

**Lackawanna Bar Association
January 11, 2024**

**State and Local Government Procurement
Solicitor and Vendor's Counsel Perspectives**

1. Introductions
 - (a) Solicitors – county, municipal, authority or school?
 - (b) Counsel to vendors to governmental entities of equipment, materials, supplies, and services?
2. Initial comments
 - (a) Answer questions now, and as we go
 - (b) Focus here on key concepts in the transactional setting involving the purchase of equipment, materials, supplies, and services
 - (i) Excluded here is a discussion of construction, leasing, and insurance
 - (c) Presentation addresses local government solicitors and vendor's counsel with clients in state and local government
 - (i) We have given presentations to state lawyers and written articles with content quite different than what is here
 - (d) Treatise in process
 - (e) Apologies if some of this is all too familiar¹
3. Governmental structure
 - (a) State has independently elected officials, agencies, and departments, deputates, bureaus, offices, divisions, commissions, authorities, systems, boards, councils, and programs
 - (i) Procurement at the state level is governed primarily by the Commonwealth Procurement Code, 62 Pa.C.S. §101 et seq.

¹ We are duty-bound to provide the usual admonition that we are not providing legal advice to any person or entity. This is “lawyer-to-lawyer” conversation, and we are happy to continue the discussion after the presentation to gather all the relevant factors and considerations if legal advice is warranted.

- (b) At the local level, there are eight classes of counties, several categories of municipalities (cities of different classes, townships of two classes, boroughs, and one town), operating and financing authorities, five classes of school districts, and charter schools.
 - (i) Each local government category has a relevant code with provisions applicable to procurement
 - (ii) See Appendix A below, identifying local government codes
 - (iii) See Appendix B below, identifying some of the statutes that are applicable in specific contexts

4. Competition and the common standard

- (a) Fostering competition is first and foremost among the governing principles in state and local procurement
- (b) The solicitation must present a “common standard” to all bidders and proposers, i.e., the bidders and proposers must be on a level playing field and have equal opportunity
 - (i) Instances where access to information is not equal or where there is favoritism, fraud, and corruption violate these principles
- (c) Provided that these principles are not violated, state and local government has broad discretion in establishing the “rules” of the solicitation

5. Procurement methods

- (a) Low-price (“strict”) bidding
 - (i) Most often used for equipment, materials, and supplies
 - (ii) Ordinarily mandatory for both state and local government unless an exception exists
- (b) Request for Proposal (RFP, also “competitive solicitation”)
 - (i) Most often used for services
 - (ii) At the same time, services that are “fungible,” meaning able to be specified with a sufficient degree of preciseness and are not professional (e.g., janitorial, maintenance, transportation) can appropriately be bid
- (c) Sole source contracting

- (i) Disfavored at the state level
 - (ii) Employed all too often by local government to bypass bidding requirements and extend contracts with incumbent vendors
 - (d) Professional services
 - (i) Need not be bid but often should be competitively solicited
 - (ii) Technically, bidding is distinct from the issue of whether professional services can be sole-sourced
 - (e) Emergency procurement
 - (i) Can you say COVID?
6. Soliciting contracts
- (a) Vendors need to market aggressively and prepare
 - (i) Include review of current contracts through Right-to-Know (RTK) requests
 - (ii) Gathering “intel” should be an ordinary activity
 - (b) For significantly sized and novel procurements, governmental entities should do more than the minimal advertising
 - (c) Vendors should consider “helping” governmental entities by providing specifications
 - (d) Governmental entities should consider securing outside expertise in establishing the “specs”
 - (i) Often, the easiest method for establishing specifications is prepare “performance” specs, rather than “technical” ones
 - (1) A couple of dozen pages would be adequate to describe the performance of a 9-1-1 system, but technical specs for such a system require volumes
7. Form of contract documents
- (a) State solicitations and contract documents are based on established forms with no opportunity in the bidding context for negotiation and little opportunity in RFPs

- (i) “Exceptions” can be taken in the proposal to an RFP’s proposed state contract terms – and the rule is, the fewer the better
- (b) At the local level, administrators have an undesirable tendency in the procurement context to adopt forms provided by vendors
 - (i) Vendors like this, not surprisingly
 - (ii) Use of vendor forms necessarily means that competitors are not bidding on a common standard
 - (iii) Solicitors should oversee the contract forms being utilized, prepare standard forms, and require that the form of agreement be included in the solicitation
 - (1) Ultimately, having solicitor-approved, standard forms will save the time and effort needed by the administrators

8. Review of bids and proposals at the state level

- (a) Bids are handled by career employees regularly assigned to this function
- (b) The “responsiveness” of a bid is reviewed, selected alternates are factored in, and contractor qualifications are checked for “responsibility”
 - (i) Responsiveness can be defined by what is called the “four corners” doctrine, i.e., whether the submission conforms in all material respects to the solicitation, excluding extrinsic information
 - (ii) Responsibility is whether the bidder or proposer has the requisite capability, experience, and integrity and is determined at the time of the award
 - (iii) Compliance with a new Disadvantaged Business Enterprise and Veteran’s Business Enterprise requirements is rigorously enforced
- (c) For proposals submitted in response to an RFP involves review by an evaluation committee composed of representatives of various governmental constituencies who score the submission using a point-based system

- (i) Point-scoring was established at the state level by the Comptroller's Office – i.e., accountants, not lawyers; point-scoring at the local level generally does not yield good results
- 9. Review of bids and proposals at the local government level
 - (a) Handled by business administrators who are more often political appointees and who have a wide range of responsibilities
 - (b) Review for responsiveness and responsibility is in practice less rigorous
 - (i) Disqualification of unqualified bidders and proposers tends to be less common because of the fear of a protest
 - (c) At the local level, use of evaluation committees is much less common, the evaluations are performed by higher-level officials, and point scoring is less frequently utilized
- 10. Use of legal authority at the state and local levels
 - (a) Reliance that is limited to the specific code applicable to the particular local governmental entity can be problematic
 - (i) Case law involving other codes and even state statutes may provide guidance
 - (b) The perpetual debate over acquiring equipment in the same solicitation as services was resolved at the state years ago
 - (i) In many equipment solicitations, services are inherent
 - (ii) The state ordinarily uses a competitive solicitation (RFP) process for combined solicitations
 - (iii) The state's use of "combined" solicitations has never been challenged and we doubt that there has been a challenge at the local level
- 11. Contract approval
 - (a) Contract authorization processes at the state level are quite intricate, involving about a dozen reviews and a half dozen signatures
 - (b) Contract authorizations at the local level can be fraught with irregularities that make the award vulnerable to challenge

- (i) Budgetary approval for expenditures is not co-extensive with approval by the governing body of the specific contract
 - (ii) Contract extensions not provided for in the original solicitation are subject to challenge under the Commonwealth Court’s decision in *Hanisco v. Township of Warminster*, 41 A.3d 116,125 (Cmwlth. 2012), appeal denied, 53 A.3d 758 (Pa. S.Ct. 2012)
 - (iii) Consideration should be given by local governments to use of multi-year agreements, with a funding clause included, so that the number of solicitations needed annually is reduced
- (c) Cooperative purchasing also provides a means of making local government procurement processes more efficient
- (i) “Buying off of” a contract solicited by another governmental entity (foreign to Pa. or domestic) avoids a repeat of the process of soliciting and selecting a vendor, but does not avoid approval of the contract by the governing body
 - (1) While this rarely occurs, a new agreement should be prepared, incorporating by reference the initial agreement and identifying the Pa. governmental entity and adjusting terms as required
 - (ii) There is a myriad of cooperative purchasing programs, including COSTARS, PML’s L3P and MUA, Keystone, PEPPM and Omnia
 - (iii) Caution needs to be exercised; although administrative time is usually saved through cooperative purchasing, the pricing and other terms are not always advantageous

12. Performance

- (a) The state often refuses to pay for services, equipment and materials provided prior to the full execution and delivery of the contract to the vendor
 - (i) This practice is grounded in the importance of precluding administrative personnel from requesting that the vendor proceed, in the state’s view, prematurely
 - (ii) Circumvention of this is extremely difficult

- (b) At the state level, it may be desirable to date the agreement to when performance commenced, or to make the contract effective at that time

13. Right-to-Know Law

- (a) Understanding is particularly critical for vendors and their counsel
- (b) Expansive coverage in 2008 enactment
 - (i) Access allowed to all “records” “of the agency” that are not exempt
- (c) Vendors can research prior relevant contracts
- (d) Inquiries into future solicitations should be part of marketing strategy; RTK requests for pending solicitation materials are likely to be treated as “predecisional” and not available
- (e) In proposals, confidential trade secrets should be identified and redacted in a second, contemporaneous submission
 - (i) Governmental officials should not be asked and may not be required to protect such information and do anything other than review what the vendor redacts
- (f) Competing proposals will not be accessible prior to an award, and ordinarily there is no time

14. Challenges to solicitations and awards

- (a) State bid protest procedures are set forth in the Commonwealth Procurement Code, 62 Pa.C.S. §1711.1
 - (i) Prior to this 1998 enactment, disappointed bidders had no statutory or constitutional rights to protest
 - (1) However, a “taxpayer” – often a straw party – could file an action in equity to enjoin an award
 - (ii) The initial step in the state protest process is administrative, required to be taken prior to the deadline for bid submission, or after submission within seven days of when the grounds of the protest were or should have been recognized
 - (iii) An automatic stay applies during the administrative pendency of the protest

- (iv) If the protest is denied (and it usually is), an appeal can be taken to the Commonwealth Court within 15 days of the date of the administrative decision
- (v) Vendors can expect that state lawyers will present a strong defense
- (b) In local government solicitations, disappointed bidders must still rely on a taxpayer challenge
 - (i) Identification of a proper taxpayer or taxpayers is highly technical and can be extremely problematic
 - (ii) The action must be filed promptly to avoid the defense of laches
 - (iii) Solicitors can also rely on the substantial burden of proof required of the taxpayer and the discretion and presumption of compliance with the law allows to governmental entities

15. Contract disputes

- (a) At the state level and failing amicable resolution of the dispute, the contract will ordinarily require resort first to internal, administrative remedies, where a non-neutral employee or in-house attorney hears the claims
 - (i) Deadlines are established in the contract and must be carefully observed by claimant's counsel
 - (ii) An appeal may be taken within a brief period and will be heard de novo in the Board of Claims
- (b) Local government contract disputes can be brought by the vendor and are heard by the Court of Common Pleas, with appeals to the Commonwealth Court

16. Conclusion

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Appendix A
Local government statutes

1. First Class County Code, 16 P.S. §7101 et seq.
2. Second Class County Code (Second and Second Class A), 16 P.S. §3101 et seq.; §5501-§5503. See also 16 P.S §1800 et seq. of the County Code
3. County Code (Third to Eighth Class), 16 P.S. §103 et seq. See in particular §1800 et seq.
4. First Class City Code, 351 Pa. Code §8.8-200 et seq.
5. Second Class City Code, 53 P.S. §22101 et seq. See in particular §23301 et seq.
6. Second - A Class City Code, 53 P.S. §30101 et seq.
7. Third Class City Code, 11 Pa.C.S. §10101 et seq. See in particular §11901 et seq.
8. General Township Law, 53 P.S. §54101 et seq.
9. First Class Township Code, 53 P.S. §55101 et seq. See in particular 53 P.S. §56801 et seq.
10. Second Class Township Code, 53 P.S. §65101 et seq. See in particular 53 P.S. §68101 et seq.
11. Borough Code, 8 Pa.C.S. §101 et seq. See in particular 8 Pa.C.S. §1401 et seq.
12. Incorporated Towns, 53 P.S. §53201 et seq.
13. Public School Code, 24 Pa. C.S.A. §7-701 to §7-760²
14. Municipal Authorities, 53 C.S.A. §5601 et seq.³ See in particular 53 C.S.A. §5614

² Note that other statutes govern Charter Schools.

³ Note that there are other statutes that create authorities at the local level related to Industrial Development, Housing, Parking and Redevelopment, and yet other statutes governing the creation of state authorities, such as the Pennsylvania Intergovernmental Cooperation Authority (PICA), 53 P.S. §12720.101 et seq.

Appendix B
Other Statutes

The is a partial list of statutes that may be relevant in the context of procurement:

1. “Piggyback purchasing” provisions found in Chapter 19 of the Act, 62 Pa.C.S. §1901 et seq.⁴
2. Local government requirements are also set forth in Part II of the Commonwealth Procurement Code, Chapters 33 to 46, 62 Pa.C.S. §3101 to 4604, including:
 - (a) Guaranteed Energy Savings Act, 62 Pa.C.S. §3752 et seq.⁵
 - (b) Antbid-Rigging Act, 62 Pa.C.S. §§4501-4509
 - (c) Electronic Bidding by Local Government Units, 62 Pa.C.S. §§4601-4604

⁴ Piggyback purchasing allows local government to adopt the solicitation and selection processes of another governmental entity but does not excuse the formation of a new contract. In this sense, the local government entity does not “buy off of” the pre-existing contract, contrary to conventional nomenclature.

⁵ This Act allows for a competitive selection process in lieu of the normal construction procedures.