

Legislative Analysis



MICHIGAN-BASED BUSINESS PREFERENCE IN SCHOOL CONTRACTING

Mitchell Bean, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 5639 as enrolled
Public Act 540 of 2008
Sponsor: Rep. Dudley Spade
House Committee: Education
Senate Committee: Appropriations

Third Analysis (1-26-09)

BRIEF SUMMARY: The bill would allow the boards of intermediate districts, school districts, and charter schools to give a preference to Michigan-based businesses when they are responding to competitive bids for school construction, supplies, materials, and equipment.

FISCAL IMPACT: The bill would have no direct fiscal impact on local school districts or the state.

THE APPARENT PROBLEM:

Currently, all school officials and boards of education in Michigan public schools must seek competitive bids for projects or purchases costing just over \$19,000—an amount that increases annually, in line with the rate of inflation in the economy.

Competitive bidding is governed by Section 1267 of the Revised School Code, although the code, itself, does not contain a definition of "competitive bid." Instead, a description of the "competitive bid" process—both its rationale and its protocols—is found in Attorney General Opinion 3303 of 1959. There, the Office of the Attorney General writes: a school board is required to request bids "to obtain a cross-section view of the particular market with which it is concerned, and apprise itself of the integrity and technical qualifications of the prospective contractors." The opinion notes that "the aim of the board should be to *secure the most able and efficient performance, from the most responsible contractor, on terms beneficial to the public.* The lowest bid does not always respond to this test."

The Thrun Law Firm, P.C. (offering counsel to hundreds of Michigan school districts) advises school board members when seeking the "lowest responsible bidder" to consider the school district's direct experience with the contractor, as well as the experience of other school districts with that contractor; the contractor's history of satisfactory performance, of reasonable change orders, and of questionable or unfounded litigation; and finally, the recommendation of the architect and/or construction manager based on past experience with the contractor. Ultimately, school officials must award the work to the lowest responsible bidder. If the low bidder is deemed responsible, the award should be made to that low bidder. Failure to do so can result in penalties, including the

imposition of a fine in an amount equal to (not more than) 10 percent of the cost of the project, or imprisonment for up to one year, or both.

At times, Michigan firms are underbid by out-of-state firms during the competitive bidding process—sometimes by only a few hundred dollars—an occurrence that often happens along the borders of the state. For example, in Lenawee County at the Intermediate School District, an Ohio firm underbid a Michigan-based firm by \$400 on a \$428,600 project in June 2007.

Because public schools depend on the support of the local business community, and local taxpayers make local public schools possible, school officials prefer to work with local Michigan-based companies whenever possible. Some school officials have suggested the statute be changed to allow them (but not require them) to exercise their discretion by extending a preference to a Michigan-based company that over-bids an out-of-state competitor.

THE CONTENT OF THE BILL:

House Bill 5639 would amend the Revised School Code to allow the boards of intermediate districts, school districts, and public school academies (or charter schools) to give a preference to Michigan-based businesses when they are responding to competitive bids for school construction, supplies, materials, and equipment.

"Michigan-based business" is defined to mean a business that would qualify for a preference in a procurement contract with the State of Michigan under Section 268 of the Management and Budget Act (MCL 18.1268).

[Section 268 of that act concerns bidders for state contracts, and includes a description of a "Michigan business," determined by several criteria including filed tax returns; and also contains the requirements that businesses certify they meet such criteria, and allow the Department of Treasury to release their tax information to the officials receiving bids. Section 268 also addresses bid preferences when out-of-state bidders seek work in Michigan.]

Under House Bill 5639, the boards of an intermediate school district, local school district, or charter school may adopt and implement a local policy that gives a preference to a Michigan-based business in awarding a contract. The policy can provide for a preference based on the status of the primary contractor as a Michigan-based business, or based on the status of one or more subcontractors of the primary contractor, as Michigan-based businesses, or both.

Any policy adopted must be consistent with federal statutes and regulations, and not be applied to a contract that is to be paid with federal funds.

The bill allows the Department of Treasury to disclose to school officials information to verify that a business qualifies as a Michigan-based business (using the definition in the Management and Budget Act cited earlier).

The bill specifies that neither the decision to adopt, implement, or apply a policy, nor the decision not to adopt a policy, would create a cause of action.

House Bill 5639 also specifies that officials of a school district are not required to obtain competitive bids for purchasing food, unless the food is purchased in a single transaction costing \$100,000, or more.

In addition, currently under the Revised School Code, the board of an intermediate school district, a school district, or a charter school cannot purchase an item or a group of items in a single transaction costing \$17,932 or more, unless competitive bids are obtained, and the purchase is approved by the board. That threshold is increased annually in line with inflation. The bill would increase the competitive bid threshold for a single transaction from \$17,932 to \$20,959.

MCL 380.623a et al.

ARGUMENTS:

For:

In February 2008 Michigan's unemployment rate was 7.2 percent; by year's end, the unemployment rate neared 10 percent, the highest in the United States. Indeed, Michigan rate of employment has often ranked at or near the top during the past two years. According to the Department of Labor and Economic Growth, there are 350,000 unemployed people in Michigan, and another estimated 100,000 residents are marginally employed. The Department of Labor and Economic Growth also reports there are 23,000 jobs unfilled in Michigan.

In order to match Michigan jobs with Michigan residents, 12 bills were passed by the House of Representatives to require recipients of state contracts and economic development incentives to hire Michigan residents first whenever possible, and not to knowingly hire those workers who are in the United States illegally.

This bill has a similar aim, but it is voluntary. It allows Michigan school officials to increase their efforts to hire qualified Michigan residents, in order to bring down the state's unemployment rate.

Further, when Michigan employers benefit from local contracts (such as being paid by local public schools for a construction project), their employees spend their paychecks locally. Their economic behavior as consumers strengthens the community whose parents and children the public school serves, and upon whom the very existence of the public school depends.

For:

The bill, as amended, is a good one. An earlier version capped the amount of money a school board could spend to maintain its "percentage disregard" (in order to favor local contractors) at 10 percent per contract, or \$100,000, whichever was less. Opponents worried that any "percentage disregard" policy would promote a culture of inflated costs in which local contractors purposely over-value their work when offering bids in order to increase their profit, knowing full well that local school officials would select them despite their higher cost. That provision has been eliminated in the enacted version of the bill.

Against:

Opponents say public purchasing policies should be entirely market-driven, and should avoid monetary rewards for less than fully competitive behavior. Consequently, the bill's opponents urge that fellow policymakers reframe the policy problem to ask: Why are the out-of-state bidders lower? Is the problem prevailing wage rates? Tax burdens? Regulatory costs? If so, opponents say these costs should be lowered, rather than adopt a policy that continues and perhaps exacerbates higher costs to taxpayers.

Legislative Analyst: J. Hunault
Fiscal Analyst: Mary Ann Cleary
Bethany Wicksall

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.