

## **LAMOILLE NORTH SUPERVISORY UNION PURCHASING PRINCIPLES & PROTOCOL**

The Lamoille North Supervisory Union and its member districts adhere to the following purchasing principles and practices in accordance with state and federal regulation and statute as well as generally accepted guidelines, best practices and the professional Code of Ethics of the Association of School Business Officials. It is not appropriate or legal to separate portions of like items in order to avoid bid process and beyond adherence to the legal aspects of bidding. LNSU strives to adhere to the ethical adherence of fairness, propriety and avoidance in not only any conflict of interest but also, the appearance of a conflict of interest.

### **BIDDING: Legal Requirement**

The Duty to Publicly Bid is prescribed under Title 16 of the Vermont State Statute as follows:

#### **§ 559. Public bids:**

(a) When the cost exceeds \$39,999.99. A school board or supervisory union board shall publicly advertise or invite three or more bids from persons deemed capable of providing items or services if costs are in excess of \$39,999.99 for any of the following:

- (1) the construction, purchase, lease, or improvement of any school building;
- (2) the purchase or lease of any item or items required for supply, equipment, maintenance, repair, or transportation of students; or
- (3) a contract for transportation, maintenance, or repair services.

(b) When a school construction contract exceeds \$500,000.00:

(1) The state board shall establish, in consultation with the commissioner of buildings and general services and with other knowledgeable sources, general rules for the prequalification of bidders on such a contract. The department of buildings and general services, upon notice by the commissioner of education, shall provide to school boards undergoing construction projects suggestions and recommendations on bidders qualified to provide construction services.

(2) At least 60 days prior to the proposed bid opening on any construction contract to be awarded by a school board which exceeds \$500,000.00, the school board shall publicly advertise for contractors interested in bidding on the project. The advertisement shall indicate that the school board has established prequalification criteria which a contractor must meet, and shall invite any interested contractor to apply to the school board for prequalification. All interested contractors shall submit their qualifications to the school board which shall determine a list of eligible prospective bidders based on the previously established criteria. At least 30 days prior to the proposed bid opening, the school board shall give written notice of the board's determination to each contractor that submitted qualifications. The school board shall consider all bids submitted by pre-qualified bidders meeting the deadline.

(c) Contract award.

(1) A contract for any such item or service to be obtained pursuant to subsection (a) of this section shall be awarded to one of the three lowest responsible bids conforming to specifications, with consideration being given to quantities involved, time required for delivery, purpose for which required, competency and responsibility of bidder, and his or her ability to render satisfactory service. A board shall have the right to reject any or all bids.

(2) A contract for any property, construction, good or service to be obtained pursuant to sub-section (b) of this section shall be awarded to the lowest responsible bid conforming to specifications. However, when considering the base contract amount and without considering cost overruns, if the two lowest responsible bids are within one percent of each other, the board may award the contract to either bidder. A board shall have the right to reject any bid found not to be responsible or conforming to specifications or to reject all bids.

(d) Construction management. The school board may contract for the service of construction management to assist in a school construction project. The state board, in consultation with the commissioner of buildings and general services other knowledgeable sources, shall adopt rules defining the term "construction management" and specifying the nature of bidding requirements under construction management services in order to assist school boards in complying with the public bidding requirements of this section.

(e) Application of this section. Application of this section. Any contract entered into or purchase made in violation of the provisions of this section shall be null and void; provided, however, that:

(1) the provisions of this section shall not apply to contracts for the purchase of books or other materials of instruction;

(2) a school board may name in the specifications and invitations for bids under this section, the particular make, kind, or brand of article or articles to be purchased or contracted for;

(3) nothing in this section shall apply to emergency repairs;

(4) nothing in this section shall be construed to prohibit a school board from awarding a school nutrition contract after using any method of bidding or requests for proposals permitted under federal law for award of the contract;

(5) nothing in this section shall prevent school districts or supervisory unions from entering into agreements with other school districts or supervisory unions to conduct joint bidding procedures otherwise consistent with this section;

(6) nothing in this section shall require a school board to invite or advertise for bids if it elects to purchase goods, materials or supplies through the commissioner of buildings and general services, pursuant to chapter 49 of Title 29; and

(7) nothing in this section shall require a school board or supervisory union board to invite or advertise for bids if it is renewing a contract entered into pursuant to subsection (a) of this section provided that annual costs will not increase more than the most recent New England Economic Project cumulative price index, as of November 15, for state and local government purchases of goods and services, the total amount of the contract does not exceed an increase of 30 percent more than the total amount of the original contract, and the contract for the renewal period allows termination by the board following an annual review of performance.

(f) Exceptions. The state board shall by rule adopt standards governing the authority of the commissioner to grant individual exceptions to the provisions of this section. The rules, at minimum, shall require the school board seeking the exception to demonstrate to the commissioner that the board is unable to comply with the bidding procedure through no fault of its own, and that the school board has proposed an alternative method of keeping costs down through a fair and public process.

(g) Violations. The state board may deny state aid for school construction and for debt service on a project which proceeds in violation of this section.

## **BIDDING: Best Practices & General Guidelines to Promote Fairness**

### Timelines:

Bids will be conducted with at least 3 days notice of the time and place of bid opening, and will normally be done between 10-21 days minimum dependent on product or service to be bid.

### Notification:

Bids will be either publicly advertised or invited with a minimum of three bidders to be invited as prescribed by Statute. Notwithstanding, requests by vendors, in good standing, to be added to the bid list will strive to be honored. Failure to include every request will not render a bid disqualified.

### General Principles of Public Bidding:

Two fundamental bidding principles must be accomplished by the bid specifications. First, a fair comparison of bids is necessary; second, to achieve a fair comparison, the specifications must allow each bidder to submit a bid on the same basis.

#### 1) Certainty Required for Uniform Bids

The specifications must be sufficiently detailed so that the kind, quality, and character of work and materials can be determined. Certainty in the bid specifications is necessary for uniform bids. A non-uniform response means that the specifications are flawed and/or the bidder providing the non-uniform response is non-responsive. If the specifications are deemed to **not** be flawed and are sufficiently detailed to afford effective measure of submitted bids, then a bidder who is not sufficiently responsive to the bid specification or comparable to the bid submittals of other bidders can be deemed a non-uniformed respondent and may have their bid rejected on that basis.

#### 2) Modifications of the Specifications - Addendum

It is the practice of the LNSU to encourage questions and clarifications of the bid specifications by bidders. Ambiguity is the source of conflict and dispute. An ambiguity, once identified, by any party will be immediately clarified by an Addendum issued to all participants in the bid process. Failure to raise a question concerning the interpretation of contract requirements may constitute a waiver of a claim of ambiguity or omission. Failure to clarify ambiguities by addendum will result in bidders submitting proposals based upon their definition of the scope of the work. The district is effectively evaluating non-responsive bids and as such, the district places itself in a position to arbitrarily and capriciously award a contract. As a consequence, this may be cause to set aside the bid award.

### Types of Specifications

Dependent on the needs of the district, three types of specifications are possible in developing bids: prescriptive, performance or proprietary.

#### 1) Prescriptive Specifications

A prescriptive (descriptive) specification prescribes (cook book fashion) the exact materials or procedures of service.

## 2) Performance Specifications

A performance specification establishes a design criteria for the results expected. This allows the contractor the ability to choose whatever system or construction procedure is most attractive to the contractor, yet still fulfills the design criteria.

## 3) Proprietary Specifications

A proprietary specification designates a particular product or system.

### Bid Submittals

#### *Sealed Bids*

LNSU requires that the bids be "sealed" to eliminate the possibility of fraud or favoritism in the expenditure of public funds.

#### *Faxed & Electronically Submitted Bids*

LNSU usually does NOT allow facsimile or electronic bids since they cannot be sealed by the bidder. Federal Acquisition Regulations were amended to specifically allow faxed bids at the federal level in many situations and as such, the consideration of electronically submitted bids is undertaken when circumstances are considered appropriately and provided adherence to regulation can be reasonably assured. To provide consistency, the Business Manager for LNSU is responsible for the application of appropriateness in the decision process to accept bids in this manner and may consult legal opinion.

#### *Timeliness of Bids*

It is the duty of the bidder to submit the bid within the time frame established by the notice to bid and the bid documents and deliver it to the appropriate place. It is within the discretion of the district to accept a late bid. However, it is the practice of LNSU to not accept late bids unless it is found that the bid was late due to the fault of the LNSU or member district such as miss-location of a properly delivered bid.

#### *Withdrawal of Bids*

Contractors or suppliers may withdraw a bid prior to opening. Although a bid submittal may constitute an irrevocable offer, it is the practice of LNSU that prior to the time and date designated for receipt of Bids, a Bid submitted may be modified or withdrawn by notice, in writing and by signature of the bidder. Notice will be sealed and the envelope time-stamped by the LNSU office on or before the date and time set for receipt of Bids.

### *Public Opening and Reading of the Bids*

An employee or officer of the LNSU or member district shall open the bids and publicly announce the contents of the bids. A summary of the bid results will be prepared and made available by request. Documentation of the bids shall state the time, date, place and parties present at bid opening where the sealed bids are received and publicly opened and read.

### *Modification after the Bids Are Opened*

A Bid may not be modified, withdrawn or canceled by the Bidder during the time period following the time and date designated for the receipt of Bid. A competitive bid which contains a material variance is an unresponsive bid and may not be corrected after the bids are opened in order to make it responsive

### *Awarding the Bid - Criteria*

One of the Three, Lowest Acceptable, Responsive, and Conforming Bids meeting Specification is acceptable,

Materiality - A two-pronged test determines whether a bid noncompliance constitutes a material irregularity. First, whether the effect of a waiver would be to deprive the district of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements; and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

A school district, when confronted with a material deviation in the bid submittal has two choices either: award to the next lowest responsible bidder; or reject all bids and re-advertise.

### *Alternate Bids*

The district shall have the right to accept Alternates in any order or combination, unless otherwise specifically provided in the bidding Documents, and to determine the low Bidder on the basis of the sum of the Base Bid and Alternates accepted.

### *Unbalanced Bids*

An unbalanced bid is a bidding technique often used where unit prices, alternatives or multiple projects are included within the same bid package. Bids may be rejected which do not contain an adequate or reasonable price for each and every item named in the schedule of quantities.

### *Post-Bid Pre-Award Negotiations*

Once the bidding process produces a decision on any of the three lowest responsible bidders, there is no supervening public interest or policy consideration which precludes negotiating and modifying a post-bid change in quantity or non-condition concession from the low bidder in the absence of favoritism, improvidence, fraud or corruption. Districts have authority to negotiate variations in a bid with the chosen one of the three lowest responsible bidders.

## Acceptance of the Bid

### *Contract Formation*

A contract exists when the school board awards the contract and notifies the contractor of the action. Execution of the agreement is a formality. Since the essential terms of the agreement of the parties has been finalized, the execution of a written contract is not intended as a condition precedent to a contract unless specified or if: (1) it is the type of business arrangement that must be reduced to writing; (2) the amount of money involved is substantial; (3) whether significant provisions were not previously discussed or agreed upon; and (4) whether the parties negotiations show that a writing was anticipated.

### *Rejecting the Bid*

The District has the discretion "to reject any and all bids".

Constitutionally impermissible basis for rejecting bids based upon factors such as race, sex, religion, sexual orientation or national origin cannot be the basis of rejecting a bid.

### *Bid Mistakes*

Four elements which must be plead and proven before a contract will be rescinded for mistake by one of the parties. "First, the mistake must relate to a material feature of the contract; second, it must have occurred despite the exercise of reasonable care; third, the other party must be placed in "*status quo*" and fourth, the mistake is of such grave consequence that enforcement of the contract would be unconscionable.

The business manager, if questioning a bid which is patently in error, must request verification of the bid submittal from the bidder. Under federal law, the business manager must notify the bidder in writing that they suspect there is a mistake in the bid *and* the disparity between the bid and the anticipated estimate.

#### 1) Material Feature of the Contract

A mistake in the order of magnitude of equal to or greater than 10% of the total value of the bid is considered as a material mistake.

#### 2) Reasonable Care

If there is neglect in the preparation of the Bid, the bidder must demonstrate it exercised reasonable care in the preparation of the bid. The bidder must establish that a check or verification procedure was in place and utilized when the bid was prepared and yet, there was still error. There are times when there can be an excusable neglect in the preparation of bid submittals. Time has been recognized as a critical factor excusing neglect. The last minute receipt of a bid or addendum mistakenly entered on the tally sheet and then onto the bid submittal form resulted in bid relief and conversely where the mistake is due to clerical or arithmetic error, there is means for appropriate relief.

#### 3) Maintaining the "*Status Quo*"

The ability of the District to award the contract to the next lowest bidder is sufficient to establish maintenance of the "*status quo*." Early discovery of the mistake and the ability of the district to

enter into a contract with the next lowest bidder is sufficient to fulfill the requirement of maintaining the *status quo*.

#### 4) The District's Knowledge of the Mistake

Where the district has reason to suspect the mistake due to the disparity in the bids or the disparity in the bid as compared to the reasonable estimate, or where the district has specific knowledge of the mistake, relief is generally granted

Circumstances not Warranting Bid Forgiveness:

#### *Unilateral Mistakes*

A unilateral mistake is not grounds for bid relief. However, the district will allow relief for a mistake of fact, i.e., clerical errors, such as arithmetical computations, transpositions, a misplaced decimal point, typographical errors or errors that result from transferring figures from a take-off sheet to the bid form. Relief may be given if the bid mistake arose out of misleading specifications.

Bid mistake is a common reason for the low bidder to withdraw its bid or refuse to enter into a contract. In some instances, it is permissible to allow a bidder to reform its bid and perform the contract where the mistake was not due to negligence or without such negligence as would preclude relief.

#### *Errors in Business Judgment*

Relief is not given for a poor business decision.

#### *The District's Response to a Claim of Bid Mistake*

Upon notification by a bidder that a bid mistake has occurred, the district must immediately demand submittal of the original bid preparation documentation which demonstrates the error, coupled with a detailed explanation of the error. Promptly thereafter, a meeting should be held for the bidder to explain and demonstrate by the documentation how the error occurred. Only then should the district decide whether to allow the bidder to withdraw the bid because of mistake.

#### *Challenges to the Award*

Access to Information (*Freedom of Information Act*) The public announcement of the bid submittal upon opening is not the limit of access to the bid materials. FOIA is a valuable competitive tool in ascertaining the bid submittals of competitors. There are two exemptions under FOIA which impact on access to the bid documents. Submittals which include trade secrets and commercial or financial information which is proprietary are not subject to disclosure. However, the confidentiality of this information can be waived. Therefore, where bid submittals include trade secrets and commercial or financial information which is proprietary, the bidder should so indicate on the bid documents. Another exemption from disclosure are proposals or bids which, if disclosed, would frustrate procurement or give an advantage to any person proposing to enter into a contract. An example is information prepared by the public body, e.g., a bid estimate. This information is exempt until an award or final selection is made

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition.

## **Grants**

See LNSU General Grant Purchase Procedures and Federal Procurement Procedures

### **Sole Provider:**

A sole source procurement is a procurement without competition and must meet one of the following criteria:

1. The item is available from only one source;
2. Public exigency or emergency will not permit a delay resulting from a competitive procurement; or
3. After solicitation from a number of sources, competition is determined to be inadequate.
4. The grantee must maintain justification, as listed in *Federal Grant Financial Guidelines*, for all non-competitive procurements.
5. The grantee must request approval from the Commissioner of Education for a non-competitive procurement over \$39,999.99 prior to incurring the expense

### **Subcontracts**

Subcontracts are normally not allowed unless specified in the bid document. However, if allowed by the district, they must be in writing, receive prior approval before they are executed by the parties, adhere to the terms and conditions of the interagency agreement shall apply to and bind the parties of the subcontract and all contracts shall include the basic provisions of any interagency agreement.

Subcontracts in Grants shall include:

Contractor's full name and address

Agency name;

Description of services to be rendered;

Contract terms

Maximum or estimated amount to be paid and payment rates; and

Signature of contractor or authorized representative.

Subcontracts shall also include the provisions in Appendix F located in the *Federal Grant Financial Guidelines*: