

Managing the Vendor Relationship- Potential Challenges During the Procurement Process

Alabama Association of School Business Officials

February 7, 2022

Dennis Heard

How Much Help Should Vendors Provide In Drafting Bid Specifications?

You know this situation:

- Your maintenance supervisor wants to buy a highly technical product.
- They already have picked out the preferred supplier that sells that product.
- The board must conduct a bid as the product costs more than \$15,000.
- No one at the board has specifications for this technical product that you need for the bid package.

Help Writing Specifications

- Drafting specifications for a technical products is especially agonizing and time consuming.
- Can you call the preferred supplier and ask them to draft the product specifications for your bid package?
 - **Not if you are paying with federal funds.**
- Should you make that call?

Vendor Help Writing Specifications

- If the preferred supplier helps, you know how those bid specifications 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 product specifications so that it likely is the only vendor can satisfy the specifications.

Writing Specifications

- The product specifications published and used should be generic and not favor a particular vendor.
- If you use the product specifications drafted by the preferred supplier in your bid package:
 - (a) you may box yourself in with language that prevents you from awarding the contract to another vendor;
 - (b) you may exclude another vendor that might have a better product and less expensive price from even submitting a bid; and
 - (c) the appearance and use of this practice will be very negative to other vendors who might bid.

Alternatives To Writing Specifications

- Consider designating a brand/model made by a particular manufacturer indicating the quality of the product that will meet specified use.
- In most situations the board must consider equivalent products other than the designated brand/model.
Suggestion: If you use this approach, have a committee help you evaluate whether a substitute product is “equivalent” in value and function.
- Review product specifications from other sources, such as state bids or purchasing cooperative bids.

The Preferred Supplier Says Bids Are Not Required

- The vendor says they will charge less than the state bid or purchasing cooperative price.
- The vendor says the board can use another school board's bid.
- The vendor says they are a sole-source provider.

Should a vendor's interpretation of state procurement laws be used to make a purchasing decision?

Purchasing From Another Entity's Bid

The Alabama Competitive Bid Law allows:

- Joint purchasing agreements before the bid process.
- Regional (in-state) purchasing cooperatives.
- GSA contract vendor.
- National or regional purchasing cooperatives approved by the State Examiners of Public Accounts when:
 - The goods or services are not available on a state procurement program for an equal or lesser price, and,
 - The purchase is made through a participating Alabama vendor holding an Alabama business license if one exists.

Approved National Purchasing Cooperatives

- *Omnia Partners – www.omniapartners.com/publicsector
 - *Sourcewell – www.sourcewell-mn.gov
 - *NCPA Cooperative – www.ncpa.us/vendors
 - H-GAC Cooperatives – <https://www.hgacbuy.org>
 - E & I Cooperative Services – www.eandi.org/
 - TIPS – <http://www.tips-usa.com>
 - NPP – <https://nppgov.com>
 - Buyboard – <https://www.buyboard.com/national.aspx>
 - NASPO – <https://www.naspo.valuepoint.org>
- **See the State Examiners of Public Accounts website for approved contracts for air conditioning and heating units and systems allowed under the public works law.*

The Vendor Claims They Are The Sole Source For The Product And Bids Are Not Required

- Vendors may say you can rely on their sole source letter to document the following exception in the bid law:

*Competitive bidding is **not** required for “Contractual services and purchases of commodities for which there is only one vendor or supplier...” Ala. Code 16-13B-2(a)(11).*

- However, Ala. Code 16-13B-7(b) provides specific requirements to document the sole source exception to competitive bidding.
- Also, the same product may be available on a purchasing cooperative at a lower price, possibly from the same vendor.

A Local Vendor Claims They Qualify For Local Preference In The Bid Process

- A local business (or school board member) reminds you that they donated funds for your recent high school project.
- Ala. Code §16-13B-1(b) provides for a local preference competitive bid award for competitive bidding of personal property.

Bid Awarded For Local Preference

- A responsible bid for personal property may be awarded to a local business located in the school boundaries if it is no more than three percent above the lowest responsible bidder.
- Before the bid process for the product begins, the school board can expand the local preference zone to include bids by vendors located in:
 - The boundaries of the county in which the school board is located.

or

 - The boundaries of the core based statistical area (CBSA) in which the school board is located.

A Vendor Asks Questions About Bid Specifications After The Formal Bid Process Begins

- You have advertised for bids and an interested vendor calls with questions about certain specifications in the bid package. How should you handle this?
- Listen to the vendor's concerns about wording and terms in the bid specifications but don't provide additional information that is not made available to all potential vendors.
- Ala. Code §16-13B- 6 states, *“Any disclosure in advance of the terms of a bid submitted in response to an advertisement for bids shall render the proceedings void and require advertisement and award anew.”*

Vendor Questions

- Vendor points out errors in bid specifications, such as:
 - The bid opening date is on a weekend.
 - Bid specifications use terms applicable to bids for services instead of personal property procurement.
 - Bid specifications use legal citations for state or local governments instead of boards of education.
- Determine if an Addendum to the Bid Specifications should be issued.

Suggestions For Vendor Questions

- After the bid process starts, minimize verbal communications with vendors.
- 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 Bid Mistakes

- You want to do business with a 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 that the board has 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?

Legal Opinions About Handling Mistakes By Bidders

- A bidder that withdraws its bid (due to a mistake) after it has been submitted but before the contract has been awarded...does not forfeit its bid bond.
- Once a bid is accepted as responsible and a contract signed thereto, a contract cannot be amended to increase compensation, but should be performed in accordance with the bid submitted.
- A wide range of flexibility is vested in the State (owner) to accept or reject a proposal or to weigh informalities or technical errors contained in the proposal where the best interest of the State would be served.

Unsuccessful Bidder Threatens to Sue

- How should the board respond to this threat?
- The bid process might be flawed. What are the board's risks in litigation?

Litigation By Unsuccessful Bidder

- 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.

Public Disclosure of Bid Documents

- It is not uncommon for businesses or persons who are developing marketing information about an industry to make such a request.
- But what if the requested information includes vendor 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 Bid Information

- Ala. Code §16-13B-4(d) states, “ *All original bids together with all documents pertaining to the award of the contract shall be retained in accordance with a retention period of at least seven years established by the Local Government Records Commission and shall be open to public inspection.*”
- 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.

Vendors Communicating With Each Other About Bids

- Any agreement or collusion among bidders or prospective bidders in restraint of freedom of competition to bid at a fixed price or refrain from bidding is a felony under the Competitive Bid Law (Ala. Code § 16-13B-5) and the Public Works Law (Ala. Code §39-2-6(h)).
- Any disclosure in advance of the terms of a bid submitted in response to an advertisement for bids shall render the proceedings void and require advertisement and award anew. — *Competitive Bid Law (Ala. Code § 16-13B-6) and the Public Works Law (Ala. Code §39-2-6(i)).*

Legal Resource

- The Department of Examiners of Public Accounts has the following publication under the Resources tab on their website:

Alabama Competitive Bid and Public Works Manual

QUESTIONS?

Alabama Department of Education

LEA Fiscal Accountability

Dennis Heard

dheard@alsde.edu

Sonja Peaspanen

speaspanen@alsde.edu