



# PROCUREMENT BULLETIN

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## IG GREETINGS

*Omnibus ad quos presentes  
literae pervenerint, salute.*

During April and May my staff conducted seven regional training seminars on Chapter 30B. A total of 865 local officials registered for the seminars. Our goal was to educate newer procurement officials and offer a review for seasoned procurement officials on sound procurement practices.

Our newly revised procurement manual, entitled *Municipal, County, District, and Local Authority PROCUREMENT of Supplies, Services and Real Property* will be mailed shortly to each public official who requested a copy. The manual is a comprehensive overview of Chapter 30B, designed to walk you through all Chapter 30B procedures.

As always, we look forward to your comments on the new procurement manual and also on how this Office can better serve the needs of the procurement community.

Sincerely,

Robert A. Cerasoli,  
Inspector General

## Ten Tips for Avoiding Bid Protests

(This issue of the *Procurement Bulletin* contains a transcript from a segment of the OIG's training seminars held this Spring.)

The term "bid protest" is often used for convenience, but keep in mind that a protest might involve any type of procurement — vendors can protest a quote solicitation process for a small contract, vendors can protest an RFP process, vendors can protest a bid process. The term "bid protest" will be used here to refer to a protest involving any procurement.

### 1. Follow The Advertising Rules

We occasionally get a protest because a community forgot to post the required notice, or forgot to advertise a contract for more than \$100,000 in the *Goods and Services Bulletin*. If you don't realize until after bids are opened that you neglected one of the advertising requirements, you will have to reject the bids and start over — you really don't want that to happen.

### 2. Reject Late Bids And Proposals

If a bid or proposal comes in late, you must reject it. Occasionally, it

may be necessary to issue a last minute addendum. Bidders may be left scrambling to meet the deadline. If it becomes necessary to issue an addendum, it may be wise to include an extension of the due date for the bids or proposals. Remember — you can always issue an addendum extending the due date as long as you do it before the bids are due. You cannot accept a late bid or proposal, even if it is only a few minutes late.

### 3. Avoid Proprietary Specifications

Proprietary specifications either require a particular brand name product, or are so restrictive that only one manufacturer's product will meet the description. For almost all kinds of equipment and material, there are at least two and usually more than two companies that make or supply high quality products. That's why Chapter 30B allows proprietary specifications only when you can show that there is no other way to describe the supply or service you need. Proprietary specifications fly in the face of the principle underlying public bidding laws, because they eliminate competition.

Some people we talk to are not sure how to differentiate a propri-

## *Ten Tips for Avoiding Bid Protests, cont.*

etary specification from a sole source procurement. A sole source procurement is a procurement you make without advertising or seeking quotes. You can make sole source purchases only up to \$10,000; any procurement over \$10,000 requires competition (except for a few special items, like library books, textbooks, and utilities such as gas, electricity, and water when there is only one source). This means that even if you really believe that there is only one source for the supply or service you want, you still have to advertise and test the market if the purchase price is \$10,000 or more. Sometimes you may be surprised to learn that there is more than one source.

Proprietary specifications limit competition to one manufacturer or supplier. There are a few kinds of contracts for which it is reasonable to restrict competition. For example, if you are purchasing additional software licenses for your current word processing system, you may choose to specify the brand name.

For the vast majority of procurements, however, you should avoid brand names. If you want to specify a fire-blocking material for school bus seats, for example, rather than using a brand name, we recommend that you describe the requirement by referring to an industry standard for flame retardancy. If you think you must use a brand name as a shorthand for describing a requirement, make it clear that other brands are acceptable.

We have also received protests where purchasing officials were unintentionally using proprietary specifications without using brand names. For example, we came across a specification for an ambulance that described the vehicle down to the last nut and bolt:

“To provide additional seat travel and improve weight distribution, the cab shall be extended a minimum of 3.5 inches but not more than 5 inches... The extension shall be attached to the body cab with 18 one-half inch diameter grade 8 steel bolts. Rivets, screws, or other fasteners are not acceptable.”

This specification was written by one ambulance manufacturer to describe its vehicle. The specification was passed from town to town and used by purchasing officials who didn't even know that it was proprietary or that it came from a manufacturer. This kind of overly detailed specification should be a red flag to you. If no one can give you a reasonable explanation of why this kind of detail is necessary, you should be skeptical.

#### ***4. Give Vendors an Adequate Description of What You Need***

This is one of the most basic rules of fair competition and it has been part of public bidding law for a long time. A Massachusetts Supreme Court case called Swezey v. the Mayor of Malden, written in 1930,

discussed this principle. In this case, the City of Malden was sued over the award of a street paving contract. The City's specifications asked bidders to submit prices based on any of three different types of paving surfaces, but left it up to the bidders to decide what composition of paving material to use and how to apply it. The court's decision stated:

"To permit each bidder to furnish his own specifications for the construction of the wearing surface might, and probably would, allow a substantial variance in the manner of construction and its cost. . . . Where . . . each bidder is invited to bid upon his own specifications, it is plain that there can be no real competition between such bidders. . . ."

This rule — that the specifications must state the quantity and quality of supplies or services needed with as much specificity as possible — is just common sense when you put yourself in the bidders' shoes. Nonetheless, we occasionally see specifications for school bus contracts, which ask for per mile or per hour prices for athletic and field trips, but provide no information on the number of miles or hours. Without these estimates, the bidders can't accurately price these portions of the job, and you have no reasonable way to factor the cost of these trips into the total bid price.

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## *Ten Tips for Avoiding Bid Protests, cont.*

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We've seen bids for consulting services that asked for an hourly rate, but didn't give bidders clear information about the type of work or number of hours of work required. If you don't give bidders enough information about the kind and amount of work you need, you are likely to get prices that are all over the map. In the end you won't know which price is the best, since each vendor will have bid on a different job.

Remember — it is just as important to have clear specifications when you are procuring supplies or services using an RFP process as when you are bidding. You can not use an RFP process to avoid writing a clear scope of services.

Vague specifications for a contract not only violate bidding laws, but they expose your jurisdiction to all kinds of problems. If you haven't spelled out the requirements for the job before you advertise, you may find out after you've signed a contract that the contract doesn't require the vendor to do all of the work you need.

### ***5. Use Clear, Objective Evaluation Criteria***

Evaluation criteria are the standards by which you will judge whether a bidder or proposer is qualified and whether the product or service offered meets your requirements. You can and should use minimum evaluation criteria that are rigorous enough to ensure that you will be

happy to do business with any vendor that can meet the criteria. Clear criteria will often avoid vendor disputes.

For example, suppose you need to hire a vendor to handle third-party billing and you decide, at a minimum, you want to require three years experience in third-party billing. The low bidder has three years experience but has only handled contracts that are much smaller and less complex than yours. If you reject this bid, you may well get a protest because you didn't state that comparable complexity was required. It pays to take a little more time to spell out your requirements. You could require a qualified firm to have a minimum of three years experience in performing at least one contract similar in size and scope to your proposed contract.

When it comes to RFPs, which require comparative criteria as well as minimum criteria, it is just as important to be clear about the standards you will use to rate proposals. Remember that the purpose of using an RFP rather than a bid is to give you discretion to consider factors other than price, but you must be able to defend your selection process as fair and reasonable. If you have vague criteria you are likely to end up with arguments from vendors claiming their proposals weren't fairly evaluated, and you will have a hard time defending yourself from charges of favoritism.

### ***6. Tell Vendors How You Will Calculate The Low Bid***

Usually this is simple. Once in a while, though, we get protests about bids that produce more than one "low bidder." How can that happen? Let's say you solicit bids for a two-year, three-year and four-year contract. You could get a different low bidder for each of these options. Or you are silent about what form you want the bids to take on a fuel oil contract permitting bidders to submit either a fixed price or prices that fluctuate according to an index. Here it may be impossible to tell which bid is the lowest. You can't decide after the bids are opened how you are going to choose which bid to take, so make sure the rules are clear up front.

### ***7. If You Are Purchasing Multiple Items Tell Vendors How Many Contracts You Will Award***

Often it makes good sense to advertise for prices on a lot of different items at once - like office supplies or automotive parts. When you do this, you can either award one overall contract to the bidder who gives you the lowest total price, or you can give a separate contract for each item to the bidder who had the low price on

## *Ten Tips for Avoiding Bid Protests, cont.*

that item. You may choose either method of award, but be sure you tell the bidders in the invitation for bids which method they should use to formulate their bids. You can't wait until after you've seen the bids to decide.

### **8. Avoid The Appearance of Bid-Splitting**

Bid-splitting is intentionally splitting a purchase into two or more smaller purchases for the purpose of evading a bidding law. As you probably know, bid-splitting is against the law. Chapter 30B, like other bidding laws, has fines and penalties for intentional violations. There are, of course, circumstances where you will need to make small, frequent purchases. The best example is the purchase of fresh produce. Many jurisdictions purchase produce by soliciting quotes week after week from the same vendors because both availability and price fluctuate. It makes sense to purchase fresh produce this way, but if you make small frequent purchases of office equipment, for example, you are likely to raise questions about why you need to make purchases in this manner.

A jurisdiction that makes five separate purchases of \$2500 personal computers from one vendor in a short period of time by getting quotes over the tele-

phone is likely to create the impression that it is trying to avoid the \$10,000 threshold for formal advertised competition. Or if you frequently solicit telephone quotes from the same vendors for highway materials that you use regularly, like sand and gravel, you should seriously consider advertising for bids. You will get better prices, save time and paperwork by making larger, less frequent purchases, and promote integrity in the process.

### **9. Play By Your Own Rules**

Some vendor complaints claim that the jurisdiction unfairly changed the rules of the competition after the bids or proposals were opened. Here's an example: a city advertised for bids for the installation of new parking meters. The specifications required a particular type of electronic lock box system to signal city hall when the meters were opened. After the bids were opened, the city discovered that the low bidder offered an inexpensive alternative to the system the city specified. The city decided to award the contract to that bidder even though the bid did not respond to the city's specification.

The city's action violated the principles of fairness underlying the bidding laws. Other

vendors may have been able to propose alternatives to the city's specifications, too, but they responded by offering the city what it asked for. The only fair way to conduct a competition is to stick to the rules you set. If you decide that you want to change them after the bids are opened, you must cancel the procurement and start over.

### **10. Treat All Vendors Fairly**

Once in a while we hear a protest from a vendor who seems to have been treated differently from a competitor. Take the example of a jurisdiction that requires bidders to submit at least three references. The lowest bidder submits five references. The jurisdiction checks all five, and four of them give a satisfactory report, but the fifth says that they had a problem with the vendor. The jurisdiction wants to reject this bidder and give the contract to the second lowest bidder after checking three references. The low bidder complains that this is unequal treatment. To avoid this situation, you could require vendors to submit references for all similar contracts within the last five years, and tell vendors that you will randomly select three of these references for each bidder. This makes it clear that you are going to treat every vendor equally.

# QUESTIONS ABOUT CHAPTER 30B

## *Are engineering services exempt from Chapter 30B?*

Not necessarily. Engineering services may fall under the exemption for contracts with designers in section (1)(b)(15) of Chapter 30B, but only if those services are in connection with a construction project. The definition of a designer is found in Chapter 30B(2).

A designer is a person performing any of the following in connection with the construction, reconstruction, alteration, repair, development, installation, maintenance, or demolition of any road, bridge, or other physical property: preparation of master plans, studies, surveys, soil tests, cost estimates or programs; preparation of drawings, plans or specifications; supervision or administration of a construction contract; or construction management or scheduling.

If you are hiring a designer in connection with any building project, you must follow procedures in accordance with M.G.L. c.7, § 38A<sup>1</sup>/<sub>2</sub>-O.

Design contracts which are exempt from competitive procurement include:

- Preparation of plans and specifications for public works construction projects such as road construction or sewer line installation.

- Hiring a licensed site professional to assess hazardous waste contamination in connection with a remediation project.

## *If you ask for information from bidders to establish financial stability of the bidders, and one bidder does not want the information to become available to the public, does our jurisdiction have to restrict access to that bidder's file?*

No. You may not restrict access to that bidder's files. The Massachusetts Public Records Law states that all documents that are submitted as a condition for competing for a public contract are public records. Therefore, any information that you ask for from bidders becomes public records.

Often, it is easier, for both bidders and awarding authorities, to require bidders to submit items such as references and a performance bond, instead of complicated or sensitive financial documents.

## Training Comments

Below are some of your comments about the OIG's Chapter 30B training seminar:

"As a new superintendent, I found all information and training very helpful, along with the print information."

"Very helpful seminar. I learned a lot and got clarification on some confusing evaluation processes."

"I hope your office continues to provide Chapter 30B workshops as changes occur. The information gained is very useful to me. I also like the idea of workshops being scheduled in various regions throughout the state so that I can attend."

"Thank you for holding this seminar. It was a big step towards the learning process for full knowledge of Chapter 30B."

"I learned that we are not in compliance on all aspects but that we are following the law in most areas and will correct our mistakes."

"I would rate this seminar as highly advantageous."