



SECTION I

PURCHASING

AND THE LAW

A. DEFINITION OF TERMS

Purchasing officials in every institution need to become familiar with the laws, policies and regulations that govern public procurement. As questions arise, consultation with legal counsel is recommended.

1. Contract

A contract is an agreement creating a legally enforceable obligation. Essential elements of a contract include (1) offer and acceptance, (2) agreement between competent parties, (3) basis on the genuine assent of the parties, (4) support by consideration, (5) intent of a lawful objective and (6) format required by law.

2. Purchase Order

A valid contract must be accepted by both parties. A purchase order, therefore, is not a valid contract unless it is accepted by the vendor. Typically an acknowledgment is initiated by the vendor and returned to the purchaser. Critical information such as date and time of delivery should be an integral part of all purchase orders. Terms and conditions should appear on the back of each purchase order containing language that protects the school district.

3. Express Warranties

An express warranty is included by the parties in the contract. No particular words or forms of expression are necessary to create an express warranty.

By definition, an express warranty can occur “wherever a seller induces a buyer to enter into a contract, under the terms of which the seller expressly guarantees to the buyer some particular quality or characteristic of the subject matter of the sale, undertaken to assume responsibility to the buyer should the terms of the guarantee be breached.”

The Uniform Commercial Code provides that an express warranty is created when the purchaser makes the decision to buy based on the seller’s representation of the fitness for purpose. Thus, it is not necessarily the form of the seller’s statement that controls, but rather the intention of the seller to be bound by their promise and the buyer’s reliance on that promise.

4. Implied Warranties

In the absence of an express warranty an implied warranty is usually in effect. The implied warranty provides that the product shall be reasonably fit for the purposes described.

Be aware of the different types of warranties, as vendors can disclaim those making modifications to the agreement. Specific disclaimers by the Purchase Order vendor can create modifications that are not in the interest of the school district.

5. Transfer of Title

If a shipment is transported Free On Board (FOB) vendor's location, the purchaser accepts responsibility at the vendor's dock. If goods are shipped FOB buyer's location, the title passes to the buyer when the goods are delivered.

6. Uniform Commercial Code

The Uniform Commercial Code (UCC) was developed by the National Conference of Commissioners on Uniform State laws and the American Law Institute. The code regulates the fields of contract; sales of goods; commercial paper; and particular aspects of warehouse receipts, bills of lading and other documents of title. The UCC can be found in Chapter 810 of the Illinois Compiled Statutes, using the same article and paragraph numbers as those enacted by the General Assembly.

7. Prescriptive specifications

Specifications may be prescriptive or descriptive in nature and define exactly how a product is constructed.

8. Performance specifications

Performance specifications define how a product must function over a specific time and with a specific use.

9. Mixed Specifications

Mixed specifications combine prescriptive specifications with a performance component.

10. Proprietary Specifications

Proprietary specifications are used when requesting, for example, a "Butler" building, provided by one specific vendor.

B. ILLINOIS SCHOOL CODE

The School Code is found in the Illinois Compiled Statutes 105 ILCS 5/1-1, *et seq.* Listed below are the paragraphs that relate to purchasing. More specifics can be found in other sections for districts from 100,000 to not more than 500,000 inhabitants, and information of public community colleges. Various other chapters, articles and paragraphs have implications for purchasing in public institutions.

1. Contracts

105 5/10-20.21. To award all contracts for purchase of supplies, materials or work or contracts with private carrier for transportation of pupils involving an expenditure in excess of \$25,000 or a lower amount as required by board policy to the lowest responsible bidder, considering conformity with specifications, terms of delivery, quality and serviceability, after due advertisement, except the following:

- (i) Contractors for the services of individuals possessing a high degree of professional skill where the ability of fitness of the individual plays an important part;
- (ii) Contracts for the printing of finance committee reports and departmental reports;
- (iii) Contracts for the printing or engraving of bonds, tax warrants and other evidences of indebtedness;
- (iv) Contracts for the purchase of perishable foods and perishable beverages;
- (v) Contracts for materials and work which have been awarded to the lowest responsible bidder after due advertisement, but due to unforeseen revision, not the fault of the contractor for materials and work, must be revised causing expenditures not in excess of 10% of the contract price;
- (vi) Contracts for the maintenance or servicing of, or provision of repair parts for, equipment which are made with the manufacturer or authorized service agent of that equipment where the provision of parts, maintenance, or servicing can best be performed by the manufacturer or authorized service agent;
- (vii) Purchases and contracts for the use, purchase, delivery, movement, or installation of data processing equipment, software, or services and telecommunications and interconnect equipment, software, and services;

- (viii) Contracts for duplicating machines and supplies;
- (ix) Contracts for the purchase of natural gas when the cost is less than that offered by a public utility;
- (x) Purchases of equipment previously owned by some entity other than the district itself;
- (xi) Contracts for repair, maintenance, remodeling, renovation, or construction, or a single project involving an expenditure not to exceed \$50,000 and not involving a change or increase in the size, type, or extent of an existing facility;
- (xii) Contracts for goods or services procured from another governmental agency;
- (xiii) Contracts for goods or services which are economically procurable from only one source, such as for the purchase of magazine, books, periodicals, pamphlets and reports, and for utility services such as water, light, heat, telephone or telegraph; and
- (xiv) Where funds are expended in an emergency and such emergency expenditure is approved by $\frac{3}{4}$ of the members of the board.
- (xv) State master contracts authorized under Article 28A of this Code; and
- (xvi) Contracts providing for the transportation of pupils with special needs or disabilities, which contracts must be advertised in the same manner as competitive bids and awarded by first considering the bidder or bidders most able to provide safety and comfort for the pupils with special needs or disabilities, stability of service, and any other factors set forth in the request for proposal regarding quality of service, and then price.

All competitive bids for contracts involving expenditure in excess of \$25,000 or a lower amount as required by board policy must be sealed by the bidder and must be opened by a member or employee of the school board at a public bid opening at which the contents of the bids must be announced. Each bidder must receive at least three days notice of the time and place of the bid opening. For purposes of this Section due advertisement includes, but is not limited to, at least one public notice at least 10 days before the bid date in a newspaper published in the district, or if no newspaper is published in the district, in a newspaper of general circulation in the area of the district.

Please note that if the contract under consideration will produce revenue and not expense for the district, these types of contracts do not have to be bid. One example is a vending machine contract by which the district receives a payment from the vending company.

2. Public Contracts

Sections of the Illinois Criminal Code refer to Public Contracts. Paragraphs exist that deal with: (1) interference with public contracting, (2) definitions, (3) bid rigging, (4) bid splitting, (5) bid rotating, (6) acquisition or disclosure of bidding information by public official, (7) interference with contract submission and award by public official (8) kickbacks, (9) bribery of inspector employed by contractor, (10) change orders, (11) rules of evidence, (12) certification, and (13) disclosure of information-bid reduction.

3. Textbooks

122 28-8. Purchase by districts for resale at cost. School districts may purchase textbooks and electronic textbooks and the technological equipment necessary to gain access to and use electronic textbooks from the publishers and manufacturers at the prices listed with the State Board of Education and sell them to the pupils at the listed prices or at such prices as will include the cost of transportation and handling. (Source: P.A. 96 1403, eff. 7/29/10.)

1980.122 28-9. Purchase by districts designation of agent for sale. School districts may purchase out of contingent funds school textbooks or electronic textbooks, instructional materials, and the technological equipment necessary to gain access to and use electronic textbooks from the publishers and manufacturers at the prices listed with the State Board of Education and may designate a retail dealer or dealers to act as the agent of the district in selling them to pupils. Such dealers shall at stated times make settlement with the district for books sold. Such dealers shall not sell textbooks at prices which exceed a 10% advance on the net prices as listed with the State Board of Education. (Source: P.A. 96 1403, eff. 7/29/10.)

122 28-10. Purchase from families moving out of district for resale. When a family moves from one school district to another within the State, the clerk of the district may purchase, out of the contingent fund, the textbooks in use by the children of the family at a fair price, based on the condition of the book. Such books may be resold to other pupils moving into the district.

4. Regular Student Transportation

122 29-6.1. Contracts for transportation. Subject to Section 6 106.11 of the Illinois Vehicle Code, school boards may enter into contracts for up to 3 years for transportation of pupils to and from school. Such contracts may be extended for up to 2 additional years by mutual agreement of the parties, and thereafter may be extended on a year to year basis by mutual agreement of the parties, however no such contract may be extended on a year to year basis if a school board receives a timely request from another interested contractor that a contract be let by bid. (Source: P.A. 84 768.) "Timely" in this context

means a written request via certified mail, return receipt requested, which is postmarked not more than 24 months or less than 3 months before the expiration of a collective bargaining or other agreement for employment of bus drivers.

Amended by P.A. 84-768,1 effective Sept. 21, 1985

A provision concerning bus transportation was added to The School Code by P.A. 89-151, effective January 1, 1996. The specific requirements for bidding for bus services by outside contractors are already included in the Code. The law requires school districts to operate their own buses with district employees from an outside party. When the bidding process is completed, the board of education must publicly announce the district's "fully allocated costs" of providing transportation under the present system and may: 1) contract with the lowest responsible bidder; or 2) continue with the present system. If the latter, the board must announce the bid amounts and the district's "fully allocated costs" at the next meeting. The elements to be included in such fully allocated costs are spelled out in the statute.

5. *Special Education Transportation*

The contract is awarded based on the criteria set forth in Public Act 96-392, which is a new law effective January 1, 2010. Thus, the contract will be awarded by first considering, in the school district's sole discretion, the bidder most able to provide safety and comfort for the pupils with special needs or disabilities, stability of service, any other factors set forth in the bid document regarding quality of service, and then price.

6. *Posting Requirements for Contractors over \$25,000*

Under Section 10-20.44 of the School Code (105 ILCS 5/10-20.44), districts must list on the district's internet website, if any, all contracts over \$25,000 and any contract that the school board enters into with an exclusive bargaining representative. Before December 1st of each year, districts must also provide to the State Board of Education a report with specific information about these contracts over \$25,000 such as the total number and value of the contracts and the number and value of contracts awarded to minorities, women or persons with disabilities. The report must be made available to the public, including publication on the school district's Internet website, if any.

C. TOXIC SUBSTANCE DISCLOSURE TO EMPLOYEES ACT

By the regulations of Toxic Substance Disclosure to Employees Act, the following language should be included in the bid specifications regarding toxic substances: "As required under the Toxic Substance Disclosure to Employees Act, all suppliers/vendors shall provide Material Safety Data Sheets (MSDS) prior to delivery of a toxic substance. The MSDS shall describe

the properties, safe handling procedures and health hazards of a substance for each substance purchased. A substance is considered toxic if it contains one or more items on the Illinois Department of Labor Toxic Substance List, and if that item(s) occurs in concentrations of more than 1%. Failure to provide a MSDS within 30 days may result in a complaint filed with the Illinois Department of Labor.”

D. PUBLIC COMMUNITY COLLEGE ACT

The Public Community College Act is located at Chapter 110, Act 805 of the Illinois Compiled Statutes (110 ILCS 805/1-1 et seq).

1. 805/3-27.1. Contracts

To award all contracts for purchase of supplies, materials or work involving an expenditure in excess of \$25,000 or a lower amount as required by Board policy to the lowest responsible bidder considering conformity with specifications, terms of delivery, quality and serviceability; after due advertisement, except the following:

- a) Contracts for the services of individuals possessing a high degree of professional skill where the ability or fitness of the individual plays an important part;
- b) Contracts for the printing of finance committee reports and departmental reports;
- c) Contracts for the printing or engraving of bonds, tax warrants and other evidences of indebtedness;
- d) Contracts for materials and work which have been awarded to the lowest responsible bidder after due advertisement, but due to unforeseen revisions, not the fault of the contractor for materials and work, must be revised causing expenditures not in excess of 10% of the contract price;
- e) Contracts for the maintenance or servicing of, or provision of repair parts for equipment which are made for the manufacturer or authorized manufacturer or authorized service agent;
- f) Purchases and contracts for the use, purchase, delivery, movement, or installation of data processing equipment, software, or services and telecommunications and tracts for duplicating machines and supplies;
- g) Contracts for duplicating machines and supplies;

- h) Contracts for the purchase of natural gas when the cost is less than that offered by a public utility;
- i) Purchases of equipment previously owned by some entity other than the district itself;
- j) Contracts for repair, maintenance, remodeling, renovation, or construction, or a single project involving an expenditure not to exceed \$50,000 and not involving a change or increase in the size, type, or extent of an existing facility;
- k) Contracts for goods or services procured from another governmental agency;
- l) Contracts for goods or services which are economically procurable from only one source, such as for the purchase of magazines, books, periodicals, pamphlets and reports, and for utility services such as water, light, heat, telephone or telegraph; and
- m) Where funds are expended in an emergency and such emergency expenditure is approved by a $\frac{3}{4}$ of the members of the board.

All competitive bids for contracts involving expenditure in excess of \$10,000 must be sealed by the bidder and must be opened by a member or employee of the board at a public bid opening at which the contents for the bids must be announced. Each bidder must receive at least 3 days' notice of the time and place of such bid opening. For purposes of the Section due advertisement includes, but is not limited to at least one public notice at least 10 days before the bid due in a newspaper published in the district, or if no newspaper is published in the district, in a newspaper of general circulation to the area of the district.

The provisions of the Section do not apply to guaranteed energy savings contracts.

2. 805/3-27.2. Joint Purchase

To participate in joint purchases by governmental units pursuant to "An Act authorizing certain governmental units to purchase personal property; supplies and services jointly" approved August 15, 1961, as amended.

3. 805/3-27.3. Prompt Payment

Purchases made pursuant to this Act shall be made in compliance with the "Local Government Prompt Payment Act," approved by the Eighty-fourth General Assembly.