

Today's Agenda – Intro to Purchasing Part I

- Nature of Purchasing Function
- Formal Bidding & GML 103: Planning, advertising, terms and conditions, specification and more...
- Problems/Issues
- GML 104b



Agenda - Continued

- Exceptions to bidding: OGS contracts, emergencies, sole source and more...
- How to Handle Bid Protests



Nature of the Purchasing Function

- To provide at the time and place needed, in the quantity and of the proper quality all; material's, supplies, tools, equipment and services for your organization's operation



Nature of the Purchasing Function

- To secure such materials, supplies, tools, equipment and services at the lowest possible cost, consistent with prevailing economic conditions, while establishing and maintaining a reputation for fairness and integrity.



Nature of Purchasing Function

- To furnish members of management with timely information and to advise them about how market conditions and trends could affect the future availability and price of any needed materials, supplies, tools, equipment and services.



Nature of Purchasing Function

- To protect and preserve all materials that are being held in storage to meet future needs.
- To provide all traffic and transportation services necessary for the accomplishment of the above duties.



Nature of Purchasing Function

- To obtain the greatest possible revenue from the disposal of by products and of surplus, damaged, scrap or obsolete materials and equipment.



Procurement Objectives

- Prevent favoritism, improvidence, extravagance, fraud and corruption
- Foster honest competition; get best goods or services at lowest price
- Right Quality/Quantity/Source/Price
- Purpose is to promote public interest

Focus: Benefit Taxpayers, NOT bidders.



Formal Bidding

- Formal bids, competitive bidding, and advertised bids, are all terms that can be used to describe the competitive sealed bidding process. No matter what term you use, it is the preferred method of procurement and a statutory requirement in New York State.



Formal Bidding

- Formal bidding is required by the General Municipal Law 103 when purchases of a single commodity or “like” commodities, can **reasonably be expected** in the aggregate amount to exceed \$20,000.00, or when the aggregate amount to be spent on a single public works contract will exceed \$35,000.00 in any fiscal year.



Formal Bidding

“Like” commodities are those **items of a similar nature**, which are generally handled by one vendor (ie: cleaning supplies, office supplies) and should be grouped together for the purpose of determining whether you will exceed the \$20,000.00 limit.

Amount: consider aggregate amount

- Can NOT break up contract to avoid thresholds



- States that a change order to or a renewal of a discretionary purchase shall not be permitted if the change order or renewal would bring the expected aggregate amount of all purchases of the same commodities, services or technology from the same provider within the 12 month period commencing on the date of the first purchase to an amount greater than the competitive bidding threshold



- Authorizes the submission of the Statement of Non-Collusion in an electronic format.
(Board must authorize the receipt of Sealed Bids in an electronic format)
- Allows local government to mandate submission in an electronic format for Technology Contracts Only



- Local governments can now piggyback public works contracts subject to **Article 8**, but not Article 9.



- The Bureau of Public Work administers Article 8 and Article 9 of the New York State Labor Law. Article 8 covers the payment of prevailing wages and supplements on public construction projects.
 - Generally, **Article 8** applies to projects for construction
 - or reconstruction done on behalf of a public agency (entity).



- Article 9 applies to building service contracts involving:
 - **- the care or maintenance of an existing building,**
 - **- the transportation of office furniture** or equipment to or from such a building,
 - **- the transportation and delivery of fossil fuel to such a building, or**
 - **- for a contractor under a contract with a public agency for more than \$1,500 to furnish services through the use of building service employees.**



- Local Government may now purchase from the following three (3) GSA Contracts **only**:
 1. IT Schedule 70
 2. 1122 Law Enforcement – State Point of Contact (SPOC) has yet to be named by the Governor. The SPOCs are responsible for receiving all orders from the state and local governments and for determining that the items will be used for counter-drug activities.
 3. Schedule 84



Additional GSA Information

Chapter 497 of the Laws of 2013 also amended GML 104 (2), as an exception to GML 103, through the use of additional federal programs made available to local governments.

- Section 833 of the John Warner national defense authorization act for fiscal year 2007 which includes products and services to be used to facilitate recovery from major disasters declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, or to facilitate recovery from terrorism or nuclear, biological, chemical or radiological attack.
- The Federal Supply Schedule Usage Act of 2010, which includes the use of federal supply schedule to purchase certain goods and services used to “facilitate disaster preparedness or response”.



GML 103-g

Iranian energy sector divestment.

- All Bids and RFPs must contain the statement of non-investment in the Iranian energy sector
- a signed affirmation must be provided by each proposer/bidder.
- Effective April 12, 2012



Best Value

"Best value" means the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers. Such basis shall reflect, wherever possible, objective and quantifiable analysis.

Such basis may also identify a quantitative factor for offerers that are small businesses or certified minority- or women-owned business enterprises as defined in subdivisions one, seven, fifteen and twenty of section three hundred ten of the executive law to be used in evaluation of offers for awarding of contracts for services.

State Finance Law, Section 163.1(J)



- Section 103

“to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section, provided, however, that purchase contracts (including contracts for service work, but excluding any purchase contracts necessary for the completion of a public works contract pursuant to article eight of the labor law) may be awarded on the basis of best value, as defined in section one hundred sixty-three of the state finance law, to a responsive and responsible bidder or offerer in the manner provided by this section except that in a political subdivision other than a city with a population of one million inhabitants or more or any district, board or agency with jurisdiction exclusively therein the use of best value for awarding a purchase contract or purchase contracts must be authorized by local law or, in the case of a district corporation, school district or board of cooperative educational services, by rule, regulation or resolution adopted at a public meeting.”



Cooperative & Piggybacking Contracts

- GML 103 was amended to add a new Section 16 that authorizes the piggybacking of certain contracts
- This will allow the use of contracts issued by all local governments within New York State and other governmental agencies outside of New York State (if the piggybacking language is included in the original bid)
- Limited Guidance has been published by the New York State Office of General Services, however it mainly directs you to contact the Comptroller's Office if you have questions and speak with your own Attorneys.



What to consider?

- (1) That bids are solicited competitively through a public solicitation process like advertising in official newspapers or websites, etc.
- (2) That bids are sealed to guard against fraud, favoritism or collusion
- (3) That bid specifications must be fair/open and not skewed toward particular vendors, i.e. that the system fosters open competition;
- (4) That the bid goes to the lowest bidder and that there is no process in which other bidders who are not the lowest bidders are "encouraged" to drop their prices for purposes of being awarded the bid.



What to consider?

- (5) That although GML now allows the use of Federal Contracts (GSA), the federal government has only authorized local governments to use Schedule 70 IT Contracts, Schedule 84 and the GSA Schedules under the 1122 Program for Law Enforcement. For purchases of \$2800 or more you must follow Federal Acquisition Regulations which require competitive pricing among the GSA contractors- which you can do by using eBuy on the GSA site.
- (6) National Cooperative Examples :
 - U.S. Communities
 - National IPA
 - Western States Contracting Alliance
 - National Joint Powers Alliance
 - Plus many more



Elements of a Bid

- Planning - Take into consideration the entire bidding process from the time the bid request is made until the purchase order or contract is completed. When are the goods or services going to be needed?



Elements of a Bid

- Advertising
 - 5 days minimum notice between publication and bid opening
 - Must be published in official newspaper
- Pre-Bid Conference – mandatory?
- Bid Security – (Bid security/deposits, performance bonds, labor and material bond, retained percentages.)



Elements of a Bid

- Submission of Bids
- Late Bids
 - Not abuse of discretion to refuse bid 1 minute late
 - May accept late bid if in best interest of municipality
- Modification and Withdrawal of Bids
 - Clerical mistake & withdrawal
- Only one bid received
- Negotiation



Elements of a Bid

- Evaluation – (responsive & responsible bidder)
- General Terms and Conditions
- Prevailing Wage
- Specifications
- Sources



Bid Specifications

- Drafting: must provide common standard, allowing vendors supplying equivalent items/work to compete on an equal basis
- Municipalities have broad discretion to fix reasonable standards and requirements
- Specifications must describe in precise terms the basis upon which the contract will be awarded, state the nature of the goods or services as definitively as practicable, and contain all the information necessary to enable vendors to prepare their bid.



Impermissible Specifications

- Favor award to a particular bidder
 - Unduly restrictive to shut out competition, permit advantage
 - Any specification excluding class of bidder must be rational and essential to public interest
- Vague/indefinite so bidders do not have enough info
- Specific examples:
 - Requiring bidders supplying blacktop to have plant in boundaries of municipality – local preferences



Award to lowest **responsive**, **responsible** bidder after advertisement for sealed bids

- **Responsive** (BID): complies in all material respects with terms, conditions, and specifications of the bid documents
- **Responsible** (BIDDER): must demonstrate the ability to perform successfully under the terms of the proposed contract, taking into account technical and financial capability, and previous work history



Awarding Contract

- Bid is an offer, binding until withdrawn, rejected or accepted for 45 days (you can ask that the vendor to hold offer longer)
- Lowest bid does not = entitlement to award
- Contract award creates binding contract per specifications; not the bid received



Problems/Issues

- Late bid
- Identical Bids?
 - May award to either, or draw lots
- Sole bidder?
 - No prohibition on accepting lone bid
 - Could reject to further purposes of competitive bidding



Problems/Issues

- Post-bid modifications or negotiations
 - Bidder may not modify bid in any way that may give bidder a substantial advantage or benefit not enjoyed by other bidders
 - Bidder may not materially amend bid, even if to conform with original specs
 - May negotiate with lowest responsible bidder to gain cost concessions if there is no favoritism, fraud or corruption, the public interest is advanced and there is no material departure from the original specifications. NO coercion or threats permitted.



Problems/Issues

- Rejecting low bidder
 - Non-responsive bid:
 - may waive minor technical non-compliance if in best interest of municipality
 - must reject if material non-compliance with bid specs because creates unfair advantage



Problems/Issues

– Non-responsible bidder:

- Responsibility is an elastic word encompassing financial ability to complete contract, accountability, reliability, skill, sufficiency of capital resources, judgment, integrity and moral worth
- Question of fact decided on case-by-case basis; courts generally will not substitute its judgment for that of local officials applying criteria
- Finding of non-responsibility does not authorize awarding body to prospectively debar or suspend contractors from future contracts



Problems/Issues

- Bid Mistake and Withdrawal
 - May withdraw after showing that mistake was known or made known to municipality before contract awarded or three days after bid opened, whichever is sooner
 - Price bidding error of such magnitude that enforcement would be unconscionable
 - Mistake proven to be clerical rather than judgmental error
 - Unintentional math error or omission of substantial quantity of work, labor, materials, goods or services
 - Error made in compiling bid and can be shown by reviewing documents



Problems/Issues

- Rejection and re-advertisement with a rational basis, cannot be arbitrary and capricious
 - Protect integrity of bidding process
 - Original specifications were ambiguous/misleading or essential information omitted
 - Plans/specifications have changed
 - Potential lower contract prices for second round of bidding



Problems/Issues

- Standardization: resolution adopted by 3/5 vote of governing body stating that for efficiency or economy there is need for standardization of items for purchase contracts; still must bid for specific type of product



General Municipal Law 104b

- What is it?
 - Section 104-b of the General Municipal Law requires municipalities to adopt internal policies and procedures governing all purchases of supplies and services not required to be competitively bid under General Municipal Law Section 103.



GML 104b continued

- As of January of 2009 you must identify the individual responsible, and title, that does the purchasing for your municipality



GML 104b continued

- These policies and procedures shall contain the following provisions:
 - Describe the procedures for determining whether a procurement is subject to competitive bidding and, if it is not, document the basis for such a determination



GML 104b continued

- When competitive bidding is not required by law, alternative proposals or quotations will be secured by requests for proposals, written or verbal quotations
- Set forth the method of procurement that will be used
- Require adequate documentation



GML 104b continued

- If a contract is awarded to other than the lowest responsible dollar offerer, require justification and documentation of the reasons for such award
- Set forth any circumstances when, or the types of procurements for which, the solicitation of alternative proposals or quotations will not be in the best interest of the municipality



GML 104b continued

- The governing board must solicit comments on the policies and procedures from officers involved in the procurement process and annually review its policies and procedures
- This should be part of your Purchasing Policy and Procedures Manual



Exceptions to bidding

- True Leases - Exception School Districts
 - Must bid leases--even true leases
 - Non appropriations clause must be included in the contract
- Professional Services
- State/County other political subdivision contracts:
 - Municipalities may purchase from NYS OGS contracts
 - County/other political subdivisions contracts must have provisions allowing other local governments to use contracts
- Federal and State Surplus
- Municipal Hospital Purchases



Exceptions to bidding

- Agencies for the Blind and other severely handicapped
- Correctional
- Sole Source
- Municipal Cooperation
- Emergencies:
 - suspend requirements if accident or unforeseen occurrence
 - circumstances must affect public buildings/property or the life, health, safety or property of residents
 - situation requires immediate action which cannot wait for bidding



Exceptions to bidding

- GSA Contracts – Only contracts extended
 - IT Schedule 70 & Schedule 84
 - 1122 Law Enforcement
- Best Value
- Other New York State agency contracts where the language is included in the original bid specifications – rules yet to be written
- GML103, Section 16 – Piggybacking Legislation



PROTESTS - HOW TO AVOID THEM

- AVOID using vendor specifications
 - Use specification libraries
 - Regional Bidding Systems
 - NIGP Specification Library
 - Call a SAMPO Member
 - Use specification ranges
 - Look at different manufacturer specifications



Be Consistent In Your Treatment Of Vendors

- Don't play favorites
- Don't change your rules after the bids are opened
- Be consistent with your process and have written procedures
- Reject any sealed bid delivered after the deadline



Give Clear And Adequate Specifications

- Provide vendors with enough information to give you a competitive bid
- A clear description of the product to be purchased will solicit genuine competition
- The bid will be awarded to the lowest responsible bidder, exactly as it was defined by the specifications



Tell Vendors How You Will Award The Contract

- You may award the contract to one bidder with the lowest **over all** price or
- You may award the contract to the bidder with the lowest cost **per item**



Protests Before the Bid Opening

- If you receive a protest before the bid is opened or vendors have many questions, issue a written addendum
- Send to all vendors to clarify vague or ambiguous terms
- This action may preserve your process and may avoid a disputed award



Protests After the Opening

- Make sure the protest is in writing from the vendor
- Consult with your legal counsel for an opinion before you sign a contract
- By seeking assistance before executing a contract you keep your options open and may avoid costly litigation



Remain objective and be timely in your response

- Make sure the vendor is given due process
- Answer any protest with your rationale in a reasonable timeframe
- The vendor must be given timely opportunity to be heard
- Remain professional



Questions – Contact Information

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