

Bidding and Procurement: Legal Strategies and Best Practices During a Pandemic

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Bidding and Procurement: Legal Strategies and Best Practices During a Pandemic

Presented By: Kenneth M. Florey and Howard A. Metz

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Bidding
Requirements
105 ILCS 5/10-
20.21



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Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice.
If you have an individual problem or incident that involves a topic covered in this document, please seek
a legal opinion that is based upon the facts of your particular case.

Section 10-20.21 of the School Code

- Requires school districts to publicly bid all contracts for purchase of supplies, materials or work involving an expenditure over \$25,000, or a lower amount as required by Board policy.
 - Invitation to bid must be advertised in newspaper published in the district at least 10 days before the deadline to submit bids.
 - Bidder must receive at least three days' notice of time and place of bid opening.
 - Bids must be sealed by the bidder and opened by Board member or district employee at public bid opening where the bids are announced.

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Section 10-20.21 of the School Code

- Contracts shall be awarded to “lowest responsible bidder considering conformity with specifications, terms of delivery, quality, and serviceability.”

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COVID-19:
Adjusting Your
Process for Bids,
Purchases, and
Vendor Payments

E-Bidding, Revisited

- Section 10-20.21 of the School Code: authorizes electronic process for communicating, accepting, and opening competitive bids.
 - Bidding process must include safeguards:
 - At the time of bid opening, the administrator conducting the bid opening must login to a specified database using a unique name and password previously assigned to each bidder to allow access to the bidder's specific bid project number.
 - The specified electronic database must be on a network that (i) is in a secure environment behind a firewall; (ii) has specific encryption tools; (iii) maintains specific intrusion detection systems; (iv) has redundant systems architecture with data storage back-up, whether by compact disc or tape; and (v) maintains a disaster recovery plan.

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COVID-19:
Adjusting Your
Process for Bids,
Purchases, and
Vendor Payments

Do we still need to take our contracts and purchases to the Board for approval?

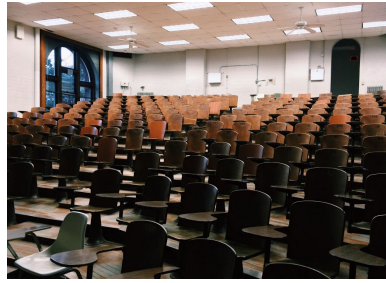
- Check your board policy on the level of administrative authority
- Seek temporary administrative authority from your Board
- Seek approval, award, or other action at a virtual board meeting
- Hold a short "skeleton meeting" to temporarily delegate authority to your administration.



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COVID-19:
Adjusting Your
Process for Bids,
Purchases, and
Vendor Payments

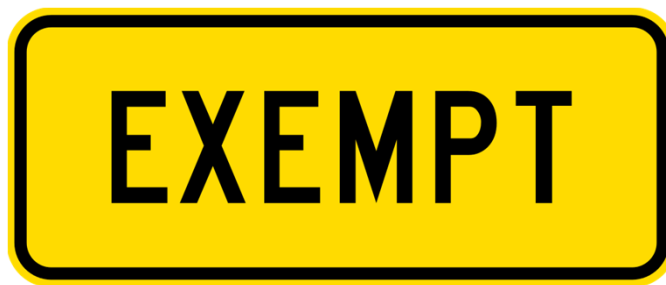


- Can we cancel mandatory pre-bid meetings and/or bid openings in light of social distancing recommendations?
- What is the best practice for conducting bid openings?

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Bidding
Exemptions –
105 ILCS 5/10-
20.21



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Professionals

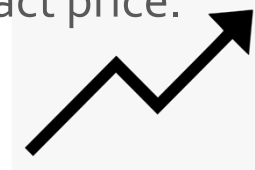
- Contracts for the services of individuals possessing a high degree of professional skill where the ability or fitness of the individual plays an important part (architects, engineers, consultants, construction managers, etc.).

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Change Orders

- Publicly bid contracts for materials or work that, due to unforeseen circumstances not the fault of the contractor, must be revised to increase the contract price by less than 10% of the contract price.



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Dealer Maintenance

- Contracts for the maintenance or servicing of, or provision of repair parts for, equipment which are made with the manufacturer or authorized service agent of that equipment where the provision of parts, maintenance, or servicing can best be performed by the manufacturer or authorized service agent.

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Data Processing

- Purchases and contracts for the use, purchase, delivery, movement, or installation of data processing equipment, software, or services and telecommunications and interconnect equipment, software, and services.

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Copy Machines and Supplies

- Contracts for duplicating machines and supplies.



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Natural Gas

- Contracts for the purchase of natural gas when the cost is less than that offered by a public utility.

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Used Equipment

- Purchases of equipment previously owned by some entity other than the district itself.

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Small Remodeling Project Exception

- Contracts for repair, maintenance, remodeling, renovation, or construction not exceeding \$50,000 *and not* involving a change or increase in the size, type, or extent of an existing facility.



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IGAs

- Contracts for goods or services procured from another governmental agency.

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Single Source

- Contracts for goods or services which are economically procurable from only one source, such as for the purchase of magazines, books, periodicals, pamphlets and reports, and for utility services such as water, light, heat, telephone or telegraph.

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Perishable Foods and Beverages

- Contracts for the purchase of perishable foods and perishable beverages.

Purchase

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Student Transportation

- Contracts providing for the transportation of pupils, which contracts must be advertised in the same manner as competitive bids and awarded by first considering the bidder or bidders most able to provide safety and comfort for the pupils, stability of service, and any other factors set forth in the request for proposal regarding quality of service, and then price. However, at no time shall a cause of action lie against a school board for awarding a pupil transportation contract per the standards set forth in this subsection (a) unless the cause of action is based on fraudulent conduct.

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Emergencies

- Funds expended in an emergency and approved by $\frac{3}{4}$ of the members of the Board.

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Governmental Joint Purchasing Act 30 ILCS 525/1, et seq.

- Allows school districts to jointly purchase personal property, supplies, and services with any other governmental unit.
- The bidding procedures in Section 4 of the Governmental Joint Purchasing Act supersede the bidding procedures under Section 10-20.21 of the School Code.

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Governmental Joint Purchasing

- Needs to meet certain legal requirements in accordance with both:
 - Cooperative consists of all government agencies.
 - Purchases must be based on competitive solicitations.
 - Bids and proposals solicited by public notice as specified by the Joint Purchasing Act.
 - May solicit bids or proposals by sending requests by mail to prospective suppliers.



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Governmental Joint Purchasing

- All purchases, orders or contracts shall be awarded to the lowest responsible bidder or highest-ranked proposer, taking into consideration:
 - The qualities of the articles or services supplied;
 - Their conformity with the specifications;
 - Their suitability to the requirements of the participating governmental units; and
 - The delivery terms.

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Governmental Joint Purchasing

- The Seller bills each governmental unit separately for its proportionate share of the cost of the personal property, supplies or services purchased.
- The credit or liability of each governmental unit shall remain separate and distinct. Disputes between bidders and governmental units shall be resolved between the immediate parties.

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Strategies for Success with Joint Purchasing Options:

- Get informal quotes or estimates from local vendors/contractors first. It may be cheaper to use the traditional bidding method.
- Look at the offerings of all of the cooperatives before deciding to "qualify" one particular cooperative.
- Have legal counsel provide an opinion on whether participation in a particular cooperative will meet the requirements of Illinois law.
- Examine the terms for participation; is there an entry fee? Is there a participation fee? Are there other costs of participation?



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Strategies for Success with Joint Purchasing Options:

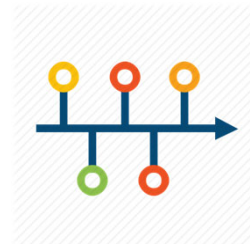
- Examine the master agreement (or have your counsel examine it). Identify any unacceptable business or legal terms and conditions.
- Confirm in advance that you will be able to amend terms and conditions to meet your business expectations, and to comply with Illinois law.
- Investigate the actual vendor, contractor, or service provider.

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Bid Timelines

- Construction
 - Architect/Owner project design
 - Board of Trustees Feedback/Community Engagement
 - Zoning Approval (if necessary)
 - Bid Publication
 - Board Approval
 - Other – Materials lead time, etc.



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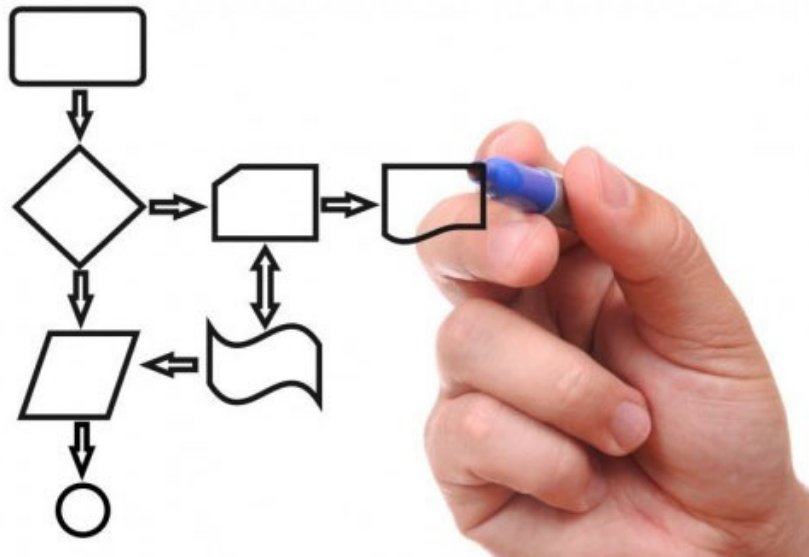
Bid Timelines

- Services, Supplies and Material
 - Work back from delivery date

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The Bidding Process



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Preparing Bid Specifications

- Certainty Required
 - Part numbers
 - Manufacturer input
- Sole Sourcing

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Bid Submittals

- Sealed Bids
- Electronic Bids
- Timeliness of Bids
- Modification, Withdrawal or Re-submittal of Bids Before Bid Opening

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Public Opening and Reading of the Bids

- Withdrawal or Modification after the Bids Are Received



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Awarding the Bid

- Criteria
 - Lowest
 - Alternate Bids
 - Responsive
 - Material Defects – Nonwaivable
 - Minor Variances – Waivable

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Awarding the Bid

- Responsible
 - Pre-qualification of Bidders
- Post-Bid Pre-Award Negotiations

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Rejecting the Bid

REJECTED

- Discretion “to reject any and all bids.”
- Documenting the Basis for Awarding/Rejecting Bid

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Board Recommendation

- Recommended components
 - Recommended bid submission
 - Bid Tabulation
 - Contract

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Board Recommendation

- Concise and factual
- Include signature docs
- Prepare for questions

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Criminal Statutes Related to Bidding

- Bid Rigging – 720 ILCS 5/33E-3
 - A person commits bid rigging when s/he:
 - (1) Knowingly agrees with a competitor concerning a bid submitted or not submitted by such person to a unit of State or local government;



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Criminal Statutes Related to Bidding

- Bid Rigging – 720 ILCS 5/33E-3
 - A person commits bid rigging when s/he:
 - (2) With the intent that the bid submitted or not submitted will result in the award of the contract to the competitor; and either:
 - (a) Provides the competitor or receives from the competitor information concerning the price or other material term of the bid which would not otherwise be disclosed to a competitor; or
 - (b) Submits a bid that is of such a price or other material terms that s/he does not intend the bid to be accepted.

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Criminal Statutes Related to Bidding

• Disclosure of Bidding Information by a Public Official – 720 ILCS 5/33E-5

- A person violates this statute by: (1) Knowingly opening a sealed bid at a time other than at the specified bid opening (or as otherwise designated by the local government) or (2) Knowingly disclosing to any interested party any information related to the terms of a sealed bid.

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Criminal Statutes Related to Bidding

• Unlawful Stringing of Bids – 720 ILCS 5/33E-18

- A person commits unlawful stringing of bids when s/he, with the intent to evade local government bidding requirements, knowingly strings or assists in the stringing or attempts to string any contract with that local government. “Stringing” means knowingly structuring a contract or job order to avoid competitive bidding requirements.

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Local
Government
Professional
Services
Selection Act –
50 ILCS 510/1,
et seq.



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Applies to

- Architectural, engineering, and land surveying services.

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Policy

- Political subdivisions, including school districts, do not need to publically bid contracts for these specified professional services, but must abide by statutory negotiation process.



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Notice

- District must provide notice of potential project and request a statement of interest by:
 - (1) Mailing or emailing firms that filed a statement of qualifications and performance data with the district;
 - (2) Advertising with a newspaper of general circulation throughout the district; and
 - (3) Advertising on the District's website.

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Evaluation

- The District may evaluate responding firms based on factors that the District specifies in its notice documents. At this point in the process, the District cannot seek estimates of cost or compensation from the service provider.

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Selection Procedure



- After evaluations, the District selects the three most qualified firms and ranks them in terms of qualifications. District shall negotiate with most qualified firm and attempt to reach an agreement with compensation that the District determines in writing to be fair and reasonable.

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Selection Procedure

- If the District cannot negotiate a satisfactory contract, the District shall terminate negotiations and shall begin negotiations with second ranked firm.
- If the District cannot reach satisfactory contract with that firm, it shall terminate and begin negotiations with next ranked firm.

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Exemptions from the Local Government Professional Services Selection Act

- If the District has a “satisfactory relationship” with one or more firms, no need to go through selection process; the District can simply contract with its previously-retained firm for the new project.

EMEMPT

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Exemptions from the Local Government Professional Services Selection Act

- The District may waive this statutory procedure if it determines by resolution that an emergency situation exists and necessitates selection of a firm in an expeditious manner.
- The District may waive this statutory procedure if the cost of the professional services is expected to be less than \$40,000.

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Questions



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Ken Florey concentrates his practice representing public and private clients, including municipalities, school districts, community colleges, townships, libraries, private owners, contractors and design professionals regarding land use, municipal law, construction, tax, finance and litigation. Ken has also started offering his services as a mediator with an emphasis on construction disputes.

Ken was the Chair of the DuPage County Bar Association's Local Government Committee. He was appointed Special Assistant Attorney General to prosecute and defend construction litigation claims on behalf of the Illinois Capital Development Board. Ken is also a member of the Illinois ASBO Service Associate Advisory Committee. He served as a Trustee for the Village of Lombard for eight years and is a member of the Lombard Fire and Police Commission.

MEDIATOR CERTIFICATE: NORTHWESTERN UNIVERSITY 2017

AWARDS

Illinois Leading Lawyer, Construction Law; Governmental, Municipal, Lobbying & Administrative Law; Land Use, Zoning & Condemnation Law; and School Law

Illinois Association of School Business Officials, Above and Beyond Award

Illinois Institute for Local Government Law, Litigation Award

RECENT PUBLICATIONS

Contributing author, "Joint Purchasing Everything You Want to Know but Are Afraid to Ask!" *UPDATE Magazine*, Illinois ASBO (2019)

Contributing author, "How Far Does the Law Allow Schools to Go?" *UPDATE Magazine*, Illinois ASBO (2018)

Contributing author, "Top 11 Public Bidding Questions & Solutions" *UPDATE Magazine*, Illinois ASBO (2018)

Co-author, "School Construction from Start to Finish: A Project Checklist," *School Business Affairs Magazine*, ASBO (2018)

Contributing author, "Top 11 Public Bidding Questions," *UPDATE Magazine*, Illinois ASBO (2018)

Contributing author, "Meditation a Win-Win for Clients and their Attorneys in Construction Litigation," *Chicago Daily Law Bulletin* (2018)



PRACTICE AREAS

Commercial Law
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Public Finance & Taxation
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Zoning, Planning & Land Use

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J.D., DePaul University
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U.S. District Court for the
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Supreme Court of Illinois

Contributing author, "Organization, Finance, and Property," Illinois School Law, IICLE (2017)

"Construction Project and Contract Pitfalls" *Update Magazine*, Illinois ASBO (2017)

"The Good, the Bad and the Ugly of School Bidding Requirements," *UPDATE Magazine*, Illinois ASBO (2016)

"Settlement Crumbles; Appeals Court Declines to Put Pieces Back Together," *Chicago Daily Law Bulletin* (2015)

"On Public Display: Advertising in Schools," *UPDATE Magazine*, Illinois ASBO (2015)

RECENT PRESENTATIONS

Foolproof Contract that Abide by State Laws, 2019 Illinois ASBO Annual Conference (May 2019)

Construction Contracts: Boilerplate Language Landmines You May Not Know, NBI (February 2019)

Legal, Legislative and Ethics Update, ICCTA (November 2018)

Purchasing Processes, Problems & Solutions, Illinois ASBO (September 2018)

Navigating Property Tax Assessment Complaints and the PTAB, Illinois ASBO & IASPA (October 2018)

Construction Disputes: Bring Home a Win for Your School District, ASBO International (October 2018)

Construction Project Problems or Solutions After Construction is Done, Illinois ASBO (October 2018)

Construction and Purchasing Disputes and Resolutions, ASBO International Conference (September 2018)

Construction, Bidding and Purchasing in Township Government, Township Officials of Illinois Online Seminar (August 2018)

Administrators Legal Session II, Concordia University (August 2018)

Construction Disputes and Resolutions, Illinois ASBO Conference (May 2018)

Top Solutions and Problems for Bidding and Construction, Illinois ASBO Annual Conference (May 2018)

Lead Testing Update: Everything You Need to Know, Illinois ASBO Conference, (May 2018)

Construction Contract Boilerplate Terms, NBI (June 2017)

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Howard Metz counsels and represents school districts, community colleges, park districts and municipalities with respect to real estate, commercial transactions, construction law and land use and zoning matters. He has resolved construction cases involving issues such as disputed architectural fees, construction defects, bidding disputes and construction delays. Howard has also litigated issues involving zoning laws and municipal control over school property.



RECENT PUBLICATIONS

Contributing author, "Joint Purchasing Everything You Want to Know but Are Afraid to Ask!" *UPDATE Magazine*, Illinois ASBO (2019)

Contributing author, "Public Body Social Media Rules Make Retention, Ready Retrieval Imperative," *Chicago Daily Law Bulletin* (2019)

Contributing author, "How Far Does the Law Allow Schools to Go?" *UPDATE Magazine*, Illinois ASBO (2018)

Co-author, "School Construction from Start to Finish: A Project Checklist," *School Business Affairs Magazine*, ASBO (2018)

Contributing author, "Organization, Finance, and Property," *Illinois School Law*, IICLE (2017)

"Look Before You Leap: Evaluating Your Joint Purchasing Options," *UPDATE Magazine*, Illinois ASBO (2016)

Contributing author, "School Property and Environmental Issues," *Illinois School Law*, IICLE (2010 and 2012)

RECENT PRESENTATIONS

Foolproof Contract that Abide by State Laws, 2019 Illinois ASBO Annual Conference (May 2019)

Construction Contracts: Boilerplate Language Landmines You May Not Know, NBI (February 2019)

Interactive Purchasing Workshop, Illinois ASBO Annual Conference (April 2017)

Public Bidding: Requirements and Solutions to Common Bidding Problems (April 2017)

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U.S. District Court for the
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Top School Construction Problems and Solutions, 2016 Joint Annual Conference - Carousel of Panels (November 2016)

Solutions to Top Bidding and Construction Problems, Association of School Business Officials International 2015 Annual Meeting and Expo (October 2015)