



School Construction: You Don't Always Bid What You Want

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The School Bidding Statute



R.C. 3313.46(A):

- In addition to any other law governing the bidding for contracts by the board of education of any school district, when any such board determines to build, repair, enlarge, improve, or demolish any school building, the cost of which will exceed fifty thousand dollars, except in cases of urgent necessity, or for the security and protection of school property, and except as otherwise provided in division (D) of section 713.23 and in section 125.04 of the Revised Code, all of the following shall apply:

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What is a “School Building”?



“build, repair, enlarge, improve, or demolish any **school building**”

- Improvements to buildings other than “school buildings” are not subject to competitive bidding
- Previously applied to “schoolhouses”
 - Attorney General determined that schools were required to bid out *all* manner of projects
- Legislature amended statute to apply only to projects involving “school buildings”
- “School buildings” are used for classroom purposes

The Fifty Thousand Dollar Question



“the cost of which will exceed fifty thousand dollars”

- Fairly straight-forward threshold
- Cannot split larger project into multiple, sub-\$50,000 projects to avoid the bidding requirement:
 - Sub-projects must be “**conceptually separate and unrelated to each other**” or “**encompass independent and unrelated needs**” of the school district.

Urgent Necessity



“except in cases of urgent necessity,”

- These terms are not defined in the ORC
- “Urgent” does not necessarily mean “emergency”
- Left to the Board’s discretion
- **Best practice:** Board resolution should describe the situation, provide the basis for the action being taken, and define the process to be followed.
- The statutory bidding requirements can be waived totally or modified.

Security and Protection



“or for the security and protection of school property”

- Includes security systems, but can be any number of things
- Again, left to Board discretion
- Best practice from “urgent necessity” recommended

Cooperative Purchase Agreements



“except as otherwise provided in division (D) of section 713.23 and in section 125.04 of the Revised Code”

- Regional Planning Commission purchasing program
- State Term Program
- Board must pass a resolution authorizing participation in the program
- Program usually has a nominal fee

Recent Change in the Law



- Can schools use a joint-purchasing program for construction work?
 - A recent Ohio Attorney General Opinion indicated that neither “construction” nor “construction services” may be the subject of a joint purchasing program under ORC 9.48. (OAG 2019-028)
 - Under ORC 167.081, however, a public entity can enter into a unit price contract procured by a COG (Council of Governments) “for the purpose of acquiring services related to the repair, enlargement, improvement, or demolition of existing buildings or structures.” (OAG 2019-028)

Other Exceptions



R.C. 3313.46(B):

- **Educational materials** used in teaching
- Item or service is only available from a **single source**
 - Requires a two-thirds vote of the Board
- **Energy conservation projects** under R.C. 3313.372 or R.C. 133.06(G)(1)
 - Also requires a two-thirds vote of the Board
- **Computer hardware or software** for instructional purposes

RFP Process



Audit Concerns over non-bidding? “Competition”
Required Process?



GC Competitive Bidding



Preparing the Bid Documents

- Legal Notice or Advertisement
- Instructions to Bidders
- Bid Form
- Bid Guaranty and Contract Bond (statutory form)
- Contract Form
- Personal Property Tax Affidavit
- May also include: Contractor qualifications and other documents (e.g. separate non-collusion affidavit)

GC Competitive Bidding



Preparing the Bid Documents

- Bid Documents = Project Manual + design
- Who Prepares?
 - Contract Documents: should be prepared in consultation with legal counsel.
 - Technical Requirements: “The board shall cause to be prepared the plans, specifications, and related information as required in divisions (A)(1), (2), and (3) of section 153.01 of the Revised Code **unless the board determines that other information is sufficient to inform any bidders of the board's requirements.** However, if the board determines that such other information is sufficient for bidding a project, the board shall not engage in the construction of any such project **involving the practice of professional engineering, professional surveying, or architecture**, for which plans, specifications, and estimates have not been made by, and the construction thereof inspected by, a licensed professional engineer, licensed professional surveyor, or registered architect.”

GC Competitive Bidding



Preparing the Bid Documents

- What is the required public notice?
 - Per ORC 3313.46(A)(2), advertise once each week for not less than 2 consecutive weeks in a newspaper of general circulation within the District
 - ORC 7.16 provides for an abbreviated 2nd publication if certain rules are followed
 - May publish in newspaper and on Board's website, eliminating the second newspaper notice if the first notice meets the requirements of 3313.46(A)(2)

GC Competitive Bidding



Other Key Statutory Requirements

- Bid Documents must include the estimated construction cost (ORC 153.12)
- Schools cannot enter into a contract if the contract is 10% over the published estimated construction cost for the work (ORC 153.12)
- If an addendum is issued within 72 hours prior to bid opening, the bid opening is automatically extended 1 week (no additional ad required) (ORC 153.12)
- Must award and execute the contract “within sixty days after the date on which the bids are opened” unless it is agreed with the accepted bidder to extend this time (ORC 153.12)

GC Competitive Bidding



Other Key Statutory Requirements

- Contracts must include a completion date, and liquidated damages must be assessed (ORC 153.19)
- Bid Guaranty must be submitted to the District with each bid (ORC 153.54)
- The contract shall be awarded to the “**lowest responsible bidder**” that is responsive (ORC 3313.46(A)(6))
- Schools have the power to reject any and all bids (ORC 3313.46(A)(6))
- Prevailing wage does not apply to school projects (ORC 4115.04(B)(3))

Questions?



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