

Managing the Vendor Relationship 10 Potential Challenges During the Procurement Process

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1. How Much Help should Vendors provide in Drafting Bid Specifications?

You Know this Situation:

- ▶ Your internal client wants to buy a highly technical product
- ▶ They already have picked out the Preferred Supplier that sells that product
- ▶ Board must conduct a bid as the Product costs more than \$15K
- ▶ No one at the Board has Specs for this technical Product, and you need a set for the Bid Package

Help Writing Specs

- ▶ Drafting specs for a technical products is especially agonizing and time consuming
- ▶ Can you call the Preferred Supplier and ask them to draft the Product Specs for your Bid Package?
- ▶ Should you make that call?

Help Writing Specs

- ▶ If the Preferred Supplier helps, you know how those Bid Specs likely will read
- ▶ The Preferred Supplier will take their marketing and technical information for the product, add the words "shall," "must," and "required" here and there, and send you Specs that it likely is the only vendor can satisfy
- ▶ Recently experienced this when the "Preferred Supplier" was helped draft the Product Specs to buy Automated Defibrillator Equipment for a School District

Help Writing Specs

- ▶ The Product Specs you publish and use should be generic and not favor any particular vendor
- ▶ If you use the specs drafted by the Preferred Supplier in your bid package:
 - (a) you may box yourself in with language that precludes you from awarding the contract to another vendor;
 - (b) you may preclude another vendor that might have a better product and less expensive price from even bidding; and
 - (c) The appearance and use of this practice will be very negative to other vendors who might bid

Help Writing Specs

Alternative to Writing Specs for a Technical Product:

- ▶ Consider designating a brand/model made by a particular manufacturer indicating the quality of the product that will meet specification
- ▶ Caveat: the Board must consider equivalent products other than the designated brand/model (see Ala AG Opin Nos. 84-00371 & 91-00124)
- ▶ Suggestion: If you have use this approach, have a Committee help you evaluate whether a substitute product is "equivalent" in value and function

2. A Vendor tells you that the Board, without bidding, can buy a product or service from them at a Co-op Price has been approved in a bid previously conducted by a Purchasing Cooperative.

- ▶ Caution: Perform some due diligence before you rely on such a representation
- ▶ Ala. Code § 16-13B-2(13) does provide an exception to bidding for purchases of goods and services (other than communication services) that are made through a "governmental cooperative purchasing program."

Co-op Pricing

- ▶ 3 conditions must apply before you can buy at the Co-op Price
 - a. The goods or services being purchased are available as a result of a competitive bid process approved by the Department of Examiners of Public Accounts for each bid.
 - b. The goods or services are either not at the time available to local boards of education on the state purchasing program or are available at a price equal to or less than that on the state purchasing program.
 - c. The purchase is made through a participating Alabama vendor holding an Alabama business license if such a vendor exists.

(Ala. Code § 16-13B-2(13)).

Co-op Pricing

- ▶ Also, legal issues may exist if you want to purchase "services" for a Public Works project at a Co-op Price from an approved Purchased Cooperative
- ▶ There are 2 different bid laws under Alabama law:
 - (1) Title 16 – bids generally required when a Board purchases goods and services valued at more than \$15K; and
 - (2) Title 39 – bids required when dealing with an over \$50K Public Works Project to improve public property
- ▶ The sources of the confusion are (1) a clause in Ala. Code § 16-13B-1 (a) stating that competitive bidding requirements for "contracts for public works . . . are governed exclusively by Title 39" and (2) fact that there is no exception bidding under the Public Works law like the "governmental cooperative purchasing program" in Title 16

Co-op Pricing

Let's assume

- ▶ Your Board approves a project to install synthetic surface on a sports field; and
- ▶ A Vendor has a Co-op price to install a synthetic surface that was approved in a governmental purchasing program that the State Examiner has sanctioned

Can the Board contract with the Vendor to perform this work at the Co-op Price and not bid this Work?

3. The Vendor's marketing assures you his company is the "Sole Source" for a special product and that the Board can buy it from them without bidding.

- ▶ Ala. Code 16-13(b)-2(a)(11) does state that bidding is **not** required for "contractual services and purchases of commodities for which there is only one vendor or supplier"

Sole Source

View Sole Source representations with skepticism

- ▶ Is the Vendor really a Sole Source, or just the only dealer authorized by the manufacturer to sell it in a franchised area
- ▶ Is the Vendor's product truly the only one that offers a product with the functions that the Board needs? Have you investigated or do you really know that?
- ▶ If the Vendor is a sole source, ask them to give you a letter stating that no other company can supply a product with the functionality it offers
- ▶ Suggest you err on the side of bidding if in doubt

4. Can the Board give the Hometown Vendor preference in the bid process?

This Situation

▶ A local business sponsored last year 's Holiday Basketball Tournament at the High School, and now is one of several bidders for a contract that the Board will award?

In this Bid your Board Members would like to reward the Hometown Vendor for its past support of the local school system? Can they?

Preferred Treatment

Yes, to a limited extent:

▶ Ala. Code § 16-13B-1(b) allows the Board to establish a "Local Preference Zone" for businesses in that Zone.

▶ That Zone may be:

- (a) the legal boundaries or jurisdiction of the Board
- (b) the boundaries of County in which the Board is located, or
- (c) the boundaries of the core based statistical area (CBSA) in which the Board is located.

▶ How does the Preference work? The Board may award a contract for supply personal property to the local business if its bid is (a) responsible and responsive and (b) not more than three percent greater than the bid of the lowest responsible bidder.

Preferred Treatment

Limitations:

(a) The Board must establish the local preference Zone "prior to advertising for bids"

(b) The Hometown Vendor's "handicap" is not more than 3%

(c) The preference only applies on bids to procure personal property – the law does not allow the Hometown Vendor to receive the local preference on bids for service contracts

5. An interested Vendor asks you questions about the Specifications in the Board's Bid Package after the formal Bid process starts.

This Situation:

- ▶ You have advertised for bids and published the Bid Specifications
- ▶ An interested Vendor calls and has questions about certain Specifications in the Bid Package.

How should you handle this?

Vendor Questions

This very problem recently arose in the Bid process for a school move contract

- ▶ One of the Bid Specs required the successful vendor to carry Full Replacement Value insurance for Board property that was damaged or lost in the move
- ▶ Interested Vendor called and explained that moving companies do not carry the type insurance the Board specified
- ▶ We thanked the vendor for their help, collected more information, and issued an Addendum to the Specifications asking for different coverage

Vendor Questions

- ▶ After Bid process starts, minimize verbal communications with vendors and put instructions in writing
- ▶ To the extent possible, all interested vendors should receive the same information and be treated on equal footing in the Bid period
- ▶ Don't communicate with just one vendor if questions arise

Vendor Questions

You might include this Provision like this in your Bid to deal with this situation:

MANDATORY PRE-BID CONFERENCE/PRE-BID INQUIRIES (ADDENDA)

- ▶ A Mandatory Pre-Bid Conference will be held at the Board Central Office () on 11, 20 at 9:00 a.m. At this time, each interested contractor will have the opportunity to visit the Project Site, and ask questions concerning the Contract. Bids will not be considered from any bidder that does not attend this Pre-Bid Conference.
- ▶ Specific questions about the Specifications or other bid materials or processes should be directed in writing to () at () at least five (5) business days before the bid opening date. () will attempt to respond to those inquiries no later than two business (2) days before the bid opening. Those responses, and, any Addenda to the Specifications that are issued by the Board, will be incorporated into and become part of the Specifications.

6. A Vendor tells you it really needs the Board's business and asks you to give them the last chance to match or beat the prices that all other companies offer before the Board makes its purchasing decision.

Can you do that?

Last Chance

It Depends on the Process

- ▶ Never allowed in a competitive Bid process
- ▶ Not prohibited in a Request For Proposal (RFP) process, but should you grant this request?

7. A Vendor submits a bid with a price that is markedly lower than all other bids. In reviewing their bids, you suspect that the low bidder made a mistake when it calculated their price.

- ▶ You want to do business with this vendor, but they can not make any money if they perform the contract at the price in their bid.
- ▶ You have a provision in your Bid Package stating the Board the "right to waive irregularities and technicalities in bids that are submitted."
- ▶ How should you handle this situation?

Vendor Mistake

- ▶ Can you call them and ask them if they made a mistake?
- ▶ Can you ask them to send you a revised bid that corrects their mistake?
- ▶ Should you hold the bidder's "feet to the fire" and tell them you will expect that they honor their bid and perform the work at their bid price.
- ▶ If the Vendor posted a Bid Bond or funds to secure their, should you keep the security if the vendor refuses to honor its bid?
- ▶ Will you allow the Vendor to withdraw their bid?

8. A Vendor claims during the procurement process that its company is not receiving a fair chance to win the contract, and threatens that, if it are not awarded this contract, "we are going to call our lawyer and take the Board to Court."

How should the Board respond to this threat?

The bid process might be flawed. What are the Board's risks in litigation?

Litigation

- ▶ Under Alabama law if an unsuccessful vendor contests an award in Court, it has high burden of proof and limited remedies
- ▶ It must prove that the Board acted arbitrarily in awarding the contract, and did not act in good faith
- ▶ It may not collect damages from the Board
- ▶ the Court cannot disqualify the company to whom the Board awarded the contract and award it to the vendor who complained
- ▶ if the Court finds that the bid process was flawed, the remedy is generally limited to ordering a rebid

9. How should you handle a request from a person or firm that is made to the Board asking for it, pursuant to the Public Records Act, to disclose and furnish to them all information that each vendor submitted in a bid process?

- ▶ Not uncommon for businesses or persons who are develop marketing information about an industry to make such a request
- ▶ The requested information includes documents that vendors may consider proprietary and competitively sensitive
- ▶ Ala. Code § 36-12-40 – the Public Records law - generally obligates governmental entities who have public writings in their possession to disclose those records to citizens and has relatively few exceptions
- ▶ What information, if any, should you provide to the person or firm making this request?

Requests for Vendor Information Given to Board

Recommendation:

- ▶ Only furnish publicly announced bids or bid tabulation sheet
- ▶ If a request is made to the Board to disclose a vendor's proprietary information to a citizen making a Public Records request, contact the vendor before you disclose that information to the citizen and give them the opportunity to go to Court and protect their information

10. Can vendors communicate or collaborate with each other concerning a bid?

- ▶ No if they are colluding on prices or making an agreement to refrain from bidding - bid collusion is a felony (see [Ala Code § 39-2-6\(g\)](#))
- ▶ Collaboration might be proper if one potential bidder wants to subcontract with another a party who will submit a bid
- ▶ After receiving an award, the successful vendor can talk to an unsuccessful bidder about assigning them the Contract if the Board approves the assignment ([Ala Code § 39-2-6\(g\)](#)), and the unsuccessful bidder was a responsible and responsive bidder in the Board's bid process (§ 39-2-6(g))

Communications between Vendors

It is a good practice to require bidders to sign a form like this when they submit their bids.

BIDDER AFFIDAVIT AND WARRANTY

The undersigned bidder warrants, represents and agrees that each of the following is true and correct in connection with BID # _____

- (a) it has not colluded with any other bidders;
- (b) it has not, directly or indirectly, induced any other bidder to submit a sham bid or to refrain from making a bid;
- (c) it has not paid, agreed to pay or offered any party or person (including, but not limited to, any employee or official of the Board (whether elected or appointed), either directly or indirectly, any money, a rebate, percentage of contract, or other thing of value as an inducement, or indirectly, inducement in the procurement of the Contract for assistance or aid rendered to or to be rendered in attempting to procure or be awarded the Contract contemplated in the Bid;
- (d) all the information contained in the response to the bid is true and correct; and
- (e) the Board may rely on information submitted in awarding the subject Contract.

Name of Firm or Company Submitting Bid _____

By: _____
Signature of Bidder Representative

QUESTIONS
