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Intro to Local Government Procurement



May 4 & 5, 2022

Today's Agenda

- Formal Bidding & GML 103
 - Planning, advertising, terms and conditions, specification and more...
- Exceptions to competitive bidding
 - OGS contracts, national cooperative, emergencies, sole source and more...
- Problems/issues

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 the 12 months from the date of the purchase

Formal Bidding

- “Like” commodities are those **items of a similar nature**, which are generally handled by one vendor (i.e.: 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
 - CANNOT break up contract to avoid thresholds

Formal Bidding

- 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

Prevailing Wages

- 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)

Prevailing Wages

- 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

Prevailing Wages

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

Exception to Competitive Bidding

- 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) New York State OGS
 - 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

Additional GSA Information

- 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”

Exception to Competitive 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

Exception to Competitive Bidding

- Federal and state surplus
- Municipal hospital purchases
- 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

Exception to Competitive 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

Do You Spend Federal Funds?

- As of January of 2018, new procurement standards must be part of your procurement policy
- The following is some suggested guidance on what the new guidance requires:
 1. Review Subpart D (Paragraphs 200.317 through 200.326) of the Guidance
 - Is your organization using the five procurement methods outlined in Paragraph 200.320?

Do You Spend Federal Funds?

2. Does your organization have the required conflict of interest policies in place (Section 200.318)?
3. Does your organization have the appropriate procurement documentation?
 - At minimum, this includes the rationale for the method of procurement; selection of the contract type; contractor selection or rejection; and the basis for the contract price

Do You Spend Federal Funds?

4. Does your organization's contracts include all the required specifications as outlined in Appendix II of the guidance?

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)



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)
- Guidance has been published by the New York State Office of General Services.
- The final authority continues to be 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

What to Consider

- 4) That the bid goes to the lowest bidder or best offer and that there is no process in which other bidders who are not the lowest bidders or the best offerer 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 \$3000 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

What to Consider

- 6) National cooperative examples :
- Omnia Partners
 - Western States Contracting Alliance
 - Sourcewell
 - TIPS
 - Plus many more

Cooperative Purchasing

- Looking for cooperative contracts?
- CoProcure (<https://www.coprocure.us>) is a free search tool to help public buyers find, compare, and use cooperative contracts from public agencies across the country

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 and withdrawal
- Only one bid received
- Negotiation

Elements of a Bid

- Evaluation
- General Terms and Conditions
- Prevailing Wage
- Municipalities have broad discretion to fix reasonable standards and requirements

Elements of a Bid

- Specifications must:
 - Provide common standard, allowing vendors supplying equivalent items/work to compete on an equal basis
 - 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
 - Contain all the information necessary to enable vendors to prepare their bid

Elements of a Bid

- **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 the 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 and 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 and 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 and 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 and 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

Problems and Issues

- Bid Mistake and Withdrawal
 - 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 and 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

Questions?

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