

The Legalities of Purchasing and Competitive Bidding

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Competitive Bidding Requirements General Municipal Law § 103

- Except as expressly provided by the State Legislature or by pre-September 1953 local laws, applies to:
 - All political subdivisions
 - Purchase contracts in excess of \$20,000
 - Contracts for public work in excess of \$35,000
- Requires awards "... to the lowest responsible bidder after advertisement for sealed bids..." or in certain cases on the basis of "Best Value".

Purposes of Bidding Statute

- Guard against favoritism, improvidence, fraud and corruption.
- Foster honest competition in order to obtain the best goods and services at the lowest possible price.
- Ensure the prudent and economical use of public monies for the benefit of the taxpayers and facilitate the acquisition of goods and services of maximum quality at the lowest possible cost.

Is Bidding Required?

- Purchase contracts in excess of \$20,000
- Contracts for public work in excess of \$35,000
- Best Value Awards for “purchase contracts” (competitive offerings) over threshold

General Rules on Thresholds

GML § 103(1) expressly provides:

- Purchases of “commodities, services or technology” may not be “artificially divided” for the purpose of satisfying the “discretionary buying thresholds” established by GML § 103(1).

General Rules on Thresholds (cont'd)

GML § 103(1) expressly provides:

- When determining whether a “purchase is an expenditure within the discretionary threshold amounts” established in GML § 103(1), “the reasonably expected aggregate amount of all purchases of the same commodities, services or technology to be made within the twelve-month period commencing on the date of the purchase” must be considered.

General Rules on Thresholds (cont'd)

- Bid requirements apply to **direct and indirect** expenditures
(e.g., trade-in allowance)
- **Unless otherwise provided by law, source of money** to be spent does not alter requirements for bidding
(e.g., state aid, federal aid, gifts)

Best Value Awards for “Purchase Contracts”

- GML § 103 provides, as an alternative to lowest responsible bidder awards, that “purchase contracts (including contracts for service work, but excluding any purchase contracts necessary for the completion of a public works contract pursuant to article eight of the labor law) may be awarded on the basis of best value,” defined in State Finance Law § 163, “to a responsive and responsible ... offerer”.

Best Value Awards for “Purchase Contracts” (cont’d)

- “Best Value” is defined as
 - “[T]he basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers. Such basis shall reflect, wherever possible, objective and quantifiable analysis” (see, State Finance Law § 163[1][j]).
 - “such basis may also identify a quantitative factor for offerers that are small businesses, certified minority- or women-owned business enterprises as defined in subdivisions one, seven, fifteen and twenty of section three hundred ten of the executive law or service-disabled veteran-owned business enterprises as defined in subdivision one of section three hundred sixty-nine-h of the executive law to be used in evaluation of offers for awarding of contracts for services.”

Best Value Awards for “Purchase Contracts” (cont’d)

- Towns, Villages, Cities (except NYC) and Counties who wish to award a purchase contract or purchase contracts based on “best value” must first be authorized by local law.
- District corporations (e.g. fire districts), school districts or BOCES, who wish to award purchase contract or purchase contracts based on “best value” must first be authorized “by rule, regulation or resolution adopted at a public meeting.”

Best Value Awards for “Purchase Contracts” (cont’d)

Example - Cost-Benefit Analysis:

- A local government solicits competitive offers to purchase a new pickup truck. Vendor A offers the lowest priced truck at \$40,000. Vendor B offers a more fuel-efficient truck at a price of \$45,000.
- Both vendors are responsive and responsible offerors.
- The local government reasonably estimates its average annual fuel costs to be \$4,000 for Vendor A’s truck and \$3,000 for Vendor B’s truck.
- The local government also concludes, based on reliable independent studies and assuming current usage of the vehicle, the more fuel efficient truck (Vendor B) will likely have \$250 less in maintenance costs annually than Vendor A (assuming maintenance costs of \$1,000 annually for Vendor A’s truck).
- The local government determines the expected useful life of a new truck to be 10 years and intends to retain the truck for the full useful life.

Best Value Awards for “Purchase Contracts” (cont’d)

Example - Cost-Benefit Analysis (cont’d):

- In order to quantify these other critical aspects relating to the new pickup truck purchase, the local government prepares the following cost-benefit analysis:

	<u>Vendor A</u>	<u>Vendor B</u>
■ Price (Truck)	\$40,000	\$45,000
■ Fuel Costs over Useful Life (10 Years)	\$40,000	\$30,000
■ Maintenance Costs over Useful Life (10 Years)	\$10,000	\$7,500
■ Total Cost	\$90,000	\$82,500

- Based on this analysis, it may be possible for the local government to support a determination that the truck from Vendor B provides the “best value” to the local government.

Certain Exceptions to GML § 103

Emergency

- GML § 103(4)

Three basic statutory criteria to meet exception:

- Arise from accident or unforeseen occurrence or condition
- Affects public buildings/property or life, health or safety
- Immediate action needed – cannot await competitive bidding

Surplus/Second-Hand Equipment

- GML § 103(6)
- Surplus/second-hand supplies, materials or equipment
- Federal or State government, political subdivision or public benefit corporation
- No exception for purchases from private source

Professional Services

- Exception by case law; no statutory definition
- In general, specialized skills, training, expertise
- Professional judgment or discretion
- High degree of creativity

True Leases and Licenses

- Must not be, in substance, a purchase or public work
- Look to “total character” of the arrangement

Sole Source Procurement

- Very limited exception; not statutory
- Available from one source only
- Product/service uniquely required in public interest
- No substantial equivalent and no competition
- Can't create by own actions (e.g., restrictive specs)

Preferred Sources State Finance Law § 162

- CORCRAFT
- Qualified, charitable nonprofit agencies for the blind
- Special employment programs serving mentally ill persons
- Qualified, charitable nonprofit agencies for severely disabled persons
- Certain qualified veterans' workshops

Certain County Contracts

- Certain county contracts - GML § 103(3), County Law § 408-a
- The 2011 amendment to GML § 103(3) and County Law § 408-a to remove the restriction on procurements through county contracts for services as an exception to bidding, when the services are subject to the prevailing wage requirements of article 8 of the Labor Law (public work), was extended to July 31, 2019.
- Note that the restriction for services governed by the prevailing wage requirements of article 9 of the Labor Law, relative to building service employees, remains in place.

Certain State Contracts

- Certain State OGS contracts – GML § 104
- Same terms/conditions
- No exception if vendor meets or beats State contract price

Certain State Contracts (cont'd)

- GML § 104 was amended to authorize political subdivisions, as an exception to GML § 103, to make purchases through “the office of general services or any other department or agency of the state subject to rules promulgated pursuant to article eleven of the state finance law...” (emphasis added).
- The Law sunsets July 31, 2019.

Certain Federal Contracts

- GML § 103(1-b) added to provide that political subdivisions have the option to purchase, “information technology and telecommunications hardware, software and professional services ” through cooperative purchasing permissible pursuant to federal GSA supply schedule (“Supply Schedule 70”).
- The political subdivision must comply with federal schedule ordering procedures as provided in federal regulations.
- GML § 104 was amended, adding a subdivision two, to similarly authorize political subdivisions, as an exception to competitive bidding, to purchase “from federal general service administration supply schedule pursuant to section 211 of the federal e-government act of 2002.”
- GML § 104 further authorizes political subdivisions, as an exception to bidding, to make purchases pursuant to section 1122 of the National Defense Authorization Act for Fiscal Year 1994 in accordance with procedures established in federal law.

Certain Federal Contracts (Cont'd)

- GML § 104(2) authorizes political subdivisions to purchase, as exceptions to the requirements of GML § 103, through several additional federal programs made available to local governments:
- the **Federal Local Preparedness Acquisition Act** (“Schedule 84”), which includes alarm and signal systems, facility management systems, firefighting and rescue equipment, law enforcement and security equipment, marine craft and related equipment, special purposes clothing, and related services.
- **Section 833 of the John Warner national defense authorization act for fiscal year 2007**, which includes products and services to be used to facilitate recovery from major disasters declared by the president under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, or to facilitate recovery from terrorism or nuclear, biological, chemical or radiological attack.
- the **Federal Supply Schedule Usage Act of 2010**, which includes the use of federal supply schedules to purchase certain goods and services used “to facilitate disaster preparedness or response”.
- These exceptions, which are separate from, and not subject to the prerequisites of GML § 103 (16), are scheduled to sunset on July 31, 2019.

Certain Other Government Contracts

- Subdivision 16 added to General Municipal Law § 103.
- Allows political subdivisions “to make purchases of apparatus, materials, equipment or supplies, or to contract for services related to the installation, maintenance or repair of apparatus, materials, equipment, and supplies, ... as may be required by such political subdivision or district therein through the use of a contract let by the United States of America or any agency thereof, any state or any other political subdivision or district therein...” (emphasis added)
- Use of such contracts is conditioned on the contract that is to be utilized having been “let to the lowest responsible bidder or on the basis of best value in a manner consistent with this section and made available for use by other governmental entities...” (emphasis added)
- Scheduled to sunset on July 31, 2021.

Certain Other Government Contracts (cont'd)

- There are three statutory prerequisites that must be met in order for a procurement of apparatus, materials, equipment and supplies, and related installation, repair and maintenance services, to fall within this exception:
 1. The contract must have been let by the United States or any agency thereof, any state or any other political subdivision or district therein.
 - Contracts developed for use by local governments that are let by private parties (e.g., a private company, association or not-for-profit corporation is the party awarded the contract to the vendor), and not by the United States or any agency thereof, any state or any other political subdivision or district therein, would not fall within the exception.

Certain Other Government Contracts (cont'd)

2. The contract must have been made available for use by other governmental entities.
 - In general, this prerequisite is satisfied by inclusion in the contract let by the other entity of a clause extending the terms and conditions of the contract to other governmental entities.
 - Unilateral offers by vendors to extend contract pricing and other terms and conditions would not fall within the exception.

Certain Other Government Contracts (cont'd)

3. The contract must have been “let to the lowest responsible bidder or on the basis of best value in a manner consistent with this section.”

Certain Other Government Contracts (cont'd)

Determining Consistency with GML § 103:

- In order for a non-New York contract to have been let to the lowest responsible bidder or on the basis of best value (competitive offering) in a manner “consistent” with GML § 103, the procedure used by that government need not be exactly the same as those under GML § 103.
- Instead, the procedures for letting the non-New York contract must be in harmony or general agreement with, and further the same principles, as the competitive bidding or best value requirements of GML § 103.
- Therefore, based on the provisions of GML § 103 as construed by the courts in this State, and the underlying purpose of GML § 103, we believe there are four fundamental elements that should be present in order for the process to have been let to the lowest responsible bidder or on the basis of best value consistent with GML § 103.

Certain Other Government Contracts (cont'd)

Determining Consistency with GML § 103: (cont'd)

1. Public solicitation of bids or, in the case of best value, offers.
2. Submission of sealed bids or offers, or analogous procedures to secure and preserve the integrity of the process and confidentiality of the bids or offers submitted.
3. Preparation of specifications, or a similar document that provides a common standard for bidders or offers to compete fairly.
4. Award to the lowest bidder who materially or substantially meets the bid specifications and is determined to be a responsible bidder, or in the case of a best value process, an award to the responsive and responsible offerer.

Certain Other Government Contracts (cont'd)

Other Factors to Consider; Internal Controls

- Contractual Relationship
- Audit of Claims
- Cost Savings Justification
- Documentation

Certain Other Government Contracts (cont'd)

Procurements Below the Bidding Monetary Threshold; Policies and Procedures

- Whether a local government may make purchases that are below the statutory thresholds by “piggybacking” on contracts let by governmental entities listed in GML § 103 (16) will be governed by the local government’s own procurement policies.

Specifications

- Nature of the services
- Physical or functional characteristics of the commodity to be purchased
- Terms/conditions under which contract will be awarded
- Justification in public interest for specifications that tend to favor particular bidder

Certain Required Specifications

- No assignment of contract without consent (GML § 109)
- Workers' Compensation coverage (GML § 108)
- Prevailing wage/ non-discrimination (Labor Law §§ 220, 220-e)
- Non-collusion statement (GML § 103-d)
- OSHA training for workers on certain contracts for public work (Labor Law § 220-h)
- Statement of non-investment in Iranian energy sector (GML §103-g, State Finance Law § 165-a)

Best Value Specifications

- Best value specifications should describe general manner in which the evaluation and award of offers will be conducted and, as appropriate, identify the relative importance of weighing of price and non-price factors.

Advertising for Bids or Offers

- Advertisement published in official newspaper
- At least five days between publication and opening bids and offers
- Time and place of opening and
- Where the identity of offerers will be publicly disclosed
- In addition to publishing in official newspaper, may publish in the procurement opportunities newsletter pursuant to article four-c of the economic development law (see L. 2014, ch 367).

Awarding Contracts

- When competitive bidding is required, award made to lowest priced responsible bidder which has complied with specifications.
- Decision to award a contract on the basis of best value must be based on objective and quantifiable analysis, such as a cost-benefit analysis, whenever possible.
- In evaluating and determining to accept a higher priced offer, generally should use a cost-benefit analysis to show quantifiable value or savings from non-price factors that offset the price differential of the lower price offers.

Non-compliance of bid specifications

- May waive technical non-compliance
- Must reject material variance if:
 - It impairs interests of political subdivision;
 - Low bidder receives unfair advantage; or
 - Other bidders placed at competitive disadvantage

Responsibility

- In assessing if bidder or offerer is responsible, should consider factors such as a bidder's or offeror's capacity and financial ability to complete the contract, accountability, past performance, reliability and integrity.
- May not debar contractors, except as provided by statute.
- Due Process for finding of non-responsibility.

Procurement Policies and Procedures: GML § 104-b

- Written internal policies and procedures
- Applies to all procurements not subject to competitive bidding
- Identify individual(s) responsible for purchasing and their title(s)

Procurement Policies and Procedures (cont'd)

- Procedure for determining if bidding applies and documenting basis for determination that bidding is not required
- Generally require alternative proposals/quotations – how obtained
- When to use each method of procurement and documentation of actions taken in connection with each method

Procurement Policies and Procedures (cont'd)

- If contract awarded to other than low offerer:
 - Justification
 - Documentation
- When/what types of procurements do not require alternative quotes/proposals

Resources

Telephone:

(518) 474-5586

- OSC Advisory Legal Opinions from 1988-present are available on the OSC website:
www.osc.state.ny.us