

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

This column is a joint effort of the members of the Institute for Local Self Government's advisory panel on ethics. The questions in this column thus far have been suggested by the ethics advisory panel members to stimulate discussion and thinking on ethical issues faced by local officials. For more information about ILSG, visit www.ilsq.org. To suggest a future topic, e-mail ilsq@cacities.org.

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. 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 at best and corruption at worst. See "Contracting Practices: Traps for the Unwary" on page 31 for some of the pitfalls local officials have experienced in this area.

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. 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. 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.

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.

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