

BEST PRACTICES IN SCHOOL DISTRICT PROCUREMENT

**Presented to the New Hampshire Association of
School Business Administrators**

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A Word of Caution

No two circumstances are exactly alike. This material is designed to provide School District Business Administrators with a broad understanding of certain aspects of school district procurements. This material does not include every aspect of the law, nor does it discuss every statute or case pertaining to purchasing. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

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I. Overview

The purpose of this material is to provide school business administrators with an overview of certain of the laws pertaining to school district procurement and with practical advice pertaining to district procurement. This material is not intended to substitute for legal counsel and it does not cover all aspects of district procurement.

II. Purchasing

A. The Statutory Framework

The Municipal Budget Act, RSA 32:1, et seq., sets forth the statutory framework for appropriations and spending public funds. The purpose of the Act is:

. . . to establish uniformity in the manner of appropriating and spending public funds in all municipal subdivisions to which this chapter applies, including those towns, school districts and village districts which do not operate with budget committees . . .

RSA 32:1.

The Municipal Budget Law was originally enacted in 1935. Pursuant to that law, each town was required to vote, by ballot, on a warrant article regarding adoption of the Municipal Budget Act. See Chapter 9:1 (1935). If your town voted to adopt the provisions of the Municipal Budget Act at its 1935 or 1936 annual meeting, then your town is subject to the provisions of the current Municipal Budget Act. See HB 615-L (1993), § 332:2, Transition Provision (“Any municipality which has validly adopted RSA 32 prior to the effective date of this act shall be deemed to have adopted RSA 32:14-23 concerning budget committees, as inserted by this act, and to have elected RSA 32:18 as inserted by this act, until such time as the municipality shall vote otherwise”).

If your district is “located wholly within” a town that has adopted the Municipal Budget Act, then your district is deemed to have adopted the Municipal Budget Act as well. See RSA 32:2 (“ . . . RSA 32:14-23, concerning budget committees, shall apply only in those towns or districts adopting that subdivision pursuant to RSA 32:14, I, and shall apply automatically in school districts or village districts located wholly within towns adopting that subdivision”) (emphasis added). If you are unsure whether your district has adopted the provisions of the Municipal Budget Act, it may be necessary for you to review town and district records dating as far back as 1935. If you discover that your town voted to adopt the Municipal Budget Act, and if the vote has not been rescinded, then your district is subject to RSA 32:14-23.

Even if your district is not subject to the provisions of RSA 32:14-23, your district will be subject to the provisions of RSA 32:1-13. The provisions of RSA 32:1-13 apply “to all towns, school districts, cooperative school districts, village districts and any other municipal entities, including those created pursuant to RSA 53-A or 53-B, which adopt their budgets at an annual meeting of their voters.” RSA 32:2 (emphasis added).

1. Appropriations

An appropriation is “an amount of money appropriated for a specified purpose by the legislative body.” RSA 32:3, II. To “appropriate” is “to set apart from the public revenue of a municipality a certain sum for a specified purpose and to authorize the expenditure of that sum for that purpose.” RSA 32:3, I. A “purpose” is “a goal or aim to be accomplished through the expenditure of public funds. In addition, as used in RSA 32:8 and RSA 32:10, I(e), concerning the limitation on expenditures, a line on the budget form posted with the warrant, or a form submitted to the department of revenue administration, or an appropriation contained in a special warrant article, shall be considered a single ‘purpose.’” RSA 32:3, V.

All appropriations must be made “by vote of the legislative body of the municipality at an annual or special meeting.” RSA 32:6. The meeting shall not appropriate any money for any purpose unless that purpose appears in the budget or in a special warrant article; however, subject to the limitations set forth in RSA 32:18, the legislative body may vote to appropriate more than, or less than, the amount recommended for such purpose in the budget or warrant. Id.

a. The need for an appropriation: NH RSA 32:8

As a general rule, if you are going to spend, you need an appropriation. RSA 32:8 states, in part:

No board of selectmen, school board . . . or any other officer, employee, or agency of the municipality acting as such shall pay or agree to pay any money, or incur any liability involving the expenditure of any money, for any purpose in excess of the amount appropriated by the legislative body for that purpose, or for any purpose for which no appropriation has been made . . .

The only exceptions to that rule are the following:

- 1) Money may be spent to pay a judgment against the district, without an appropriation (RSA 32:9);

- 2) If changes arise during the fiscal year that make it necessary to expend more than the amount appropriated for a specific purpose, the governing body may transfer to that appropriation an unexpended balance remaining in some other appropriation, provided that:
- a. The total amount spent shall not exceed the total amount appropriated at the district meeting;
 - b. Records shall be kept by the school board, such that the budget committee, or any citizen requesting records, may ascertain the purposes¹ or appropriations to which, and from which, amounts have been transferred; provided however, that neither the budget committee nor other citizens have the authority to challenge the discretion of the school board in making such transfers;
 - c. A statement comparing all legislative body appropriations against all expenditures shall be deemed adequate for purposes of the records required by this section, so long as every expenditure has been properly authorized and properly classified and entered and any expenditures exceeding the original legislative appropriations are offset by unexpended balances remaining in other appropriations, in which case the governing body shall not be required to designate the specific source of each transfer;
 - d. Any amount appropriated at the meeting under a special warrant article may be used only for the purpose specified in that article and shall not be transferred;
 - e. The district meeting may vote separately on individual purposes of appropriation contained within any warrant article or budget, but such a separate vote shall not affect the governing body's

¹ The term purpose, when used in paragraphs (a)-(d), "refers, in addition to its meaning in RSA 32:3, V, to individual line items in whatever detailed budget or chart of accounts is regularly used by the municipality. The general wording of a vote adopting a budget or portion of a budget shall not be considered a 'purpose' to which an amount may be transferred. The definition of 'purpose' as used in paragraph (e) shall be the definition of 'purpose' under RSA 32:3, V." RSA 32:10, II.

legal authority to transfer appropriations, provided, however, that if the meeting deletes a purpose, or reduces the amount appropriated for that purpose to zero or does not approve an appropriation contained in a separate article, that purpose or article shall be deemed one for which no appropriation is made, and no amount shall be transferred or expended for such purpose (RSA 32:10); or,

- 3) When an “unusual circumstance” arises that makes it necessary to expend money in excess of an appropriation which may result in an over-expenditure of the total amount appropriated for all purposes at the meeting or when no appropriation has been made, the school board, upon application to the Commissioner of Education, may be given authority to make such expenditure, provided that:
 - a. Except in cases of a sudden or unexpected emergency, the request to the Commissioner is made prior to making the expenditure. The request will not be granted until a majority of the budget committee has approved the application in writing. If there is no budget committee, then the board must hold a public hearing on the request.
 - b. The application must designate the source of revenue to be used. The Commissioner does not have the authority to increase the district’s tax rate to fund the expenditure.
 - c. A copy of the application must be sent to the Department of Revenue Administration (RSA 32:11); or,
- 4) Certain special education expenditures, as discussed below (RSA 186-C:18, X).

RSA 32:9-32:11; RSA 186-C:18, X.

In Ashley v. Rye School District, 111 N.H. 54 (1971), the plaintiff sought to enjoin the school district from expending any sum of money for the salaries of teacher aides during the 1969-70 school year. Id. at 54. In March 1969, at the annual district meeting, the district refused to approve a program of four teacher aides; however, the district voted to approve an appropriation for the “support of

schools, for the salaries of school district officials and agents.” In September 1969, the board voted to retain and rehire the teacher aide that had been employed during the previous year at a cost of \$1,100; at the time of the board’s vote, there was an unencumbered surplus in the instructional salaries account in the amount of \$11,589. *Id.* at 55. The court held that the board’s decision to expend a portion of the unencumbered surplus for the aide’s salary did not violate the Municipal Budget Act and was within the discretion of the school board.

Note: After Ashley v. Rye Sch. Dist. was decided the Legislature amended RSA 32:10 to prohibit boards from transferring appropriations if the legislative body “deletes a purpose, or reduces the amount appropriated for that purpose to zero or does not approve an appropriation contained in a separate article.” RSA 32:10, I(e).

In Sullivan v. Town of Hampton Board of Selectmen, 153 N.H. 690 (2006), the New Hampshire Supreme Court held that the failure to pass an operating budget in an SB2 town “was a sufficient change in circumstances within the meaning of RSA 32:10, I, to justify the use of transfer authority.” *Id.* at 694. The Court noted that “[d]iscretionary transfer authority ensures that selectmen have the requisite flexibility to address unplanned needs by redirecting appropriated funds.” *Id.* at 693. Thus, the selectmen had the authority to transfer funds among the budgetary line items. In this case, unlike in Ashley, the selectmen were transferring funds among line items that had received appropriations, and not among line items for which no appropriation had been made.

The Attorney General has opined that the term “unusual circumstances,” as used in RSA 32:11, is not so restrictive as “sudden or unexpected emergency” since there is no requirement that there be an unforeseen, unanticipated happening coming without warning and demanding immediate action. 1 N.H. Op.A.G. 60. In that same opinion, the Attorney General opined that employment of two teachers to meet expending enrollments was not an unusual circumstance that made it necessary to expend money in excess of an appropriation.

b. Expenditures for special education programs and services

Each district’s annual report must include an accounting of actual expenditures by the district for special education programs and services for the previous 2 fiscal years. RSA 32:11-a (emphasis added). The accounting must include offsetting revenues from all sources, including but not limited to, reimbursements from state funds, federal funds, or Medicaid funds, private or other health insurance coverage, transferred special education moneys received from another school district, and any other special education resources received by the district. *Id.*

Practice Pointer: You should exercise care in reporting the accounting of special education expenditures so that you do not inadvertently violate the Family Rights and Privacy Act (“FERPA”) by releasing personally identifiable student information.

In addition, unexpected special education costs incurred by a school district that are eligible for reimbursement from the state pursuant to RSA 186-C:18, III [catastrophic aid] and which could not be identified prior to the adoption of the local district budget are exempt from the provisions of RSA 32:8, 32:9, and 32:10. RSA 186-C:18, X.

c. Capital Reserve Funds, Expendable Trust Funds and Revolving Funds

i. Capital Reserve Funds

Districts may raise and appropriate money for the establishment of a capital reserve fund for the financing of all or part of the cost of specific items, including:

- Construction, reconstruction or acquisition of a specific capital improvement, or the acquisition of a specific item or specific items of equipment;
- Construction reconstruction, or acquisition of a type of capital improvement or the acquisition of a type of equipment;
- A reappraisal by appraisers of the Department of Revenue Administration or such other appraisers, appraisal firms or corporations approved by the Commissioner of Revenue Administration, of the real estate in such town for tax assessment purposes;
- The acquisition of land;
- To meet the expenses of educating children with disabilities; or
- For the maintenance and operation of a specific public facility or type of facility, a specific item or type of equipment, or for any other distinctly-stated, specific public purpose that is not foreign to its institution or incompatible with the objects of its organization.

RSA 35:1; RSA 35:1-b; RSA 35:1-c.

When a district establishes a capital reserve fund, the fund is held by the trustees of trust funds of the town where the district is located; if the district is comprised of more than one town, then the voters determine which town's trustees hold the funds. RSA 35:2. In the alternative, the district's legislative body may vote to appoint agents to expend from the capital reserve fund; however, agents cannot be appointed for any fund which includes the purchase of land. RSA 35:15.

The establishment of a capital reserve fund requires a majority vote by the legislative body at a district meeting. The warrant must include an article distinctly stating the purpose for which the capital reserve is to be established. RSA 35:3. A district may raise and appropriate money to place into the capital reserve fund, or may vote, at a district meeting, to transfer its unencumbered surplus funds into a capital reserve fund. RSA 35:5. However, a district may not raise and appropriate an amount in excess of $\frac{1}{2}$ of one percent of the last base valuation for that district's debt limit. RSA 35:8.

The moneys in a capital reserve fund must be held in a separate account and may not be intermingled with other funds of the district and there are limitations on the manner of investing the funds. RSA 35:9. Those limitations are set forth in RSA 35:9.

When a district votes to transfer any accumulated surplus to the capital reserve fund, or to appropriate any sum for the capital reserve fund, the district clerk must forward to the school board and the district treasurer, within 10 days of the vote authorizing the transfer, a certified copy of the same. The school board and the treasurer have specific duties with regard to the funds. See RSA 35:11 - 35:13.

Persons holding the capital reserve funds in trust are required to hold the funds until the district votes to withdraw from the fund, or until such time as an agent to expend the funds has been appointed. RSA 35:15, I. As previously indicated, however, districts cannot appoint agents to expend a capital reserve fund for the purpose of purchasing land. Instead, expenditures from a fund established for the acquisition of land must be made by a majority of the legal voters present and voting at an annual or special meeting. RSA 35:15, II(a). In addition, expenditures from any capital reserve fund can only be made for or in connection with the purpose for which the fund was established. RSA 35:15, V.

Capital reserve funds may be used to make payments under a "financing agreement for the purpose for which the capital reserve was established." RSA 35:15, III(a). If the financing agreement is a lease/purchase agreement, then the following requirements apply:

- The lease/purchase agreement cannot contain an "escape clause" or a "non-appropriation clause" and;

- The lease/purchase agreement must be ratified by the legislative body by a ballot vote of 2/3 of all voters present and voting at an annual or special meeting.

RSA 35:15, III(a)(1)-(2). If agents to expend the fund have been named, then, after the initial vote ratifying the agreement, no further vote is required to disburse funds. RSA 35:15, III(b).

After a capital reserve fund has been established, a district may decide to change the purpose of the fund. In order to change the purpose of a capital reserve fund, the legislative body must authorize the change by a 2/3 vote at the district's annual meeting. RSA 35:16.

The district may discontinue a capital reserve fund by a majority vote of its legislative body. RSA 35:17. If a fund is discontinued, the trustees transfer the monies to the district's general fund. RSA 35:16-a.

ii. Expendable Trust Funds

A district may, at an annual or special meeting, appropriate money to create an expendable trust fund for the maintenance and operation of schools, and for any other public purpose that is not foreign to the district's institution or incompatible with the objects of its organization. RSA 198:20-c, I. The school board may be named as agent to expend the funds; expenditures from the fund shall be made only for the purpose for which the fund was established. Id.

Funds are held in the custody of the trustee of the trust funds of the town where the district is located; if the district is comprised of more than one town, then the voters determine which town's trustees hold the funds. RSA 198:20-c, II. Prior to expending any funds, the school board must properly notice and hold a public hearing. Id. Notice of the time, place, and subject of such hearing shall be published in a newspaper of general circulation in the relevant municipality at least 7 days before the meeting is held.

Districts may create expendable trust funds for the purpose of maintaining health insurance funds for the benefit of employees and retired employees. RSA 198:20-c, III. If a fund is established for that purpose, there are specific requirements pertaining to trustees and making expenditures. Id. These funds are also exempt from certain requirements. RSA 198:20-c, V.

Expendable trust funds are subject to the same provisions pertaining to custody, investment, expenditure, change of purpose, and audits as capital reserve funds. RSA 198:20-c, V.

Expendable trust funds may be revoked by a majority vote at an annual meeting, unless the vote creating the fund expressly provides that the fund is irrevocable. RSA 198:20-c, IV. If the fund is revoked, the trustees are required to return the funds to the school treasurer. Id.

iii. Revolving Funds

Districts may vote to establish a revolving fund for the purpose of providing money to school programs that are self-supporting, in whole or in part. RSA 194:3-c, I. The district must specify the purpose for which the fund is established and the funds may only be expended for the specified purpose. Id. Moneys appropriated to a revolving fund may be non-lapsing. RSA 194:3-c, IV. Upon termination of a program funded by a revolving fund, the money derived from the program that remains in the fund is returned to the pupil, if derived from tuition, or used as local general funds to reduce the tax rate, if derived from the sale of goods or services associated with the program. RSA 194:3-c, V.

d. When does an appropriation lapse?

As a general rule, all appropriations lapse at the end of the fiscal year, and any unexpended portion shall not be spent without a further appropriation. RSA 32:7. The exceptions to this rule are:

- Prior to the end of the fiscal year, the amount has been encumbered by a legally-enforceable obligation, created by contract or otherwise;
- The amount is legally placed in any properly created non-lapsing fund, such as a capital reserve fund;
- The amount is to be raised, in whole or in part, through the issuance of bonds or notes. In such cases, the appropriation, unless rescinded, does not lapse until the fulfillment of the purpose or completion of the project being financed by bonds or notes;
- The amount is appropriated from moneys anticipated to be received from a state, federal, or other governmental or private grant, in which case the appropriation shall remain nonlapsing for as long as the money remains available under the rules or practice of the granting entity;
- The amount is appropriated under a special warrant article, in which case the local governing body may, at any properly noticed meeting held prior to the end of the fiscal year for which the appropriation is made, vote to treat that appropriation as encumbered for a maximum of one additional fiscal year; or

- The amount is appropriated under a special warrant article and is explicitly designated in the article and by vote of the meeting as nonlapsing, in which case the meeting shall designate the time at which the appropriation shall lapse, which shall not be later than 5 years after the end of the fiscal year for which the appropriation is made.

RSA 32:7, I-VI.

e. Spending your “ARRA” Funds

Districts may, at an annual meeting, adopt an article authorizing the school board to apply for, accept and expend unanticipated money from a state, federal or other governmental unit or private source. RSA 198:20-b. If your district has adopted this provision, then the school board may accept funds from the American Recovery and Reinvestment Act (“ARRA”), provided that the acceptance of the ARRA funds does not require the expenditure of other district funds for which no appropriation was made. RSA 198:20-b, IV(a).

If the acceptance of ARRA funds would require an appropriation, or if your district has not adopted the provisions of RSA 198:20-b, the school board may call a special meeting of the legislative body “to consider an appropriate response to the [ARRA] or any similar act adopted by Congress in 2009.” HB 239 (2009). The legislative body may authorize the appropriation and expenditure of funds allocated to the district by ARRA, the appropriation and expenditure of any local matching shares, the issuance of bonds for any local share, and the adoption of a warrant article under the provisions of RSA 198:20-b. Id. These special meetings are subject to the following requirements:

- In SB2 districts, the school board may elect to hold and conduct the meeting without regard to RSA 40:13. If the board elects to follow RSA 40:13, then it shall provide at least a 15-day period between the deliberative session and the official ballot vote.
- The school board shall post a notice, which shall include the warrant, in at least 2 public places within the district, one of which shall be the district’s website, if one exists, at least 7 days prior to the meeting. In addition, notice shall be published in a newspaper of general circulation within the political subdivision, at least 7 days prior to the meeting. If notice cannot be published in the newspaper at least 7 days prior to the meeting, then it shall be posted in at least one additional place within the district.
- The school board shall hold a public hearing on the proposed articles at the meeting.

- In SB2 districts, even if the board elects to hold the meeting without regard to RSA 40:13, the issuance of notes or bonds shall be authorized by a vote of 3/5 of all ballots cast. In non-SB2 districts, the issuance of bonds or notes shall be authorized by a ballot vote of 2/3 of all voters present and voting, unless the district has adopted a charter that contains an alternative voting requirement.
- The meeting shall be conducted in accord with RSA 40:1-40:11 and the most recently updated checklist shall be used.

Note: if your district is seeking a qualified school construction bond to finance a lease-purchase agreement, then it is likely that the super-majority voting requirements for a bond will apply.

2. The Ability to Contract: NH RSA 32:13

All school districts have the ability to enter into contracts. RSA 194:2. Similarly, school administrative units (“SAUs”) have the ability to enter into contracts relating to the functions of the SAU. RSA 194-C:1, II.

The legislative body does not have the authority to nullify a prior contractual obligation of the district, when such obligation is not contingent upon an appropriation and is otherwise valid under New Hampshire law. Nor does the legislative body have the authority to nullify any other binding state or federal legal obligations which supersede the authority of the local legislative body. RSA 32:13, I.

The case of Marrone v. Town of Hampton, 123 N.H. 729 (1983) involved a claim that the Town was bound by an agreement entered into by the Selectmen. In that case, the Selectmen had entered into an agreement with the plaintiffs, pursuant to which the plaintiffs would make certain improvements to a public road in exchange for the right to landscape portions of the road. After the plaintiffs made the improvements, their neighbors complained about the landscaping, and the Selectmen ordered the plaintiffs to restore the road to its original condition, with the exception of the improvements made by the plaintiffs. Plaintiffs sought an injunction, prohibiting the Town from enforcing the Selectmen’s order. The court found that the agreement entered into by the Selectmen exceeded their authority and therefore, the contract was void; thus, the plaintiffs were required to restore the road. However, the court held that the Town was liable to the plaintiffs for the reasonable value of the improvements.

Note: This case illustrates that the governing body can only contract for items that are within the scope of its power or authority. If the board improperly enters

into a contract it runs the risk of exposing the district to a quantum meruit claim, in which the other party seeks damages based on the value of services provided to the district.

3. Town Purchasing versus School District Purchasing

A town may vote to establish a central purchasing department for the town; if such a department is established, the selectmen shall appoint a purchasing agent who shall purchase all supplies for any agency of the town and who may establish rules and regulations for competitive bidding for said purchases. RSA 31:59-a; RSA 31:51-b. A town vote to establish a purchasing department, does not impact the school district located within that town, or the purchase of supplies for the school district. RSA 31:59-d (emphasis added).

In contrast, no state statute authorizes school districts to establish a purchasing department. Instead, school boards are required to “[a]dopt policies necessary and desirable to control and effectuate the purchase of equipment, supplies, or services and may delegate to the superintendent of schools the authority to make financial commitments in accordance with such policy.” Ed 303.01(b). Superintendents are responsible for selecting and purchasing “textbooks and other supplemental materials and supplies in accordance with the policies of the school board and the state board”; however, the Superintendent may assign duties for the efficient management of the SAU. Ed 302.02; Ed 302.01(h). Thus, the Superintendent could assign selection and purchasing responsibilities to another individual.

There is no distinction between districts located within cities and towns; thus, the school boards of a school district located within a city would be responsible for developing policies pertaining to district purchasing. The components of a purchasing policy are discussed in greater detail, below.

The SAU may vote to establish “other administrative positions” within the SAU, such as assistant superintendents and business administrators. RSA 194-C:5, II(c). If the position of a business administrator is created, the Superintendent is responsible for nominating an individual to fill that position. Ed 302.01(h).

4. Insider Dealing: NH RSA 95:1 et seq.

Individuals holding public office in any political subdivision of the state, shall not “by contract or otherwise, except by open competitive bidding, buy real estate, sell or buy goods, commodities, or other personal property of a value in excess of \$200 at any one sale to or from the . . . political subdivision under which he holds his public office.” RSA 95:1.

Note: It is not enough for a board member to recuse him or herself from a vote to approve the contract in excess of \$200; instead, the statute prohibits board members from entering into contracts with the district if the value of the contract exceeds \$200, unless the issue has first been put to public bid. In addition, your district may have adopted a conflict of interest policy, which may impose additional restrictions on the ability of board members to contract with the district.

With regard “to any public works or construction contracts of any type that are paid for by public funds of the state or by any of its political subdivisions, or of any public authority, it is unlawful for any officer or employee of the state, or of any of its political subdivisions, or of any public authority, either directly or indirectly to require the builder or the bidder to make application to or to get any surety bond or contract of insurance specified in the building or construction contract from a particular surety or insurance company, agent, or broker.” It is also unlawful “for any officer or employee of the state, or of any of its political subdivisions, or of any public authority, or for any person who purports to act for such an officer or employee to negotiate, make application for, or to get any such a surety bond or contract of insurance which can be obtained by the builder, bidder, contractor, or subcontractor on the building or construction contract.” RSA 95:1-a.

A violation of RSA 95:1 et seq. is a misdemeanor, “and upon conviction there shall automatically be a vacancy in the office held by the person convicted which shall be filled as otherwise provided by law.” RSA 95:3.

RSA 95:1 is intended to prohibit compensated officials from dealing with themselves as individuals except upon open bid, where more than \$200 is involved in the particular transaction. See Bourne v. Sullivan, 104 N.H. 348, 353 (1962). The statute “applies to transactions between a[n] . . . official and a ‘firm or corporation’ in which he is interested only in cases where the official has such direct personal and pecuniary interest in its transactions as to warrant the conclusion that his official judgment may be influenced thereby.” Id. at 354.

B. Purchasing and Procurement Policies

1. “Widgets” versus Services

The purchase of “widgets,” supplies, or equipment is objective – the purchase order should contain a clear description of the item that is being purchased and the district, upon receipt of the item, will be able to ascertain whether it met the qualifications set forth in the purchase order.

In contrast, purchasing services involves a subjective judgment, and requires discernment as to whether or not the service provider meets the required qualifications. A request for services should clearly specify the type of service and any necessary qualifications for service providers.

2. Components of a Policy

There are several possible components of a purchasing policy, some of which would take into consideration fiscal policy decisions by the school district and others of which pertain to purchasing procedures. Policy considerations could include:

- Consideration of the interests of the school and its educational program
- Obtaining the best possible value based on the amount spent
- Equal consideration for responsible bidders. This is discussed in more detail in section V, below.
- Prohibiting gifts that may influence the purchase of school supplies and equipment

Purchasing procedures may include:

- Centralizing purchasing in the business office with oversight by the Superintendent or a designee
- Requiring an authorized purchase order
- Contracts and purchase orders require the approval of the Business Administrator
- Employees submit requests for purchases to a designated individual who then submits a requisition to the business office for approval
- Criteria for purchasing supplies and equipment versus services
- A sum certain that will trigger bidding requirements, and a statement that bidding requirements can be waived at the discretion of the school board or the superintendent

C. Buying Real Estate

All school districts are corporations, with the power to sue and be sued, and to hold and dispose of real and personal property, and to make necessary contracts in relation thereto. RSA 194:2. As such, districts may raise money “[t]o procure land for lots for schoolhouses and [SAU] facilities, and for the enlargement of existing lots;” and they may “build, purchase, rent, repair, or remove schoolhouses and outbuildings, buildings to be used for occupancy by teachers in the employ of such school district, and buildings to be used for educational administration including office facilities for [SAUs].” RSA 194:3, I-II.

The acquisition of land will require an appropriation and expenditures from capital reserve funds for the purpose of land will always require a vote by the legislative body.

1. Land for a School

a. Location statutes

i. Towns

Districts may decide on the location of their schoolhouses, school buildings, and educational administration buildings, including SAU facilities, by vote or by a committee appointed for that purpose. RSA 199:1. However, all plans, specifications, and the selection of site for any new school buildings for a district shall be approved by the school board. Id.

Committees may only bind the district up to the amount of money appropriated, and the district is not bound by any act beyond the committee’s authority, unless ratified by an express vote of the district. RSA 199:6.

If the district does not agree upon a location for a schoolhouse, or upon a committee to locate the same, or if the committee cannot find a location within 30 days after its appointment, then the school board, upon petition of 10 percent or more of the voters, shall determine the location. RSA 199:7.

If 10 percent or more of the voters of a district are aggrieved by the location of a schoolhouse by the district or its committee, they may petition the school board; the board shall hear the parties involved and determine the location. RSA 199:8.

If 10 percent or more of the voters of a school district are aggrieved by the location of a schoolhouse by the district or its committee, or by the school board, they may, within 10 days after the location has been determined, petition the State Board of Education; the State Board shall hear the parties involved and determine the location. RSA 199:9.

The district is prohibited from taking any steps to carry into effect the location of the schoolhouse while any proceedings authorized by law for a change in location are pending. RSA 199:14.

The board may enlarge any existing lot used for school purposes upon petition and proceedings as are required to authorize it to determine the location for a schoolhouse. RSA 199:16.

If a district fails to procure the lot of land selected for the location of a schoolhouse, or for the enlargement of a schoolhouse, or if the owner of the land refuses to sell the same to the district for a reasonable price, the selectmen, upon petition by the school board or by 3 or more voters of the district, shall appraise the damages occasioned to the landowner by the taking of his land. RSA 199:17.

If the school board refuses or neglects to build, repair, remove or fit up a schoolhouse, the selectmen, upon petition of 3 or more voters of the district, after hearing the parties, may assess upon the district and collect such sums of money as may be necessary, and cause the schoolhouse to be built, removed, repaired or fitted up. RSA 199:20.

ii. Cities

In cities, the school board has the sole power to select and purchase land for schoolhouse lots. The board may make the purchase after it has secured, by vote of the city council, an adequate appropriation. RSA 199:2. The school board must approve all plans for construction, alteration, or remodeling schoolhouses. RSA 199:3, I. In addition, construction relating to schoolhouses shall be done under the direction of a joint building committee that is established and chosen by the city council and the school board. RSA 199:3, II. The joint building committee is responsible for:

- 1) Overseeing and deciding all matters relating to any construction on school buildings;
- 2) Preparing and submitting monthly status reports relating to construction progress to the city council and the school board; and,
- 3) Preparing and submitting monthly financial reports relating to the total authorized construction budget and expenditures to date to both the city council and the school board.

RSA 199:3, III (a)-(c).

All funds appropriated by the city council for construction of a new schoolhouse shall be administered by the joint building committee, and the funds shall be disbursed upon authorization of the committee until final acceptance of the schoolhouse by the city council. RSA 199:3, IV. When a schoolhouse is no longer needed for public school purposes, the school board shall transfer its care and control to the city. RSA 199:4, II.²

b. State standards for Building Aid

Under certain circumstances, districts may be eligible to receive School Building Aid from the Department of Education. RSA 198:15-a states:

To aid local school districts in meeting the costs of payment of debt for school buildings and educational administration buildings, including office facilities for [SAUs], and to meet the costs of leasing permanent space in a building which is used for the operation of a high school vocational technical education program, the department of education shall, from funds appropriated by the general court to carry out the provisions of this subdivision, pay annual to the school districts of the state, sums in accordance with the provision of this subdivision, or the alternative school building aid provisions . . .

Districts seeking building aid must have the plans, specifications, and cost estimates for the school construction or proposals for the purchase of the buildings, and the costs for them approved by the State Board of Education prior to the start of construction. RSA 198:15-c; see also Ed 321.23 (setting forth the steps for the procedure for building approval). Requests for school building aid must be submitted by January 1. Id.

Specific requirements and standards for construction of any building “to be used for the purpose of providing education to pupils in grades kindergarten through grade 12” are set forth in Ed 321, available at: <http://www.gencourt.state.nh.us/rules/ed300.html> (accessed Sept. 9, 2009). Ed 321.01. The regulations also contain requirements pertaining to how school building aid will be paid and contain limitations as to the amount of school building aid that is available for land acquisition. Ed 321.04; 321.04-321.06; 321.26-27. In addition, certain projects are not eligible for school building aid, unless a waiver is granted in accord with Ed 321.30. Ed 321.29. Those projects that require a waiver include:

- Swimming pools;
- Field houses;

² The provisions of RSA 199:2-4-a do not apply to the Union School District off Concord and to the school districts of Keene, Lebanon and Claremont. RSA 199:5.

- Indoor tennis courts;
- Indoor tracks;
- Ice rinks;
- Artificial turf on athletic fields
- Auditoriums with a seating capacity including seating capacity for staff greater than 50 percent of the building core design capacity;
- All auditoriums in elementary schools;
- Resurfacing of tracks, courts, and playing fields;
- Motor vehicles; and
- Text books.

2. Can an SAU buy land?

No. A school administrative unit is considered a corporation, with the power to sue and be sued, to hold and dispose of real and personal property for the establishment of facilities for administration and any instructional purposes, and to make necessary contracts in relation to any function of the corporation; provided however, that the SAU shall not have the power to procure land, to construct or purchase buildings, to borrow money in order to purchase real estate, or to mortgage said real estate. RSA 194-C:1, II (emphasis added).

3. The Typical Process

The purchase of land by a school district will require an appropriation by the legislative body. At a minimum, there must be an appropriation for the acquisition of real estate in order for the board to enter into an agreement for the acquisition of land. If your district has a capital reserve fund for the acquisition of land, money from that fund cannot be spent without a vote by the legislative body. See RSA 35:15, II (“Expenditures from any fund established for the acquisition of land . . . shall be made only as authorized . . . [b]y a majority vote of the legal voters present and voting at an annual or special meeting, in the case of a . . . school district . . .”).

Prior to entering into a contract involving an expenditure of more than \$25,000 for the construction, repair or rebuilding of a public building, the district must obtain sufficient security, by bond or otherwise, in an amount equal to at least 100% of the contract price, or of the estimated work if no price is agreed

upon. RSA 447:16. If the contract involves an expenditure of less than \$25,000, the district may still obtain a performance bond from the contractor. Id.

III. Leasing Equipment: “Please release me, let me go.”

A. The Statutory Exception to a District Meeting

Pursuant to RSA 33:7-e, school boards may enter into equipment leases, as required by the School District. If the lease agreement has a non-appropriation clause, the agreement can be approved by a simple majority vote of the legislative body. A lease agreement with a non-appropriation clause is not treated as debt under RSA 33:4-a, for purposes of determining the district’s debt limit. RSA 33:7-e. If the agreement does not contain a non-appropriation clause, then it will need to be approved by a super-majority vote of the legislative body. If the agreement is for a single year, the school board may place the agreement as a line item in the general operating budget, provided that there is sufficient detail to inform the citizens about the subject of the agreement.

B. The Components of an Equipment Lease Purchase Agreement.

All equipment lease purchase agreements, whether in the form of a lease-purchase agreement, sale and lease back agreement, installment sale, or other similar agreement to acquire use or ownership of equipment, should contain a clear definition of the item being leased. The provisions of RSA 33:7-e, authorizing the school board to enter into leases, pertain only to equipment leases, and not to other types of lease agreements, such as fixtures. Thus, to avoid any question as to whether the agreement is an equipment lease, it will be important to have a clear description of the type of equipment that is being leased.

In addition, the equipment lease should contain a non-appropriation clause; otherwise, the agreement will need to be approved by a super-majority vote of the legislative body. The following is a sample non-appropriation clause:

If, as part of a budget finally approved for Lessee for a fiscal year, sufficient funds are not appropriated to make payments required under the equipment lease purchase agreement, the agreement shall terminate as of the end of the last fiscal year for which sufficient funds have been appropriated and Lessee shall not be obligated to make payments beyond the last fiscal year for which funds have been appropriated.

Non-appropriation clauses should also limit the Lessor’s remedy to the return of the equipment within a specified period of time. Be wary of entering into an agreement that contains a non-appropriation clause but then gives the Lessor a monetary damage remedy or creates a cause of action based on the failure to

appropriate. There appears to be no prohibition against the Lessor filing a UCC statement with regard to the leased equipment. All such agreements should be clearly authorized by school board resolution.

IV. Bonding: “*My word is my Bond*”

A. The Municipal Finance Act

Districts may issue bonds or notes for the acquisition of land, for planning relative to public facilities, for construction, reconstruction, alteration, and enlargement or purchase of public buildings, for other public works or improvements of a permanent nature, for the purchase of departmental equipment of a lasting character, for payment of judgments, and for purposes of economic development. RSA 33:3. Bonds or notes for the purposes of economic development may be issued only after the school board has held hearings and presented the public benefit to the public, and after the legislative body has approved the bond or note. Id. However, districts are prohibited from incurring “net indebtedness to an amount at any one time outstanding exceeding 7 percent” of their valuation. RSA 33:4-a, IV.

School administrative units may not issue bonds or notes. RSA 33:1, I.

School boards may authorize the issuance of “Reimbursement Anticipation Notes” under an abbreviated procedure. NH RSA 198:20-d provides that the District may incur debt in anticipation of reimbursement under RSA 186-C:18 and under RSA 198:42. The school board, after notice and public hearing, may elect to borrow such funds and to recognize the proceeds of the borrowing as revenue for property tax rate setting purposes by providing written notification to the commissioner of the department of revenue administration stating the specific amount of borrowing to be recognized as revenue. Any borrowing under this section is exempt from the provisions of RSA 33, relative to debt limits.

B. The Components of the Process

In SB2 districts, the issuance of bonds or notes requires an affirmative vote by a 3/5 majority. In non-SB2 districts, the issuance of bonds or notes requires an affirmative ballot vote by a 2/3 majority. RSA 33:8. The warrant for the bond or note shall be posted at least 14 days before the date of the meeting, and the district must certify that the warrant has been duly posted. Id. The governing body may delegate to the board the discretion to fix the date, maturity, denomination, interest rate, place of payment, form and other details, and to provide for the sale of the bond or note. Id.

Bonds and notes cannot be acted upon at a special meeting, unless a majority of all legal voters are present and voting, or unless the school board petitions the superior court for permission to hold a special meeting. RSA 33:8.

The warrant for a special meeting shall be published once in a newspaper of general circulation within the district within one week after the posting of the notice of the special meeting, and the warrant must be posted at least 14 days prior to the date of the special meeting. The district must certify that the warrant has been duly posted. Id.

All bonds or notes authorized by the legislative body shall be signed by the school board, or a majority of the school board, and the treasurer of the district, and shall have the district's corporate seal, if any, affixed to it. Id.

1. Bonds or notes in excess of \$100,000

If the school board seeks to obtain a bond or note in excess of \$100,000, then it must hold at least one public hearing on the issuance of the bond or note. The hearing must be held at least 15 days, but not more than 60 days, prior to the date of the meeting that the bond or note will be voted on. RSA 33:8-a, I. Notice of the time, place, and subject of the hearing must be published in a newspaper of general circulation at least 7 days before the hearing is held. Id.

Warrant articles proposing a bond or note in excess of \$100,000 must appear in consecutive numerical order and must be acted upon prior to other business, except the election of officers, or as otherwise determined by the voters at the meeting. RSA 33:8-a, II. The vote must be by ballot and the polls must remain open for at least 1 hour following the completion of discussion on each respective article. A separate ballot box must be provided for each bond article to be voted on. Id.

If a motion to reconsider the vote on a bond or note in excess of \$100,000 passes, reconsideration of the article shall not take place for at least 7 days from the date on which the original vote was taken. Notice of the time and place of the vote on the reconsideration shall be published in a newspaper of general circulation at least 2 days prior to the reconsideration vote. RSA 33:8-a, IV.

V. Bidding

A. Bidding Policies and Standardized Procedures

As a general rule, an invitation to bid on a public contract is not an offer. Marbucco Corp. v. City of Manchester, 137 N.H. 629, 633 (1993). Instead, "the bid itself is an offer that creates no right until it is accepted." Id. The entity requesting bids has an obligation to "treat all bidders fairly and equally." Id.

All districts should have a policy pertaining to bidding requirements. The policy may describe the types of purchases and services that will be put to bid, as well as a minimum dollar amount. For example, the policy could indicate that all purchases of materials, supplies, equipment, or contracted services in excess

of \$5,000 shall be subject to public bid, unless an exception is made by the school board. The policy could further indicate that expenditures under \$5,000 may be subject to public bid at the discretion of the school board or the Superintendent.

The policy should either contain specific bidding procedures or direct the Superintendent to develop standard bidding procedures. These procedures could include, but not be limited to, the following:

- A statement that the public will be notified of bidding opportunities and a description of procedures that may be used to advertise the bid (ex.: newspaper, website, etc.);
- A statement authorizing the Superintendent to establish the level of notice necessary to ensure responsive bids;
- A procedure for the submission of bids;
- A requirement that the successful bidder enter into a written contract with the district, in a form acceptable to the District;
- A statement that the district reserves the right to reject all bids and to accept the bid that is in the best interest of the district;
- A statement that the district reserves the right to waive any formalities with regard to the bid process;
- A statement reserving the right for the Superintendent or his/her designee to make a purchase without first going through the bidding process;
- A statement that the district will seek a minimum number of competitive bids;
- A statement that bids received after the specified date and time shall not be considered;
- A statement that bidders must meet qualification standards - these standards are described in more detail, below;
- A provision requiring board members with a personal interest in the bid to recuse themselves from the vote on the bid;

- A statement that receipt of an insufficient number of bids, as determined by the Superintendent, may constitute grounds for rebidding;
- A statement indicating that all contact pertaining to the bid shall be with the Superintendent or the Business Administrator;
- A statement indicating whether, and under what circumstances, the bidders will be interviewed by the administration and/or school board;
- A statement giving the Superintendent discretion to include additional criteria and procedures, including but not limited to, qualifications for bidders, in the RFP or RFQ;
- A statement reserving the right to reject any or all bids;
- A procedure pursuant to which bids are opened and accepted – for example, the Superintendent and/or Business Administrator shall be responsible for opening and reviewing all bids and making a recommendation to the school board regarding the acceptance of a bid;
- A statement authorizing the Superintendent to award a bid that is less than a certain amount, such as \$10,000; bids in excess of \$10,000 shall require school board approval; and,
- A statement that the final award of the bid will be contingent upon the parties entering into a signed contract. Contract provisions may include, but not be limited to, the following:
 - Scope of services;
 - Term of the contract;
 - Opportunities to cure;
 - Events of default;
 - Notice requirements to the other party;
 - If the contract is a multi-year contract, a non-appropriation clause;
 - Insurance requirements;

- Requirements that the vendor/service provider comply with all applicable state and federal standards;
- An indemnification provision;
- A provision setting forth conditions for curing a breach;
- A liquidated damages provision;
- Injunctive relief; and,
- A provision pertaining to the choice of forum and how disputes will be resolved.

Note: Avoid using “one-size fits all” contracts. Otherwise, you may find yourself failing to adequately define the vendor’s obligation to perform.

You may also wish to consider including a statement that the district reserves the right to negotiate with bidders.

In addition, in order to reduce fraud, your policy and/or procedures should include some or all of the following:

- Establishing a time period in which certain long-term services or items will be rebid;
- A statement prohibiting school board members and administrators from having business interests in entities that submit or are awarded bids;
- Prohibiting or limiting the acceptance of marketing trips or gifts from vendors;
- A requirement that bidders either certify that they do not have business or personal relationships with members of the school board or administration, or disclose their business or personal relationship as part of the bid.

B. RFP versus RFQ

A request for a proposal (“RFP”) is a document that solicits offers to provide a certain service. The RFP contains the district’s specific requirements, such as a description of the service sought, the required qualifications for the

bidder, the information that must be contained in the bid, and any anticipated terms and conditions that would be contained in the final contract. The RFP may also contain factors that will be used to evaluate the proposals.

In contrast, a request for a quote (“RFQ”) is a request for a specific item or items. It is generally utilized when the district is seeking to purchase a specific quantity of a certain item, and has specific specifications for said item. For example, the district could be seeking to purchase 100 computers with a specific amount of memory and specific programs. In those circumstances, the district may wish to submit a RFQ, containing the description of the computers.

Regardless of whether you are using a RFP or a RFQ, the detail and objectivity of the description of the product or service sought will define the quality and accuracy of the responsive bids or quotes. In particular, the RFP or RFQ should clearly and explicitly define whether the district will be seeking to enter into a requirements contract, in which the quantity of the items that are provided depends on the district’s need, or whether it will be seeking to enter into a contract for a specified quantity. In addition, the RFP or RFQ should clearly state any limitations on services or items that the district will not pay for.

Depending on the service, or product, it is often prudent for the District to hire an outside consultant with the expertise necessary to develop the product or service specifications. At times, cutting corners by designing a “home-grown” RFP or RFQ can result in disparate bids, unresponsive bids, or unsatisfactory products of services.

C. Qualifying Bidders Through Your Policies and Procedures

A bidding policy or the bidding procedures adopted by the district should set forth requirements pertaining to bidder qualifications. These qualifications could include, but not be limited to, the following:

- A certification that the bidder is an equal opportunity employer;
- Proof of insurance;
- Ability to secure a bond and the name/address of the bidder’s bank/bonding company;
- Minimum years of operation;
- A certification that the bidder complies with all applicable civil rights laws;
- If the bidder is a corporation, the amount of corporate capitalization and names of shareholders;

- If the bidder is a partnership, the names of the partners in the corporation;
- Whether the bidder has any outstanding adverse civil judgments pertaining to its failure to supply goods or provide services;
- The court, date, docket number and description of any and all misdemeanor convictions involving moral turpitude, conviction of a bidding crime and other felony convictions of the bidding contractor/vendor, or the contractor's/vendor's directors, partners, principal officers or key employees;
- A list of all civil cases in which a final verdict was rendered against the bidding contractor/vendor or the contractor's/vendor's directors, partners, principal officers or key employees on the ground of fraud, misrepresentation, dishonesty, deceit, breach of contract or any other matter involving allegations of failure to perform on a contract;
- The court, date, docket number and description of any felony convictions whatsoever of the bidding contractor/vendor, as well as the contractor's/vendor's directors, partners, principal officers or key employees;
- The employment record of the principals of the bidding entity;
- References from major suppliers and/or subcontractors with whom the bidding entity has done business in the past;
- To the extent that the bidder will be involved in the provision of services in the school setting, an acknowledgement of the obligation to report violations of the Safe School Zones Act.

Depending on the item or service sought, additional bidder qualifications could be set forth in the RFP or RFQ.

If you are seeking bids from organizations or individuals who will be providing services directly to students, you will need to comply with RSA 189:13, pertaining to background investigations and criminal background checks. If your district's policy pertaining to background investigations and criminal background checks expands on the statutory requirements, then background investigations and criminal background checks may be required in additional circumstances. Thus, it will be important to familiarize yourself with that policy prior to soliciting bids, so that you may incorporate those requirements into the RFP.

D. Reserving Rights

As observed by Laughlin in his treatise, *New Hampshire Practice, Local Government Law*, “Public officials have broad discretion in deciding whether to reject all bids made on a public contract.” See 14 *New Hampshire Practice, “Local Government Law”* Section 780, p. 36 (1995). However, when public officials choose not to exercise their broad discretion to reject all bids, they then are limited to the more ministerial function of determining “the lowest responsible bidder who has complied with the terms of the solicitation.” Id. Laughlin goes on to observe that, “If there is no fraud, corruption, or improper motive, municipalities may reject all bids received when this right has been expressly reserved. When the contracting authority has reserved the right to reject all bids, and does so, no justiciable right of action accrues to the benefit of bidders.” Id.

Thus, each RFP and RFQ should contain a reservation of rights, in order to put bidders on notice that the district may reject some or all bids. The reservation of rights could also include the following:

- A reservation of the right to reject bids that fail to meet the requirements in the RFP, including any required certifications;
- A reservation of the right to reject all bids and resubmit the matter out to bid;
- A reservation of the right to reject any bidder on the basis of any criminal history or civil litigation record which it deems to be adverse to the interests of the district;
- A reservation of the right to withdraw acceptance of any bid when the district deems the results of a criminal records history check to be adverse to its interests;
- A reservation of the right to reject and not award any bids;
- To the extent that your district has a practice of giving preferences to local bidders, then your district should expressly reserve that right;
- A reservation of the right to split the bid among qualified bidders; and,
- A reservation of the right to waive some or all of the bidding formalities.

The district’s reservation of rights should be specifically set forth in the RFP so that prospective bidders are on notice of the reservation of rights.

E. Case Law studies

The following cases provide additional insight into bidding requirements and policies.

In Gerard Construction Company v. City of Manchester, 120 NH 391 (1980), the City of Manchester, through its Joint School Building Committee, invited bids for the construction of a vocational education center. The notice to bidders and bid specifications contained no project completion date; instead, the bid completion form contained blank spaces in which the bidders were to indicate the number of calendar days and months in which they would complete the project. The City received 8 bids; Gerard Construction was the lowest bidder, but the proposal contained the largest completion time. Thus, the City awarded the bid to another bidder, whose price was \$100 more than Gerard's, but who had indicated that they would complete the project six months prior to Gerard's completion date. The relevant City Charter provision provided that the bid shall be awarded to the lowest responsible bidder. Id. at 396. Gerard filed suit, arguing that the award of the bid to the other bidder was illegal and violated the City Charter provisions pertaining to competitive bidding.

The court noted that the purpose of competitive bidding is to “invite competition, guard against favoritism, improvidence, extravagance, fraud and corruption, and secure the best work or supplies at the lowest price practicable.” Id. at 396 (internal quotations and citation omitted). The court also noted that strict compliance with the bidding procedures is required; otherwise, the contract award is void. Id. at 395. Strict compliance with the bidding requirements is necessary to ensure that “every prospective bidder . . . ha[s] identical information upon which to submit a proposal.” Id. at 396 (internal quotations and citation omitted).

Thus, the court held that since the request for proposals did not specify that the completion time was an essential element of the bid, that factor could not be used to determine the lowest responsible bidder. Id. at 397. The court also held that if the committee determined that Gerard was the lowest responsible bidder, it was obligated to either accept its bid, or reject all bids and readvertise the project. Id. at 398.

Practice Pointer: All essential requirements must be included in the RFP. If an essential requirement is not specifically included in the bid, then the district cannot utilize that factor when determining the lowest responsible bidder.

In the case of Irwin Marine, Inc. v. Blizzard, Inc., 126 N.H. 271 (1985), the City of Laconia invited bids on City property that was for sale. Irwin Marine was the only bidder, and offered \$7,000. The City rejected the proposal and opened

a second round of bids; however, it did not notify Irwin that the bid had been rejected or that the City had requested new bids. During the second round of bidding, the City received four offers; it accepted an offer from Blizzard. When Irwin learned of the sale, it filed suit, seeking to set aside the conveyance. The trial master recommended to the court that it void the sale because the bidding procedures did not treat Irwin fairly – in particular, the trial court focused on the fact that the City had failed to notify Irwin that its bid had been rejected and that the City had requested new bids. On appeal, the State Supreme Court affirmed, holding that “A public bidding procedure that places a bidder at a disadvantage violates the public interest in according prospective bidders an equal opportunity to bid and weakens public confidence in government.” Id. at 276.

Practice Pointer: Once a RFP or RFQ has been sent out, entities have a duty to act in good faith and they must ensure that bidders are treated fairly.

Finally, in the case of Marbucco Corp. v. City of Manchester, 137 N.H. 629 (1993), Marbucco filed suit against the City after it failed to award it a municipal contract that had been sent out to bid. Marbucco, the lowest bidder, sought damages from the City. The bid process called for a base bid and 8 alternate bids, specified either as additions or deductions from the base bid. Marbucco’s bid was the lowest. The day after the bids were opened, another bidder sent a facsimile to the City, clarifying its alternate bids and including a 9th alternative. Despite the late clarification and the addition of the 9th option, the City recalculated the bid – the result was that the bid was \$650 lower than Marbucco’s. The City voted to waive the irregularity and award the bid to the other party. Marbucco filed suit, seeking damages based on the City’s improper rejection of its bid. The Superior Court dismissed the suit, holding that a disappointed bidder could not maintain an action against a municipality for failure to award a contract. On appeal, the court noted that Marbucco’s “reasonable reliance on the city’s promise, if it awarded the contract at all, to award it to the lowest responsible bidder submitting all essential information prior to the bidding deadline, could entitle [Marbucco] to damages under the theory of promissory estoppel.”

The court concluded that the City’s award the contract to the other party went beyond a mere informality or an irregularity, and was therefore improper. The court went on to hold that the trial court erred in dismissing the suit, and it remanded the matter back to the trial court. In doing so, the court noted that as a general rule, unless the public entity has acted in bad faith, damages for wrongfully rejecting a bid would be limited to “the expense incurred by the low bidder in its fruitless participation in the competitive bidding process, i.e., its bid preparation costs.” Id. at 634. If, however, the lowest bidder “is deprived of the contract through some conduct of the awarding authority tantamount to bad faith, . . . then the recovery of lost profits should be the measure of damages.” Id.

Practice Pointer: If a district fails to follow bidding policies and procedures it could find itself subject to a claim for damages.