Building Practices & Construction Safeguards for School Districts

A White Paper by the West Michigan Construction Alliance

The purpose of this paper is to provide information and expectations on behalf of Michigan school districts to those who build and renovate schools such as architects, construction managers, general contractors, contractors, sub-contractors, engineers and labor workforces about school district expectations regarding design, construction and performance.

The paper is dedicated to schools who have had good experiences regarding school construction so school officials are assured the procedures and practices they are using have been effective and to those schools who have experienced difficulties or failures regarding construction quality, cost, service or liability.

prepared by

Ed Haynor, Consultant

Ed Haynor has over 25 years of experience as a Michigan school board member at Newaygo Public Schools and Newaygo County RESA. As a board member, Mr. Haynor has had both good and bad experiences with school construction. Much of the content of this publication is based on his experiences with school construction; input he has received from school officials and those who make their living building and renovating schools; and information from the National Clearinghouse for Educational Facilities and School Construction News.

West Michigan CONSTRUCTION Alliance

140 N. 64th Avenue, Suite 9 ● Coopersville, MI 49404

Ph: 616-837-8080 ● Fx: 616-837-8090 ● Email: ehaynor@chartermi.net

Web: www.wmconstructionalliance.org

Constructing a BETTER Tomorrow

November 2007

(amended 8-1-11)

TABLE OF CONTENTS

Page

Setting the Stage 3

Design, New Technologies and Sustainability 3

Construction Practices 5

Bad & Illegal Practices 6

So What Can Be Done 7

- Don't Wait to Engage a Planning Process 7
- Determine the Level of Professional Liability Insurance 10
- Clarify Contract Issues with Professional Consultants 10
- Predetermine the Methods Used for Dispute Resolution 12
- Review the Non-Technical Contract Provisions in Bid Packages 12
- Develop Surety Bonds to Include with Bid Packages 13
- Develop Responsible Contracting Guidelines to Include with Bid Packages 13
- Michigan Public Sector Organizations who have Adopted Responsible Contracting Criteria 19
- Planning for Involvement in Contractor Disputes 20
- Monitoring Prevailing Wage 20
- Determine the Need for an Independent Inspector 20

Summary 21

Setting the Stage

School district boards of education, administrative staffs, community leaders and taxpayers in general may or may not have the types of experiences or knowledge that are ideal in understanding the policy requirements and technicalities of building new schools or undertaking major building renovation projects. In general, many if not most school district leaders want the highest construction quality that maximizes student learning, is a safe haven for students and is a resource and focus of the community. And then of course they want the construction project to cost as little as possible. The contradictions in the previous statements regarding quality, expectations and cost are obvious, but this is how many school officials perceive undertaking a school construction project. School officials who have this attitude about construction and are inexperienced as they go into this process lay the foundation for disastrous results which may include ineffective building design, poor construction quality, exorbitant costs and years of litigation.

In consideration of building and renovating schools, school officials should seek out construction professionals who have the necessary experience in working with superintendents, parents, teachers, citizen committees, school board members, administrators, and those persons in the school district who are responsible for facilities in order to address the needs of school districts. Architects, designers, construction managers and general contractors who don't have recent and relevant knowledge and experience about the needs of schools as learning communities or who lack the ability to work with divergent groups inhibit the schools ability in obtaining effective design and sound construction.

Many construction professionals are available to make their "pitch" to school districts regarding their qualifications. Like any other industry there are firms that do a good job and there are firms that don't. In a recent survey of Michigan school board members 15% stated they were dissatisfied with some phase of school construction. It's been my experience that 10-15% of Michigan school construction "goes bad," i.e., poor quality work, excessive change orders, back charges, cost overruns, delays and unfinished work, causing potential litigation. Just consider, if a school is engaged in a $10 million dollar construction project, potentially, $1,000,000 to $1,500,000 could be designed or built improperly. Surely, Michigan schools can do better. It's up to school leaders, boards of education and administrators, to do their homework in regards to identifying the most qualified in performing school construction including architects, construction managers, general contractors, engineers, contractors, subcontractors and labor workforces.

Design, New Technologies and Sustainability

Building a new school or renovating an existing one can be a long-term process. During that time trends and technologies will change. Designers and school officials face a two-pronged challenge; they are designing for the needs of today while anticipating the demands and needs of tomorrow.

Certainly schools should be built structurally sound, but at the same time they should be built to allow for flexibility in use and ease of renovation. The demands of schools districts are constantly changing, mostly because the global economy requires it, so students are able to compete in a world they face. So if the demands of school districts are ever-changing, so must the design and use of school buildings.

Below are some considerations school leaders, construction professionals and the general community should consider in school design:

1. School planners should thoroughly conduct surveys of board members, administrators, teachers, support staff and the general community in order to determine local needs and wants in order to set goals.

2. Persons and groups identified as key stakeholders should be provided the necessary planning and visioning workshops in regards to school design.

3. Designers should lead discussion groups of school officials and community members comparing and contrasting conventional versus high performance design.

4. Student safety needs to be a prime consideration in regards to building configuration, line-of-sight consideration and site design.

5. Electronic surveillance and building monitoring technologies should be designed into all school facilities to enhance school safety and security.

6. Designers should consider lifecycle building strategies concerning building materials, components, information systems, and management practices to create buildings that facilitate and anticipate future changes and eventual adaptation or dismantling for recovery of all systems, components and materials.

7. Schools should be built with consideration of flexibility. Designers should consider flexibility in space that may be easily renovated as well as the flexibility to be simply changed by its users. Schools must have the flexibility to accommodate yesterday, today and tomorrow.

8. Schools should be designed to accommodate several educational techniques, including traditional, departmental and small-group learning.

9. The designer should utilize modern technologies throughout the design to provide Internet access and computer-networking capabilities and facilitate the use of electronic instructional techniques.

10. School infrastructure design should be expandable and adaptable for future needs regarding power, plumbing, heating and cooling.

11. Design needs to accommodate curriculum delivery maximizing student achievement through effective forms of communication and technology.

12. Design considerations should be given to academic disciplines who would work well together as a team.

13. School buildings should be designed and renovated in consideration of environmentally sustainable design practices as outlined in Leadership in Energy and Environmental Design (LEED) standards especially being conscience of energy and water use with the goal of lower operating and maintenance costs.

14. Emphasis in design should consider the latest research regarding air quality, daylighting, skylighting, windows and thermal comfort.

15. Consideration should be given to solar and ground source heating and cooling of buildings.

16. A serious attempt should be made by designers in order to determine if it's feasible and cost effective for the school building to generate its own energy.

17. The latest technology should be used in order to design and install necessary energy controls in order to regulate and monitor energy consumption.

18. Schools should be durable in design resisting corrosion, moisture, mold, rain, wind, fire, humidity and ultraviolet light.

19. The latest technology should be used in the design and construction of school roofs in order to prevent leaks.

20. Noise considerations should be considered in school design.

21. Landscaping design should give consideration of using minimal irrigation.

22. Although trends in design and construction seem to be academically oriented, designers shouldn't forget that schools are learning communities, in such that the arts, humanities, athletics, industrial arts and career preparation space are necessary to complement academic needs.

Construction Practices

School officials often lack an understanding of construction trade and employment practices; local, state or federal construction law; and the uniqueness of the

construction industry. Because of this scenario, public entities have to be on guard for less than scrupulous organizations that attempt to form relationships and contract to build and renovate schools.

Although construction is a vital and mostly worthy industry, in some quarters, it has a reputation for less than honorable practices. Why is this? There is no simple answer, but in most cases, there are three major reasons.

1. Schools boards and administrators take for granted there are few problems in school construction so they don't pay attention and don't do the necessary homework in creating standards of performance up front that is used in determining and selecting construction professionals who are best qualified and are the best fit to design and manage their project.

2. Boards and administrations view all construction contractors and their workforces as created equal, therefore failing to create reasonable and pertinent qualifications and criteria in bid documents to ensure the selection of qualified and responsible contractors.

3. School officials take the advice of construction professionals and sign off on practices and expenditures without thoroughly investigating what they are signing, agreeing to or paying for.

Due to these major reasons and the nature of the complexities of construction, schools can find themselves in a bad way during any phase of the job, from pre-planning to final inspections.

Because of its complexities, construction is an industry that presents many risks so that deception, dishonesty and bad construction practices can happen unless meticulous oversight is undertaken by school officials. Because millions of taxpayer dollars are at stake and the safety of students are at risk, schools have to be constantly on guard.

Bad & Illegal Practices

Public sector construction where millions of tax dollars are at stake can be a breeding ground for fraudulent practices such as shell companies, fictitious expenses, falsified wages, fake invoices and false workers compensation claims. Often, these types of expenditures are approved even under the most watchful eyes.

Substandard materials and labor can be another source for bad behavior. For example, if schools are paying for top quality materials, they should be getting what they pay for. Some contractors have billed for top quality materials and instead use cheap or less than standard products. Also, because much of what is built or renovated is underground, above ceilings or behind walls, some construction firms knowingly engage in shoddy work and pass it off as quality work. Concrete, wiring,

plumbing, heating, cooling, roofing and painting are just some of the areas that can be taken advantage of. Although examinations by building inspectors can discover and correct building code violations, many deficiencies go unnoticed because they are out of sight.

Wage and tax fraud can be another area of dishonesty practiced by some in the construction industry. Michigan is a prevailing wage state. But many examples are out there where contractors have violated Michigan's Prevailing Wage Act (Act 166) on school construction projects. Prevailing wage abuse has become so prevalent that the State of Michigan now posts a website listing a Prevailing Wage Act Violators List (www.michigan.gov/documents/cis/PW_Violatiors_pix_205234_7.pdf).

Prevailing wage assures that Michigan workers will receive fair and reasonable pay for their labor based on rates that exist in a community/region. Prevailing wage provides protection to taxpayers so unscrupulous contractors and untrained workers don't befall those same communities by undercutting wages and construction quality.

Another dishonest construction practice is the misclassification of workers. Some construction employers illegally use workers as independent contractors rather than company employees. This scheme lets companies avoid normal payrolls, so they don't pay Social Security or Medicare, workers' compensation, unemployment insurance, or overtime, all of which are required by law.

The purpose of misclassifying workers by construction employers is to undercut labor costs thereby winning more construction contracts. This practice underbids honest, law-abiding, taxpaying competitors thereby increasing the profit of dishonest companies.

Michigan Governor's Interagency Task Force on Employee Misclassification cited a report issued in December, 2008 by Dale L. Belman and Richard Block of Michigan State University's School of Labor & Industrial Relations. Based on their assessment of random audits by Michigan's unemployment insurance system, they estimate 30% of Michigan employers misclassify employees as self-employed workers or underreport employee payroll. In the construction industry, the MSU report estimated employers misclassify about 19% of the time.

So What Can Be Done?

Just as no one builds or renovates a school without architectural plans, no one should build a school without preparing a detailed operational plan of engaging construction professionals and construction contractors. There are important measures school districts can take to avoid legal disputes. Disputes can happen early in the construction planning process as well as during actual construction. Many of these disputes require the school's legal council. The following is an outline

of measures school districts should undertake to protect themselves to assure a quality school construction project.

Don't wait to engage a planning process

School districts have broad discretion in selecting construction professionals to design and manage their project. Often schools don't agree on a necessary set of standards required in hiring construction professionals and are left to conduct cursory interviews of architects, construction managers, general contractors and other construction consultants.

Most if not all schools will require an architect or designer, but schools will have to determine for themselves if they plan to hire a general contractor or construction manager to manage the project. Both methods have advantages and disadvantages and there is no secret formula to determine which one to use. Each school's project will ultimately be the determining factor whether a general contractor or construction manager is hired.

After contacts are made with construction professionals who may be interested in a school's project, at a minimum, the criteria listed below should be used to screen applicants:

1. Training and experience, including that of partners, associates and employees,
2. Planning ability and know-how in interpreting educational specifications,
3. Promptness and ability to meet deadlines,
4. Specification writing, accuracy and sufficiency of detail,
5. Imagination in design, appearance and utility of work,
6. Adequacy of supervision and inspection of previous jobs,
7. Integrity of the firm,
8. Relations with other construction professions, contractors, trade groups and labor,
9. The firm's command of quality performance,
10. Experience with government agencies and adherence to local, state and federal laws,
11. Adequacy of staff for building to be designed or built,

12. Business practices of the firm including the ability to foresee and prevent cost overruns and inhibit change orders,

13. Examples of previous plans, specifications and construction,

14. Willingness to work with a coordinated construction plan if desired by the Board of Education,

15. Ability and reputation to follow up on any problems that surface after construction and during periods, in which performance and material guarantees and goodwill are in effect,

16. Responsibility for correction of faulty or ineffective design or construction,

17. Economic factors, such as demonstrated ability to design and provide well-constructed buildings at a reasonable cost,

18. A list of school construction projects the applicant, or any predecessor firm, has worked on over the past five years, including projects currently in progress or for which the applicant recently has been retained,

19. For each school construction project built within the past five years:

    a) The name of the school district and the project's architect, engineer, construction manager, general contractor, design/build partnership, whichever applies, with contact information,

    b) A brief description of the project, including its location and the grade levels it was designed to accommodate,

    c) The project's construction superintendent, with contact information,

    d) The type of construction – new, addition, renovation, or mixed,

    e) The square footage of the building(s) involved,

    f) The construction start and completion dates,

    g) Whether or not the project was completed on schedule and, if not, the causes and extent of delays,

    h) The amount of time after occupancy required to complete punch-list items,

    i) The total construction cost compared to the construction budget,

j) The costs associated with project change orders or overruns, with an explanation of any abnormalities,

k) Any fee concessions or payments made to the owner in excess of $10,000 as a result of an alleged error or omission by the applicant,

l) Litigation or arbitration involving the applicant arising from the project, including the names and phone numbers of opposing parties, court and docket numbers, and a brief explanation of pertinent claims and results,

m) Information about litigation or arbitration for any projects the applicant has been involved with over the past ten years, school construction or otherwise,

n) The names of key individuals to be assigned to the project and their relevant training, professional experience and specific experience with schools, and

o) Information about the applicants background, financial status/capabilities, insurance and legal status (corporation, partnership, LLC, etc.)

After this screening and more than two firms have been identified, presentations should be given by the finalists and formal interviews need to be conducted by the board of education, after which the Board shall make its selection. A contract should be prepared and signed with the architect, engineer, construction manager, general contractor, design/build partnership or any other construction professional firm only after thorough review and recommendation by the school's legal counsel.

Determine the level of professional liability insurance

Many professional firms such as architects, engineers, construction managers, general contractors, design/build partnerships carry minimum insurance coverage. So what is "adequate" insurance for professional liability? Many school district construction projects costs tens of millions of dollars, so defective work could cost considerably more to correct than the amount of the professional firm's insurance. It's important that school districts consult legal counsel in determining the adequacy of construction insurance.

In some cases, insurance policies are written as "depleting," meaning that in the event of litigation or arbitration, the cost of legal fees and expert witness fees are deducted from the insurance funds available. If professional liability policies are issued on a "claims made" rather than on an "occurrence" basis, coverage may apply only during the period in which a claim is made rather than the period in which events occur that give rise to a claim. There can occur a problem if a hidden design or construction fault appears years later and the professional firm responsible is no longer in business.

One way to overcome some of these insurance issues is to require professional firms have a "project rider." A rider could take effect at the start of construction and extend for five years. Another option for providing additional protection is project liability insurance, whereby an insurance company provides coverage in the event of defective work by professional consultants.

The important point is that a school district should not simply assume that its professional consultants have adequate liability insurance coverage. Rather, the district must include adequate coverage in its construction plan. Also, keep in mind that some school-controlled insurance programs, which might cover such things as workers' compensation and property damage claims, don't include liability insurance for architects or project managers.

Clarify contract issues with professional consultants

Standard owner agreements with architects, construction managers and general contractors may not serve the best interests of a school district. Special attention should be given to:

1. Scope of basic, additional and contingent services that construction professionals provide,

2. Fee calculation and if determined by percentage, what is the percentage based upon. Does it include project contingencies or the construction manager's fee? Is the fee based on project estimates or on actual bids?

3. Approval of the architect's and construction manager's consultants so that agreements state the school district is an intended third party beneficiary in case of legal action regarding defective work.

4. Review of work performed by trade contractors. Standard agreements generally include a requirement that professional architects and others guard owners against defective work by visiting the site. Schools should consider identifying a minimal amount of these visits.

5. Standard of care agreements. Generally, the law requires that architects and others perform their duties with a standard of care. Schools should include a standard-of-care clause in agreements with architects and construction managers so there is no dispute regarding such expectations.

6. Legal and expert fees. Schools cannot recover fees such as attorney fees, expert witness fees in the event of a claim against an architect and other professional consultants even if the school prevails in court, unless the agreement includes a reimbursement clause.

7. Beware of multipliers. Standard agreements between schools and architects and other professional consultants allow them to charge a mark-up fee if consultants perform additional work beyond basic services. Although the standard mark-up is 20%, schools may want to negotiate this fee.

8. Construction manager scope of services and response. Schools should make sure that the scope of services identified and required by the school district and the construction manager's response be included in the construction manager's agreement. This obliges the construction manager to perform everything identified in the scope of the school's project as well as their response to the scope of work.

9. Supervisory services. Schools should specify that the agreed upon budget for the construction manager's services provide an adequate level of supervision in order to bring the project to a successful conclusion.

10. Conflict among construction agreements. Although it would seem obvious that contract provisions for architects, construction managers and trade contractors would coincide with each other, often this is not the case. School officials should perform a final review of all construction agreements to ensure they don't conflict or overlap.

Predetermine the methods used for dispute resolution

Although standard agreements of architects and construction managers regarding disputes with schools allow for mediation, and, without results, binding arbitration, these methods of dispute resolution may not be in the best interest of the school. There are many reasons why school districts might not be in a position to agree to a compromise at the onset of a construction dispute. There is a likelihood that the school in the early stages of a dispute might not know enough about a particular problem to agree to participate in mediation or arbitration.

In general, mediation and arbitration are often effective methods of resolving minor disputes. These methods though are not as effective as litigation when it comes to major disputes.

In regards to mediation, arbitration and litigation consider contract provisions as follows:

1. Require arbitration only for disputes less than a stipulated amount by using a range of $25,000 to $50,000.

2. Ensure that arbitration is mandatory only if it includes all pertinent parties. This can be accomplished by:

a Permitting the parties to opt out of arbitration if the dispute includes other parties not subject to mandatory arbitration, or

b Requiring all consultants, trade contractors and their respective subcontractors to agree to the same arbitration language in their agreements, so that arbitration includes all parties involved in the dispute.

3. Require that any litigation occur in a court with jurisdiction over the municipality where the school project is located.

4. Require responsible contracting criteria provisions in bid packages.

5. Bid packages contain the contract provisions to be entered into with trade contractors.

Review the non-technical contract provisions in bid packages

It's important that school districts authorize architects and construction managers to distribute bid packages only after a thorough review by the school's legal counsel. This legal review is important because it governs parties during construction. The documents reviewed include school-contractor agreement, general terms and conditions, supplementary terms and conditions and the non-technical specifications.

Agreements made between schools and trade contractors should contain many of the same types of issues that are contained with architects and construction managers, such as dispute resolution and the reimbursement of school district legal counsel and expert fees in the event of a claim over defective work. Some of the more important subjects school districts may wish to address include:

1. No delay damages against an owner,

2. Liquidated damages and other damages for contractor delay or labor disputes, and

3. Reviewing plans and specifications and reporting defects.

Develop surety bonds to include with bid packages

School districts should consider developing their own surety bonds to include with bid packages instead of using the standard industry bond forms. This can be of value with respect to performance bonds. By indicating that the performance bond remains in effect until the trade contractor completes all work defined in contract documents, the bond remains in effect even if years after project completion the owner identifies construction that was never properly completed.

Develop responsible contracting guidelines to include with bid packages

A responsible contractor policy is a set of enforceable qualifications adopted by a formal meeting of the board of education (trustees) and incorporated into the school's construction bid specifications by the school's construction manager and design professionals. Once adopted and generated into the bid documents, these important qualifications let the entire community know that your district wants competent and qualified construction firms and personnel to build and renovate your schools.

Below is a sample school district responsible contractor policy:

A responsible contractor policy is a set of guidelines that a contractor must follow, and a set of qualifications a contractor must possess, in order to construct or renovate for (Name of School). The purpose of this policy is to assist the school district in awarding school building construction contracts to the "lowest responsible bidder." The requirements of the policy, including any obligation of contractors to respond to the responsibility criteria and other criteria as listed, shall be incorporated into all bid documents used to solicit construction project bids. The school district can refuse to hire any contractor who does not meet the requirements of this policy. Furthermore, the school district may reject any bid proposals, which, in the school district's opinion may contain inaccurate information. The school district reserves the right to accept or reject a bid or combination of bids.

The school district's role in selecting a contractor(s) on construction projects shall be determined from the lowest responsible bid on the construction project(s) that meet the requirements of this policy.

DEFINITIONS

Construction Project – the labor and material necessary for the construction, renovation, repair or improvements to real property, except repair in emergency situations, which requires solicited bids so that the work, when complete, shall be ready for service for its intended purpose and shall require no other work to be a completed system or component.

Lowest Responsible Bidder – a responsible contractor with the lowest cost bid that satisfies the requirements of all local, state, and federal laws; this policy; any bid documents used to solicit bids; and any other guidelines and specifications required for the construction project. Submitted bids must breakout labor costs from material and equipment costs.

Responsible Contractor – any contractor or sub-contractor who is sufficiently qualified to satisfactorily perform the construction project, or any relevant part of the construction project, as determined by the school district, based on:

1. contractor or sub-contractor evidence of qualifications or lack thereof, as described in this policy;

2. The contractor or sub-contractor's compliance with all applicable local, state and federal laws; an

3. Input from the schools architect and/or construction manager if applicable.

All required contractor/sub-contractor financial and privileged information submitted to the school district shall be kept from public disclosure unless required by law.

RESPONSIBILITY CRITERIA

The school district shall consider at least each of the criteria listed herein in determining whether a contractor is a responsible contractor. The list set forth below shall in no way limit any additional criteria that the school district may deem relevant for purposes of making a determination of contractor responsibility. Any such criteria deemed relevant by the school district that is in addition to the items listed below shall be specified in the bid documents together with the requirements of this policy.

The bid documents for a construction project shall require any contractor or sub-contractor bidding on the project or any part of the construction project, to submit with its bid, written responses and other information demonstrating its compliance (or noncompliance and the reason for such noncompliance) with the listed Responsibility Criteria and any other criteria declared pertinent by the school district and included in the bid documents. For each separate bid package of a construction project, the school district may accord such weight as it deems appropriate to the Responsibility Criteria and any other criteria included in the bid documents for purposes of determining whether a contractor is a responsible contractor.

The school district will consider the following information in determining whether a contractor is a responsible contractor. This list is not in any particular order or intended to be all inclusive or exhaustive:

1. General information about the bidder's company, its principals, and its history, including state and date of incorporation.

2. Trade categories and information regarding the state and local licenses and license numbers held by the applicant.

3. A confirmation that all sub-contractors, employees and other individuals working on the construction project will maintain current applicable licenses with the Michigan Bureau of Construction Codes and Fire Safety and as may otherwise be required by law for all licensed occupations and professions.

4. The ratio of masters or journeypersons to apprentices proposed to be used on the construction project job site.

5. Documentation that the bidder maintains, participates in, and contributes to a bona fide apprenticeship training program as required by the State of Michigan and approved by the United States Department of Labor, Bureau of Apprenticeship and Training (BAT) if apprentices are used on the job site.

6. Verification that no illegal non-US citizens will work on the project nor will the fraudulent use of the federal government's H2B visa program for immigrant construction workers be allowed.

7. A statement of determination from the contractor/sub-contractor on what percentage of their work force can be drawn significantly from area residents because it's a goal of the school district to utilize, in its construction activities, local residents as much as is economically feasible while retaining the high quality of construction required for its construction activities. The Board will consider, in evaluating which bids best serve the interest of the District, the extent to which bidders are able to achieve this goal.

8. A statement regarding the bidder's staffing capabilities and labor sources including sub-contractors and a verification from the bidder that construction workers will not be misclassified, nor will independent contractors be used on site in violation of state and federal law.

9. Documentation of an on-going MIOSHA-approved safety-training program for employees used on the proposed job site.

10. Evidence of a worker's compensation Experience Modification Rating ("EMR"). Preference will be given to contractors and subcontractors who exhibit an EMR of 1.1 or less.

11. A list of similar projects completed within the past five (5) years, including dates, clients, approximate dollar value, and size. Documentation from these previous projects of comparable size/complexity, including but not limited to all costs relating to the bidder's timeliness, performance, quality of work, extension requests, contractual fines and penalties imposed (including proof of such fines and penalties), liens filed, history of claims for extra work and any contract defaults with an explanation of the reason for the default and how the default was resolved.

12. Evidence of experience with construction techniques, trade standards, quality workmanship, project scheduling, cost control, management of projects of comparable size/complexity, and building codes by documenting the bidder's ability and capacity to perform the project. The bidder must identify those portions of the project it reasonably believes will be sub-contracted in the

names of the sub-contractors.

13. Audited financial information current within the past twelve months, such as a balance sheet, statement of operations, and bonding capacity. Evidence that the applicant has financial resources to start up and follow through on the project(s) and to respond to damages in case of default as shown by written verification of bonding capacity equal to or exceeding the amount of the project. The written verification must be submitted by a licensed surety company rated ("B+" or better) in the current A.M. Best Guide and qualified to do business within the State of Michigan.

14. A list of all litigation and arbitrations currently, pending and within the past five (5) years, including an explanation of each. Evidence of satisfactory resolution of claims filed by or against the bidder asserted on projects of the same or similar size within the last five (5) years. Any claim against the bidder shall be deemed to have been satisfactorily resolved if final judgment is rendered in favor of the bidder or any final judgment rendered against the bidder is satisfied within ninety (90) days of the date the judgment became final.

15. Disclosure of any violations of any state, federal or local laws, including OSHA violations, violation of any state or federal prevailing wage laws, worker's compensation or unemployment compensation laws, rules or regulations, issued to or against the bidder within the past five years.

16. Disclosure of any debarment by any federal, state or local governmental unit and/or findings of non-responsibility or non-compliance with respect to any public or private construction project performed by the bidder.

17. Proof of insurance, including certificates of insurance, confirming existence and amount of coverage for liability, property damage, workers compensation, and any other insurances required by the proposed contract documents.

18. Provide references from individuals or entities the bidder has worked for within the last five (5) years including information regarding the records of performance and job site cooperation.

19. Verification of an existing Fitness for Duty Program (drugs and alcohol) of each employee working on the proposed jobsite.

20. Documentation as to whether the bidder provides health insurance and pension benefits to its employees.

21. A criminal records check for each employee the bidder proposes to use on the construction site.

22. A warranty statement regarding labor and materials.

23. Evidence of any quality assurance program used by the bidder and the results of any such program on the bidder's previous projects.

24. Have an existing Michigan School-to-Registered Apprenticeship Program partnership within the school district, intermediate school district/secondary career technical center or community college.

25. Evidence of Equal Employment Opportunity Programs for minorities, women and small businesses.

26. Assurance that all construction work for this project shall proceed economically, efficiently, continuously and without interruption.

SUBSTANTIALLY LOW BID REVIEW

In the event the amount of the lowest bidder's bid appears disproportionately low when compared with estimates undertaken by or on behalf of the school district and/or compared to other bids submitted, the school district reserves the right to inquire further of the apparent lowest bidder to determine whether the bid contains mathematical errors, omissions, and/or erroneous assumptions, and whether the apparent lowest bidder has the capability to perform and complete the contract for the bid amount.

SUSPENSION OR REVOCATION

The school district may, for good cause, disqualify or suspend a contractor for a specified period of time or revoke the contract. Causes for disqualification, suspension or revocation shall include, but not be limited to, one or more of the following:

1. Inaccurate or misleading statements on the contractor's qualification statements.

2. Declared in default by the school district.

3. Adjudged to be bankrupt.

4. Performance, in connection with contract work, becomes unsatisfactory to the school district, based on the school district asserting and recovering liquidated damages in an action against the contractor.

5. Contractor's license becomes suspended or revoked.

APPEAL

A contractor whose contract with the School District has been suspended or revoked

shall be given the benefit of reconsideration and appeal as follows:

1. The aggrieved contractor may, within ten (10) days after receiving notification of such action, request reconsideration in writing. The contractor may submit additional information at the time of appeal.

2. The School District shall act upon the contractor's request within thirty (30) calendar days after the filing and shall notify the contractor of its action to adhere, to modify, or reverse it original action. The School District may require additional information to justify the reconsideration.

Date adopted: _____

Some Michigan Organizations Who Have Adopted Policies on Responsible Contracting

PUBLIC SCHOOLS
Allendale Public Schools
Atlanta Community Schools
Bangor Township Schools
Battle Creek Public Schools
Brandywine Public Schools
Buena Vista School District
Chelsea School District
Climax-Scotts Community Schools
Comstock Park Public Schools
Coopersville Area Public Schools
Decatur Public Schools
Elkton-Pigeon Bayport Schools
Fitzgerald Public Schools
Flat Rock Schools
Fremont Public Schools
Free Soil Community School
Galesburg-Augusta Community Schools
Galien Township Schools
Grand Rapids Public Schools
Gull Lake Community Schools ***
Hale Area Schools
Holton Public Schools
Jackson Public Schools
Kent City Community Schools
Lakeview School District
L'Anse Creuse Public Schools
Lansing School District
Lincoln Consolidated School District
Mason County Central School District
Mecosta-Osceola ISD
Mendon Community Schools
Meridian Public Schools
Mesick Consolidated Schools
Michigan Association of School Boards *
Montabella Community Schools
Montague Area Public Schools
Mt. Morris Consolidated Schools
Muskegon Public Schools **
Newaygo County RESA
Newaygo Public Schools
Oakland Schools
Otsego Public Schools
Parchment School District
Pennfield Schools
River Rouge School District
Romulus Community Schools
Roseville Community Schools
Saginaw Public Schools
Saline Area Schools
Sanilac ISD
South Haven Public Schools
Swan Valley School District
Trenton Public Schools
Tri County Area Schools
West Branch-Rose City Area Schools
White Cloud Public Schools
Yale Public Schools

COLLEGES / UNIVERSITIES
Michigan State University
Western Michigan University

LOCAL GOVERNMENTS
City of Battle Creek
City of Grand Rapids
Kalamazoo County
Muskegon County

LIBRARIES
Detroit Public Library

*The Michigan Association of School Boards has adopted responsible contractor policies (4760, 3660 & 4770). The original contribution of language in the formulation of policies was provided by the West Michigan Construction Alliance and the Michigan Building and Construction Trades Council. The above organizations and their designated and authorized representatives have full rights to the use of the policies.

**Muskegon Public Schools was the first Michigan school district to adopt a responsible contracting policy.

*** Gull Lake Community Schools developed a Responsible Contractor Policy for their 2004 bond issue only.

Planning for involvement in contractor disputes

There are two big decisions for a school district during construction, when to get involved in a developing dispute and when to involve the school's legal counsel. These decisions have to be made on a case-by-case basis. Although a school district is already paying its construction professionals to manage the project and should not spend undue time or money duplicating efforts, many construction lawyers can identify situations where they might have kept a minor problem from blowing up to a major one, had the school district been involved early to help resolve it.

It's also important to make sure facts of any dispute are properly documented. Some construction professionals and contractors are good at documentation, others aren't. It's the school district's job to make sure that the school's positions are not compromised by a lack of proper documentation.

Monitoring Prevailing Wage

As earlier mentioned, Michigan is a prevailing wage state. Michigan's prevailing wage law covers construction workers employed on state financed or sponsored construction projects. Under the act, the State's Wage and Hour Division establishes wage and fringe benefit rates to be paid construction workers on state projects.

It's not uncommon on a construction site to have up to 15 different construction crafts working. It's inevitable that someone is going to charge that workers on the project are not receiving prevailing wage compensation required by the law. To minimize problems, schools in partnership with their construction professionals should highly consider bringing in a third party to monitor prevailing wage compliance. One such organization is the Michigan Fair Contracting Center (MFCC). The Center is a non-profit company whose focus is assisting both contractors and contracting agencies to meet the complex requirements of Michigan prevailing wage law.

To be more proactive regarding the payment of prevailing wage, schools should make sure that compliance language be included in bid documents. Included in this bid language, schools should make sure that any contractors or sub-contractors who are found in violation of prevailing wage, the school in conjunction with their construction professionals withhold any and all payments to the employer until the employer remedies and any all violations.

Determine the need for an independent inspector

On any given construction project, especially large ones and ones where schools lack the necessary construction oversight, the school should consider hiring an independent inspector. Also known as an owner's project representative, bringing on an independent inspector can help ensure a construction site is free of fraud, waste and negligence, potentially saving incredible amounts of tax dollars.

Using an inspector is only effective when three major factors are considered:

1. The inspector is fully qualified. This persons needs to well-versed in major trade areas such as electrical and mechanical.

2. Make sure the inspector is not spread to thin. The inspector must be able to monitor numerous projects at once.

3. The inspector must have credibility and the ability to be assertive when dealing with contractors.

Once contracts are signed, schools put themselves at the mercy of construction professionals and contractors so it's logical for schools to bring in an independent inspector. Some will say that bringing in an inspector costs money that is needed for the construction project. Schools need to consider if the perceived benefits of bringing in an independent inspector outweigh the costs. Certainly, an independent inspector can be a tremendous asset to any construction project, by keeping tabs on construction progress, compliance with the specifications, compliance of numerous codes and standards and looking out for signs of illicit activity. Also, inspectors can be an added asset to schools as school administrators and staff, get accustomed to their new building.

Summary

School officials need to do their homework and plan meticulously. School construction can be a difficult task especially for school leaders who are inexperienced. Construction can be expensive, time consuming and very disruptive. Properly applying the measures recommended in this paper can significantly increase the chances of completing a school construction project on time, within budget and without litigation.

In preparation for construction, school officials should seek additional information beyond this paper through the school's legal counsel.

Good luck!

About the West Michigan Construction Alliance

The West Michigan Construction Alliance (WMCA) is a construction labor-management partnership composed of contractor organizations, signatory contractors, organized labor and affiliate members. The WMCA is committed to a program of quality craftsmanship and professional contracting. We provide the highest quality, most cost effective and safest delivery of construction products and services to our customers. As a public service we assist school districts and other organizations with the necessary information they need to know in order for them to be successful with construction projects.