reverse auction. A board of education may resolve to purchase supplies and services by using a “reverse auction.” 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 concerning the use of reverse auctions to obtain necessary goods and services.

Boards desiring to use this process 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 upon 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.

Withdrawal of bids

What happens if after the bids are opened and a bid is accepted, the successful bidder discovers that some of its figures are wrong or some item has been left out that the bidder wanted to include?

RC 9.31 — A bidder for a contract may

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.

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, such as printing, advertising and mailing.

Miscellaneous

Gov. Bob Taft issued an Executive Order in September 2002 declaring that certain public agencies require contractors to enroll in the Ohio Bureau of Workers’ Compensation Drug-Free Workplace program or participate in a similar program in order to be eligible for state construction projects. The Ohio School Facilities Commission adopted a resolution dated March 27, 2003 to implement the drug testing program “as fully as practical.” It is suggested that boards of education discuss with construction counsel the applicability of the order to their specific program and/or project.

It appears that a board may be required to use licensed engineers and surveyors on all projects exceeding \$5,000 (RC 4733.17).

You should be careful with use of brand names in specifications. If specifications are too limiting, this may discourage competition and may be struck down by courts, because the intent of the bidding statute is to provide for open and honest competition in bidding for public contracts.

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.

The successful bidder also must file a performance bond with the treasurer to guarantee performance of the contract and indemnify the board. The bond must be for the full amount of the contract.

RC 3327.08 — The purchase of school buses shall be made only after competitive bidding in accordance with RC 3313.46. The requirement that separate bids be obtained for the body and the chassis was removed in 1994.

Caution: Due to the complexity of the law and continuously changing court decisions, OSBA recommends that questions of interpretation of the law be directed to your board’s legal counsel.

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What schools need to know about Competitive bidding



The Ohio Revised Code (RC) 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 (*Board of Education v. Sever-Williams Co.* (1970), 22 Ohio St.2d 107).

What exactly must be bid?

RC 3313.46 says school districts must solicit bids to “build, repair, enlarge, improve, or demolish, any school building.”

Some examples would be:

- a new school building,
- a new roof on a school building,
- painting of the school building (1951 Ohio Atty. Gen. Ops. No. 200).

In 1994, the General Assembly removed the term “furnish” from the statute. We are unsure as to the significance of this change. One possible interpretation could be that items such as tables, desks, chairs and office equipment would no longer need to be bid.

The purchase of school buses also requires competitive bidding (RC 3313.172, 3327.08).

There also is a federal procurement standard that requires competitive bidding for the purchase of food items, the cost of which exceeds \$25,000. This dollar limit applies to the board’s contract period with the vendor, i.e., school year, quarterly, etc.

For example, if the board wishes to enter into a contract for the purchase of milk for the first semester only, and the cost is less than \$25,000, there is no need to competitively bid that contract (however, you must obtain at least three quotes). If the cost is \$25,000 or more, the board must obtain competitive sealed bids.

For more complete information on food purchase procedures, contact the Ohio Department of Education, Office of Child Nutrition Services at (614) 466-2945.

What are you not required to bid?

The list of items not requiring competitive bidding includes:

- motor vehicles, except school buses (RC 3313.172, 3327.08),
- services,
- 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 board must adopt a resolution by a 2/3 vote that this is the case),
- energy conservation measures (with certain restrictions provided by statute).

There is no dollar limit on any of the above items for school boards. However, we would suggest that you obtain quotes from more than one source.

\$25,000 limit

If you are going to build, repair, enlarge, improve, or demolish any school building, and the cost exceeds \$25,000, the board is under a mandatory duty to follow the competitive bidding procedures.

A particular project cannot be done “piece-meal” in order to evade the dollar limitations of the statute (*State ex rel. Kuhn v. Smith* (C.P. 1963), 92 Ohio Law Abs. 527, 25 O.O.2d 203, 194 N.E.2d 186).

The law also prohibits evasion of the law by purchasing only the materials and having employees of the district supply the labor (1951 Ohio Atty. Gen. Ops. No. 200).

If cost is \$25,000 or less, the law does not require that you follow the competitive bidding procedures. In fact, it does not specify any particular method or procedure.

In these circumstances, the board has the discretion to determine how it will have a school building built, repaired, enlarged, improved or demolished. 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 for the work (*Anderson’s Handbook of Ohio School Law*, Section 6.19).

OSBA recommends that boards use a procedure that will result in the receipt of quality work at a fair price.

Procedures to be followed

The board is required by RC 3313.46, 153.01, 153.12 to have an architect or engineer prepare the following:

- full and accurate plans, suitable for use by mechanics and other builders on the project;
- details to scale and full sized, to be drawn so that they are easily understood;
- definite and complete specifications of the work to be performed, together with such directions as will enable a competent mechanic or other builder to carry them out and afford bidders all needed information;
- an estimate of costs.

The board, however, now has the authority to determine that other information is sufficient to

inform bidders of the board’s requirements. If the board makes such a determination, it should keep in mind that the services of an architect, engineer or surveyor still will be needed on construction projects.

The board then must advertise for bids in a newspaper of general circulation in the district once each week for **two** consecutive weeks. The bids submitted are required to be sealed.

Unless the board extends the time for the opening of the bids, they shall be opened at the time and place specified by the board in the advertisement.

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

- If the board modifies the plans and mails or otherwise furnishes such modifications to the plans, specifications or cost estimate to prospective bidders within 72 hours before the time set for the opening of bids, the time for the opening must be extended for one week (RC 153.12).

Each bid 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.

- the bond must be issued by an insurer authorized to do business in Ohio,
- a bid must be rejected if the bond is issued by a company that is not licensed to do business in Ohio.

Acceptance of bids

RC 3313.46 states that the board shall accept only the “lowest responsible bid.” 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%. The board has 60 days from the date bids are opened to award and execute a contract with the successful bidder.

Determining the “lowest” bidder would seem to

be a fairly easy process. Establishing whether a bidder is “responsible,” however, may present problems. It would have been helpful if the General Assembly had provided a definition of “responsible.” Although this has not happened, the courts and the Ohio Attorney General have stepped in and furnished some guidance.

In deciding which bidder has submitted the “lowest responsible bid,” a board may consider the following:

- general ability and capacity to carry on the work,
- equipment and facilities,
- promptness,
- the quality of work previously done by bidder,
- personal qualities such as competence, integrity and judgment. (*Anderson, Section 6.25*)

Here are some examples:

- A court has found that a board has discretion as to the procedure used to determine that a low bidder was not responsible. The board was required to consider certain factors as outlined in RC 9.312, but was not required to follow a specific investigation procedure. Rejection of a bidder on the basis of poor performance on one contract was not arbitrary, unconscionable, or illegal (*Monarch Constr. Co. v. Ohio School Facilities Comm.*, 150 Ohio App.3d 134, 2002-Ohio-6281).
- A court has held that if the bidder that submitted the lowest bid was in bankruptcy and previously defaulted on the performance of a contract, a board does not abuse its discretion in finding that the bidder was not “responsible” (*Anderson, Section 6.25*).

- Where a board previously had hired a contractor to fix a roof but the roof still leaked, the board did not abuse its discretion in deciding that the contractor was not “responsible” and seeking a subsequent contractor (*State ex rel. R&R Roofing v. South Point Bd. of Educ.* (1983), Lawrence Co. App. No. 1658 , unreported).
- A board may not reject a bid because it has no previous dealings with a bidder (1970 Ohio Atty. Gen. Ops. No. 105).

School districts have used the lowest responsible bid standard for many years. In 1988 and 1990, new laws were enacted that established additional standards that boards may adopt.

- RC 153.52 — Contracts for labor and materials must be awarded to the “lowest and best separate bidder.”

- There are no guidelines in either the statute and case law as to what constitutes “best.”
- However, this may allow the board to look at brand name reliability, serviceability, proximity of service provider and past experience with bidder.
- Due to the uncertainty about this language, it may be subject to legal challenge.

- 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.”

- Definition of “responsive” — 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.
- Definition of “responsible” — look at 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.
- Possible disadvantage — creates right to a hearing for the rejected bidder.

When can you deviate from the competitive bidding procedure?

RC 3313.46 — “In cases of urgent necessity, or for the security and protection of school property.”

- If these emergency conditions exist, the board may decide not to follow the above procedures, choosing instead, for example, to:

- advertise for less than two weeks;
- avoid bidding altogether, and get quotes from three or four local companies;