



Illinois State Board of Education

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Dr. Randy J. Dunn
State Superintendent of Education (Interim)

MEMORANDUM

To: Illinois School Superintendents and Regional Superintendents

From: Jonathan Furr, ISBE General Counsel

Re: Legality of Participation in U.S. Communities Contracts Offered Through the Illinois School Purchasing Network

Date: June 16, 2005

This memorandum sets forth the opinion of the Illinois State Board of Education ("ISBE") on the legality of school district participation in contracts offered through the U.S. Communities Government Purchasing Alliance ("U.S. Communities") as part of the Illinois School Purchasing Network. Districts may participate in these contracts through two separate grants of legal authority: (1) the statutory and constitutional intergovernmental cooperation provisions; and (2) the education purchasing program provisions of the Illinois School Code.

I. Background on U.S. Communities Contracts

U.S. Communities was established in 1994 to provide government entities with the best products and services at the lowest procurement cost. U.S. Communities pools the purchasing powers of public agencies, achieves bulk volume discounts on behalf of public agencies, competitively solicits quality products through a lead public agency and provides a purchasing forum for public agencies nationwide. More than 8,000 public agencies utilize U.S. Communities contracts and suppliers to procure a half billion dollars in products and services annually.

All contractual agreements offered through U.S. Communities have been competitively solicited through a lead public jurisdiction in accordance with the jurisdiction's public purchasing rules and regulations.

II. Intergovernmental Cooperation Provisions

Section 10-20.21 of the Illinois School Code (105 ILCS 5/10-20.21) sets forth requirements for bidding of purchases by school districts and the allowable exceptions. Unless an allowable exception applies, Section 10-20.21 requires a school board "to award all contracts for purchase of supplies, materials or work ... in excess of \$10,000 to the lowest responsible bidder." Allowable exceptions from bidding requirements include "contracts for goods or services procured from another governmental agency" (subsection xii).

Both Article VII, Section 10 of the 1970 Illinois Constitution and the Intergovernmental Cooperation Act (5 ILCS 220/1 et seq.) authorize school districts to contract with other states and their units of local government to obtain or share services and to exercise, combine or transfer any power or function in any manner not prohibited by law. Article VII, Section 10(c) of the 1970 Illinois Constitution further directs the State to encourage intergovernmental cooperation and use its technical and financial resources to assist intergovernmental activities.

All of the contracts offered through U.S. Communities were entered into in accordance with the purchasing laws and regulations of the procuring government entity. No statutory provisions restrict the ability of school districts to participate in these contracts. Accordingly, school districts have the legal authority to participate in the U.S. Communities contracts in accordance with the intergovernmental cooperation powers granted by both the 1970 Illinois Constitution and the Intergovernmental Cooperation Act.

III. Education Purchasing Provisions of the School Code

ISBE is required, pursuant to Section 28A-10 of the Illinois School Code (105 ILCS 5/28A-10), to establish an education purchasing program. Through the education purchasing program, ISBE may certify an education purchasing contract provided the contract was entered into according to procedures and conditions that conform to applicable State purchasing laws. (105 ILCS 5/28A-15(3)) Generally, ISBE interprets this requirement to mean that the contract was awarded by the procuring entity: (i) to the lowest responsible bidder; (ii) considering conformity with specifications, terms of delivery, quality and serviceability; and (iii) after advertisement determined to provide notification of the bidding opportunity to a wide variety of potential vendors. Participation by Illinois school districts in certified education purchasing contracts is exempt from bidding and advertising requirements pursuant to Section 10-20.21(d) of the Illinois School Code (105 ILCS 5/10-20.21(d)).

Under Illinois law, it is the public body which specifies the terms of the contract for which it solicits bids and the criteria which bidders must meet in order to be considered a "responsible bidder." Compass Health Care Plans v. Bd. of Educ., 246 Ill. App. 3d 746 at 751 (1st Dist. 1992). Under the School Code, it is appropriate for the procuring entity to evaluate solicitations based upon both cost effectiveness and program offerings. Id. at 752. The accepted bid does not have to be the lowest bid in terms of contract price, where the award is made in the public interest, in the exercise of discretionary power granted under the laws, without fraud, unfair dealing, or favoritism, and where there is a sound and reasonable basis for the award as made. Cardinal Glass Co. v. Bd. of Educ., 113 Ill. App. 3d 442 at 448 (3rd Dist. 1983), *quoting* S. N. Neilson Co. v. Public Building Com., 81 Ill. 2d 290 at 299 (1980); *see also* Northwest Disposal Co. v. Vill. of Fox Lake, 119 Ill. App. 3d 546 at 551 (2nd Dist. 1983) ("While the bid accepted was not the lowest bid submitted, the village board has the discretion to determine who is the 'lowest responsible bidder' and it need not be the lowest bidder in terms of contract price, the presumption being that the decision of the board is regular and valid.")

In light of the foregoing case law, and based upon the representations made by U.S. Communities, the certifications by lead public jurisdictions and the review of the contracts and solicitation documents by this office, ISBE has determined that the contracts offered through U.S. Communities meet the criteria for certification as an

education purchasing contract under Article 28A of the Illinois School Code. All of the contracts offered through U.S. Communities were awarded by the lead public agency using a competitive solicitation process consistent with applicable procurement laws and regulations, after public notice providing notification of the bidding opportunity to a wide variety of potential vendors. U.S. Communities has further certified that each of the solicitations was posted on its website. The solicitations considered both (i) the greatest overall discount for the required product categories, using a fixed percentage or margin from a standard index or other objectively verifiable criteria; and (ii) conformity with specifications, terms of delivery, quality and serviceability. The amount of the discount was a critical factor in all evaluations. While the bidder offering the largest discount was not always awarded the contract due to the bidder's evaluation on other factors (i.e., conformity with specifications, terms of delivery, quality and serviceability), the evaluation criteria used in each lead public agency's solicitation are consistent with the types of evaluation criteria allowed by Illinois courts to determine the "lowest responsible bidder" for government procurements.

The State Superintendent of Education has certified the contracts offered through U.S. Communities as education purchasing contracts in accordance with Section 28A-15 of the Illinois School Code (105 ILCS 5/28A-15). Accordingly, participation in the contracts by Illinois school districts is exempt from bidding and advertising requirements pursuant to Section 10-20.21(d) of the Illinois School Code (105 ILCS 5/10-20.21(d)).