



*Everyday Ethics for Local Officials*

## **Let's Make a Deal: Securing Goods and Services For Your Agency**

*October 2004*

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### **QUESTION**

*I'm very frustrated with our agency's contracting process. There's a ton of red tape and it takes forever for vendors to go through the process and then for us to make a decision. Lots of business people I know simply choose not to go through the process because it costs them so much for so little return. Because my own company does business with these folks, I can personally attest that they would give the agency quality results at a competitive price. What am I missing here in terms of what best serves the public's and the agency's interests?*

### **ANSWER**

Certainly, the process an agency uses to select the provider of goods and services can seem both cumbersome and time-consuming. Like so many ethical issues for public officials, the public's perceptions and expectations play a significant role in the procurement process.

There are two aspects to these expectations:

1. that the agency will get the best deal for its money; and
2. that the process will be fair.

Let's look at each issue.

### **Getting the Best Deal**

Getting the best deal for the agency is part of your responsibility as a public official to be a prudent steward of scarce public resources. How do you determine whether your agency is getting the best deal? Typically this means receiving materials or services of appropriate quality for a competitive price.

A key way to assure the public of this fact is for an agency to use a competitive and comparative process that enables it to evaluate both price and quality. A risk of "sole-sourcing" is that the agency has no way of knowing whether there would have been a better deal out there for the agency.

This is not to say that an agency should put all contracts out to bid. The question for public officials to ask themselves, however, is whether the processes the agency uses to select contractors provides assurance to the public that it is receiving the best value for the dollar.

## **A Fair Process**

Both the business community and the public expect public agency processes to be fair. Some elements of a fair vendor selection process include:

- Widely publicizing the opportunity to compete for the agency's business;
- Providing the same information to all businesses so that no one business has an advantage;
- Applying the evaluation criteria consistently to all bidders; and
- Making sure the contract is administered in such a way that the agency gets the full benefit of its money.

Red flags can go up when an agency makes multiple demands for "best and final" offers after all bids have been opened and made public. According to one private sector representative, multiple calls for "best and finals" raise concerns about the fairness of the process and give the impression that the agency will keep asking bidders to resubmit until the agency gets the bidder it wants into the position of being the low bid.

With respect to the contract administration issue, the goal is to avoid having a would-be vendor submit an unrealistically low bid, only to propose amendments to the contract that would increase costs. This would be unfair to a vendor who would have stuck to an original, ultimately lower bid.

## **Avoiding Favoritism**

One aspect of fairness is making sure that a would-be vendor does not have an advantage merely because of a friendship with local officials, a past history of support for someone's campaign, or a family relationship. This is where the value of personal loyalty to individuals must yield to one's responsibilities as a public official to get the best deal for the public through a fair process.

In a small privately owned business, it can be perfectly ethical and gracious to give preference to a friend or return a favor in a business relationship. So, too, are such pleasantries as being treated to a meal or receiving other niceties to create goodwill and solidify a potential business relationship. In the public sector, however, giving preference to friends is likely to be characterized as cronyism<sup>1</sup> at best and corruption at worst. See "Contracting Practices: Traps for the Unwary" for some of the pitfalls local officials have experienced in this area.

### **Contracting Practices: Traps for the Unwary**

Here are some examples of scenarios that have attracted unfavorable attention in terms of contracting practices. They are traps for the unwary because they can involve instances in which an official is criticized for the appearance of impropriety, as opposed to any actual impropriety. They also can involve situations in which the norms of the public sector differ from the private sector.

**Vouching for the qualifications of a business.** Putting in a good word for a contractor can be hazardous, mostly because it's challenging to know everything about a firm's history and business practices. In one instance, a city official found himself receiving unwanted media attention when a firm he was promoting to his fellow city officials was under investigation by the district attorney for embezzling public funds. For elected officials, the wisest course of action is to let the companies' records as presented in the bidding process speak for themselves.

**Receipt of gifts or special favors from would-be contractors.** Similarly, when a would-be vendor buys meals or bestows other types of gifts on a public official, critics can charge the vendor with trying to curry favor. These same critics can also charge the public official with placing personal gain ahead of the public's interests in having a scrupulously fair and competitive selection process. As harsh as it may seem, critics may also characterize such special benefits as akin to bribery.

**Campaign contributions from would-be contractors.** Add campaign contributions to the mix, and the unfavorable media attention can become even more charged, as one state agency found when decision-making on a contract for computer services coincided with the receipt of a sizeable campaign contribution from the would-be contractor. Even when the timing is not so close, accusations of *quid pro quo* (this in return for that) and "pay to play" are easy for critics to make. Moreover, as a number of local officials can attest, the media does not reserve its attention only for state contracting practices. Even if correlation is not causation (as any beginning statistics student will be quick to recite), disproving causation can be difficult. A newspaper editorial illustrates this dynamic when it concluded with the observation that "actions speak louder than words."<sup>2</sup> The editorial was critical of, among other things, a local official's support for easing competitive bidding requirements.

The editorial implied that campaign contributions had an influence on that support, even though the official specifically denied such influence. The implication of the “actions speak louder” statement was, in essence, that the official’s support for a policy that correlated with the interest of campaign contributors was sufficient for the newspaper to infer causation - no matter what the official said.

**Insiders-turned-contractors.** Suspicions of unfair selection processes can arise when a public agency does business with a firm that has hired a former employee or official of that agency. Although the agency’s decision may have been driven exclusively by merit (who could know and serve an agency’s needs better than a former and well-respected insider?), the perception can be that the insider used his former public position for personal advantage and that the agency engaged in favoritism in deciding to do business with that particular firm or individual.<sup>3</sup>

**Underestimating the importance of governmental transparency and other ethics requirements.** The book *The Ethics Edge* notes that people from the private sector who come to government service can get into trouble by not taking ethics restrictions seriously.<sup>4</sup> Author Dennis F. Thompson explains: “Being respectable in their own communities and corporations, they find it hard to understand why they should take these more restrictive standards seriously, especially since they do not have as much respect for government as they do the private sector.”

A word to the wise: Take these ethics issues seriously. The media, your political rivals and the public will be all over you if you don’t.

## What About Trust?

When confronted with charges of unethical practices, public officials are likely to be surprised and hurt that anyone would claim that the officials were acting with anything but the public’s best interests in mind. Why do the media and the public instantly gravitate toward thinking the worst of someone’s intentions?

This is a fundamental distinction between personal and public ethics. As one scholar explains, personal ethics are based on face-to-face relationships with individuals.<sup>5</sup> Public ethics, on the other hand, tend to involve relationships that are more removed in most communities. Most constituents simply don’t know a public official well enough to form an opinion about his or her ethics.

The reality is that the public cannot know how an official sorted through all the efforts - proper and improper - to influence his or her decision-making process on contracts. As a result, the media and the public tend to judge public officials’ ethics by the circumstances surrounding those officials’ actions. If the circumstances are such that improprieties could have occurred, the public will conclude that improprieties likely did occur.

Media coverage and the existence of those who do in fact abuse the public's trust exacerbate the public perception issue. For example, during March 2004, four different newspapers in different parts of the state featured coverage critical of local officials' behavior related to contract issues.<sup>6</sup> The public is also well aware of instances (typically rare) in which an unscrupulous public official will steadfastly claim to have the most sterling character. Regrettably, this "bad apple" syndrome creates almost a presumption of untrustworthiness.

This is the origin of the maxim that public officials are wise to avoid even the appearance of impropriety. If the public is inclined to infer wrongdoing merely from circumstances that could have involved wrongdoing, the most reliable way to promote the public confidence is to avoid those circumstances in the first place. One scholar goes so far as to assert that, because the appearance of impropriety erodes public trust, the appearance of impropriety constitutes a breach of an official's responsibility to promote public trust in government.

### **Typical Steps in the Procurement Process**

**Step 1:** Establish a need for a product or service not otherwise available to the agency through internal resources.

**Step 2:** Determine standards or specifications for the product or service.

**Step 3:** Invite vendors to submit proposals to supply the product or deliver the service.

**Step 4:** Evaluate the proposals according to evenly applied criteria and select the winner.

**Step 5:** Negotiate the contract.

**Step 6:** Vendor performs according to contract terms.

## About Those Contracting Processes?

So, in essence, the answer to the opening question is that the public agency contracting process is generally not designed for speed. Instead, the process is designed to reassure the public that the process is fair and competitive. To be sure, this can result in businesses declining to participate in the process and a missed opportunity for the public to receive a better product at a more competitive price.

Furthermore, some of the checks and balances in the contracting process are designed to ensure that no one individual plays too great a role in contracting decisions. These layers to the process limit any one official's ability to skew the outcome based on personal interests, as opposed to the public's interests.

Perhaps the ultimate explanation is that the public is willing to incur the costs associated with minimizing the opportunities for mischief in the contracting process, even if the process turns away some would-be contractors. The theory is that, in the long run, fair processes prevent improprieties and increase the likelihood that the public will, in fact, get the best deal over time.

### Top 10 Things to Know About Public Contracting and the Law

**1. Key principles.** Public contracting laws – including those adopted at the local level – are designed to give all interested parties the opportunity to do business with the government on an equal basis. This keeps contracts from being steered to businesses or individuals because of political connections, friendship, favoritism, corruption or other factors. It also ensures that the public receives the best value for its money by promoting competition among businesses so the public can get the best deal.<sup>7</sup>

**2. Competitive bidding requirements.** Many competitive bidding requirements are locally-imposed – for example, by charter cities as part of their municipal affairs authority.<sup>8</sup> State law also authorizes local agencies to adopt procedures for acquiring supplies and equipment.<sup>9</sup> Most of these purchasing ordinances require competitive bids for contracts in excess of designated dollar amounts.

For public works projects, state law defines when general law cities and counties must use competitive bidding. For general law cities, public works projects worth more than \$5,000 are subject to the state's competitive bidding requirements.<sup>10</sup> For county projects, the threshold is based on population: counties with populations of 500,000 or more (\$6,500); counties with populations of 2 million or more (\$50,000); and all other counties (\$4,000).<sup>11</sup> Note that it is a misdemeanor to split projects to avoid competitive bidding requirements.<sup>12</sup>

**3. Achieving an open process.** In order to give all interested parties an opportunity to do business with the agency and get the best price for the public, the agency has to publicize the opportunity. This is typically accomplished by publishing a notice inviting bids in a newspaper of general circulation that is printed or published in the jurisdiction,<sup>13</sup> or if there is none, posting the notice in at least three public places in the jurisdiction. Trade publications can also be a helpful way of reaching a wide segment of the contracting industry.

**4. Uniform bidding instructions and information.** A key component of a fair bidding process is to ensure that the bid documents and specifications are complete and identical for all bidders. Any modifications to the bidding package that are made before the bidding deadline should be provided promptly to all bidders. For example, agencies must extend the time for submission of bids if a city issues any material changes, additions or deletions to the bidding documents later than 72 hours prior to the bid closing.<sup>14</sup> Creating a “level playing field” is important not only to achieving a fair process but also to ensuring a defensible decision in awarding the contract and an enforceable contract with the successful bidder.

**5. Contracts awarded to the lowest responsive bidder in a sealed bid process.** For public works projects, a bidder who meets the contractor licensing requirements, submits a bid that conforms to the terms of the bid package and is the lowest monetary bid in a sealed bid process is generally entitled to be awarded the bid.<sup>15</sup> If an agency has concerns about a contractor’s competence or previous billing practices with the agency, it must give the contractor an opportunity to rebut information about his or her inability to perform the work (called a non-responsibility hearing).<sup>16</sup>

**6. Considerations of price versus skills.** For certain kinds of services, price will not be the only or main consideration. For example, for architectural, landscape, architectural, engineering, environmental, land surveying or construction project management services, the selection of a firm must be based on demonstrated competence and having the professional qualifications necessary for satisfactory performance of the services required.<sup>17</sup> Local agencies may adopt ordinances specifying how this goal is achieved.<sup>18</sup> Price can be a consideration after competence and qualification requirements are met.<sup>19</sup>

**7. Consideration of other non-price issues in awarding contracts.** One special district found itself in legal hot water when it decided not to do business with a firm because of concerns about the firm’s labor relations practices.<sup>20</sup> The court found that federal law pre-empted the agency from imposing additional penalties on the bidder (disqualifying it from doing business with the agency). Local preferences<sup>21</sup> and “Buy American” requirements<sup>22</sup> may also cause legal troubles. At least one commentator has observed that these kinds of requirements can be manipulated to engage in the kind of favoritism at odds with the principles of fairness underlying public contracting laws in general.<sup>23</sup>

**8. “Wining and dining” by prospective contractors must be disclosed and may disqualify an official from participating in the contracting process.** Local officials subject to reporting requirements<sup>24</sup> must disclose meals, sporting event tickets and other such gifts of \$50 or more from a single source on their Annual Statement of Economic Interests.<sup>25</sup> These may not add up to more than \$420 (2009-10) in a calendar year.<sup>26</sup> (The gift limit is modified every two years to reflect changes in the Consumer Price Index; the Fair Political Practices Commission website typically has current information on the gift limitation.) Receiving gifts from potential contractors of \$420 (2009-10) or more in a 12-month period prior to the contracting process creates a potentially disqualifying economic interest in the contract.<sup>27</sup>

**9. An agency may not enter into a contract in which one of its officials has a financial interest.** A key question to ask when evaluating your agency’s contracts is “Will this contract affect my interests in any way?” If the answer is “yes,” speak with your agency counsel immediately. A public official may not have a financial interest in any contract made by the council or board of which he or she is a member.<sup>28</sup> A “financial interest” includes a direct or indirect financial interest. A direct financial interest is present when the official is the party contracting with the agency. An indirect financial interest involves an official who has a financial relationship with the contracting party or will receive some benefit from the making of the contract with the contracting party. It does not matter if the official’s financial interest is positively or negatively affected. When this prohibition applies, the agency may not enter into the contract in question unless certain exceptions apply.

The penalties for violating the prohibition against conflicts of interest in contracts are severe. Willful violations are a felony and may be punished by fines, imprisonment and being disqualified from ever holding public office again.<sup>29</sup> The contract is also void,<sup>30</sup> which means that the local agency does not have to pay for goods or services received under the contract. The agency may also seek repayment of amounts already paid.<sup>31</sup>

**10. Receiving any kind of gratuity for awarding a contract is a crime.** A public official may not receive anything in return for the award of a contract by the agency. Depending on the circumstances, the official could be guilty of bribery and extortion. A bribe involves influencing an official’s vote or actions by conferring a benefit on that official.<sup>32</sup> Asking for a bribe is illegal, of course, but so is receiving one or agreeing to receive one.<sup>33</sup>

A public official may not demand money or other favors in return for the performance of his or her official duties.<sup>34</sup> Note that this would include demanding campaign contributions in return for official action. Bribery and extortion may be prosecuted by the district attorney or federal prosecutors. These are crimes punishable by a combination of prison time, fines and being removed from office (and being forever disqualified from holding public office).<sup>35</sup> The official may also be ordered to pay as restitution any amounts received.<sup>36</sup>

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## Endnotes:

<sup>1</sup> Cronyism is a term attributed to the *New York Times* in the early 1950s. The newspaper used the term to criticize a presidential administration for appointing friends to positions in government without regard to their qualifications (the *Times* described the administration for having a “sorry reputation for corruption, cronyism, extravagance, waste and confusion”).

<sup>2</sup> “Mayor Works Around the Rules,” *San Jose Mercury News* Editorial, March 21, 2004.

<sup>3</sup> See Cal. Gov’t Code § 87407; Cal. Code Regs. § 18747. Note that other conflict of interest prohibitions against having an economic interest in a matter an employee works on or a contract may also apply.

<sup>4</sup> Dennis F. Thompson, “Paradoxes of Government Ethics,” reprinted in *The Ethics Edge* (ICMA, 1998), at 47, 51.

<sup>5</sup> Dennis F. Thompson, “Paradoxes of Government Ethics,” reprinted in *The Ethics Edge* (ICMA, 1998), at 47, 50-55.

<sup>6</sup> See “DA Will Look Into Mayor-Firm Link” *The Daily Breeze*, March 2, 2004; “Mayor Reportedly Pitched Towing Firm to Officials,” *The Daily Breeze*, March 16, 2004; “Airing Out a City Hall Stink” *Los Angeles Times* Editorial, March 10, 2004; “Money and Politics” *Long Beach Press Telegram*, March 11, 2004; “Mayor Works Around the Rules,” *San Jose Mercury News* Editorial, March 21, 2004.

<sup>7</sup> See Cal. Pub. Cont. Code § 100.

<sup>8</sup> *Smith v. City of Riverside*, 34 Cal. App. 3d 529, 110 Cal. Rptr. 67 (4th Dist. 1973). See also Cal. Pub. Cont. Code § 11007.

<sup>9</sup> Cal. Gov’t Code §§ 54201 and following.

<sup>10</sup> Cal. Pub. Cont. Code §§ 20160-20162.

<sup>11</sup> Cal. Pub. Cont. Code §§ 20120-20123.

<sup>12</sup> Cal. Pub. Cont. Code § 20163.

<sup>13</sup> See, for example, Cal. Pub. Cont. Code § 21064.

<sup>14</sup> Cal. Pub. Cont. Code § 4104.5.

<sup>15</sup> Cal. Pub. Cont. Code § 20162; Cal. Bus. & Prof. Code § 7030.5.

<sup>16</sup> *City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court*, 7 Cal. 3d 861, 103 Cal. Rptr. 689 (1972).

<sup>17</sup> Cal. Gov't Code § 4526.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *CF&I Steel v. Bay Area Rapid Transit District*, 2000 WL 1375277 (N.D. Cal.), 142 Lab. Cas. P 59,131 (N.D. Cal. 2000).

<sup>21</sup> *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987) (finding preferences for firms based in city are only permitted if council can legitimately find local firms are disadvantaged because doing business within city limits is more expensive than doing business outside city). *But see United Building & Construction Trades Council of Camden County & Vicinity v. City of Camden*, 465 U.S. 208 (1984) (declaring an ordinance requiring preference for hiring local residents on public works contracts violates federal constitution's privileges and immunities clause). *See also* 72 Cal. Op. Att'y Gen. 86 (1989) (opining local preference ordinances do not conflict with state public bidding statutes, but not discussing *Associated Contractors*).

<sup>22</sup> The "California Buy America Act", and the "California Preference Law" (Cal. Gov't Code §§ 4300 and following) have been declared invalid as an interference with the federal government's power over foreign affairs. *Bethlehem Steel Corp. v. Board of Commissioners of the Department of Water and Power of the City of Los Angeles*, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (2d Dist. 1969); 53 Cal. Op. Att'y Gen. 72 (1970).

<sup>23</sup> *See* Cal. Pub. Cont. Code § 100 and "Trustworthiness in Public Contracting: Back to Boss Tweed? *CF&I Steel v. Bay Area Transit District*," Scott J. Kaplan, 31 Pub. Cont. Law Journal, 237 (2002).

<sup>24</sup> *See* Cal. Gov't Code § 89503.

<sup>25</sup> Cal. Gov't Code § 87207(a)(1) (requiring public officials to report sources of gifts aggregating \$50 or more and a general description of the business activity of the gift giver).

<sup>26</sup> 2 Cal. Code Regs. § 18940.2.

<sup>27</sup> Cal. Gov't Code § 82028, 87103(e); 2 Cal. Code Regs. § 18703.4.

<sup>28</sup> Cal. Gov't Code §§ 1090 and following.

<sup>29</sup> *See* Cal. Gov't Code § 1097.

<sup>30</sup> *Thomson v. Call*, 38 Cal. 3d 633, 214 Cal. Rptr. 139 (1985).

<sup>31</sup> *See* Cal. Gov't Code § 1092.

<sup>32</sup> Cal. Penal Code §§ 7 (definition number 6), 68.

<sup>33</sup> *See* Cal. Penal Code § 68.

<sup>34</sup> *See* Cal. Penal Code § 518; *In re Shepard*, 161 Cal. 171, 118 P. 513 (1911) (in the context of removal-from-office proceedings for misconduct).

<sup>35</sup> *See generally* Cal. Penal Code § 68; Cal. Gov't Code §§ 3060-3074.

<sup>36</sup> *U.S. v. Gaytan*, 342 F.3d 1010 (9th Cir. 2003).