

MUNICIPAL LAW

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Principles of Public Procurement

THE CITY OF New York typically spends approximately \$10 billion to \$12 billion on the purchase of goods, services and construction each year. A few contracts a year can be expected to become controversial, a few can be expected to be welcomed by a neighborhood or borough, but most are quotidian and will be awarded and performed in relative obscurity. It is incumbent upon the city and its agencies to conduct its procurements fairly and honestly in a manner consistent with state, local and federal law.

As part of the city's procurement process, the Contracts and Real Estate Division of the Law Department performs the oversight function of approving "as to form" contracts entered into by city agencies. We approve approximately 3,000 city contracts every year, with dollar-value ranges between the tens of thousands and the tens of millions. We perform this function in fulfillment of the requirement of Charter §394 (b) that the corporation counsel must approve all contracts entered into by the city.

This article examines basic legal principles of public procurement that guide this office's review of city contracts, and some current issues of public interest.

Legal Framework

The starting point of an analysis of the legal framework governing city procurement is Article 5-A of the General Municipal Law (GML), which establishes a statutory scheme governing procurement by municipalities throughout the state. The Legislature has identified two indisputably reasonable goals as the primary purpose of the state's procurement laws: (1) obtaining the best work at the lowest possible price and (2) preventing corruption in the awarding of public contracts. To effectuate these purposes, pursuant to GML §103, competitive sealed bidding after advertisement is generally required for all "public work" and "purchase contracts" over certain amounts. In conducting a competitive sealed bid, the city must award the contract after advertisement to the responsible contractor that bids the lowest price and meets the minimum qualifications. With a competitive sealed bid, the city cannot evaluate the quality of the bidders and award a contract based upon some combination of price and quality. If the low bidder is a responsible bidder (i.e., has the capability and integrity to perform the contract), the city cannot award to the second low bidder on the basis that the second low bidder is a better value because, although the price is higher, it believes the performance would be better.

For those procurements that are not subject to competitive sealed bidding (e.g., professional services), the city must comply with GML §104-b. That section requires municipalities (in the case of New York City, the New York City Procurement Policy Board) to adopt policies and procedures for such procurements that are consis-



tent with the two primary purposes of the state's procurement laws. When the city uses a procurement method other than a sealed bid, the city is not required to award a contract based on price alone. Instead, the city may consider price along with a variety of other factors such as experience and quality of proposal. This gives the city discretion to consider both price and performance factors in selecting a contractor that will best serve the interests of the public.

The Procurement Policy Board, established in Chapter 13 of the City Charter, is responsible for promulgating rules governing city procurements. The PPB has adopted detailed requirements regarding contract formation and administration.¹ The PPB is a five-member board, three of whose members are appointed by the mayor and two by the comptroller. The PPB is a rulemaking body but has no authority with respect to the award or administration of any particular contract. Instead, responsibility for contract award and administration is focused upon the mayor, who must determine the organization, personnel structure and management of the city's procurement system.

By executive order, the mayor has designated a City Chief Procurement Officer (CCPO) to head the mayor's Office of Contract Services (MOCS) and to exercise the powers of the mayor in the procurement process, both those granted by the charter and additionally those powers added by the PPB rules. The CCPO oversees a system of Agency Chief Contracting Officers (ACCOs) who are responsible for the procurement functions of the individual agencies. This system of procurement professionals is a major reform that was created in the aftermath of the procurement scandals of the 1980s and the abolition of the Board of Estimate by the voters on the recommendation of a charter revision commission in 1989.

Structuring Bids

Although the city is required to award contracts to the lowest bidder when awarding contracts through a competitive sealed bid, the city still retains discretion in how to structure the bid. The bid specifications state the terms of the contract to which the bidder must agree in order to be awarded the contract and the city has substantial latitude in structuring the business terms of its contracts. The city, however, may adopt bid specifications that restrict the pool of bidders (e.g., a requirement that a contractor implement a project labor agreement) only if the specifications further the underlying goals of public procurement of obtaining the best possible product at the best possible price without the interference of corruption.²

In addition to being able to structure the business terms of its agreements, the city awards contracts only to responsible contractors. A responsible contractor must have both "the capability in all respects to perform in full the contract requirements, and the business integrity and reliability that will assure good faith performance."³ To ensure that the contractor is capable of performing the work, the city may impose experience

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requirements such as a requirement that a bidder had successfully completed similar projects. The city may not, however, limit competition by imposing rigid experience requirements that go beyond what is necessary to ensure the successful completion of a project.

The city may also consider, on a contract-by-contract basis, a bidder's honesty, integrity, good faith and fair dealing. The failure to disclose information requested by the city or a failure to cooperate in an investigation, creates independent grounds on which the city may find a bidder not responsible.

Database of Contractors

The city maintains information regarding a potential contractor's responsibility in a computerized database known as VENDEX.⁴ The contractor's previous history with the city, such as negative performance evaluations or significant breaches of prior contracts, and information obtained by the city from outside bodies regarding either performance or integrity issues, are all entered onto VENDEX. Before a bidder may be awarded a contract, the agency must check VENDEX for relevant information. In addition, the bidder must complete a series of forms called VENDEX questionnaires requesting information about the bidder, its principals and its past practices. That information is used for making a responsibility determination on the specific contract and is also entered into VENDEX for future contract awards.

With these general principles and requirements of law in mind, let us look at a specific contracting issue that is currently the subject of spirited litigation between Mayor Michael R. Bloomberg and the New York City Council: the validity of local laws that seek to wield the city's purchasing power in a manner that will effect social change. The city has recently been in court regarding the validity of Local Law 36 of 2002,⁵ with that law being struck down on Jan. 26, 2004 by Justice Michael D. Stallman of the New York State Supreme Court (N.Y. Co.).⁶ The City Council and the city comptroller have not appealed that decision.

Local Law 36 would have prohibited the city from providing financial assistance to, contracting for goods or services with, or depositing city funds in a financial institution that issues, purchases or invests in "predatory" loans. The Local Law 36 was initially vetoed by the mayor, who stated his legal objections to the measure, but the veto was overridden by the City Council.⁷ The mayor, represented by the corporation counsel, then challenged the validity of the law.

The mayor argued that Local Law 36 was preempted by federal and state banking laws. The mayor also argued that Local Law 36 would impose social policy restrictions on municipal contracting that are unrelated to the GML's purpose of ensuring that the city obtains the highest quality of goods and services for the lowest cost. Finally, the mayor argued that Local Law 36 would curtail mayoral powers and was therefore subject to a referendum before it could take effect.⁸

The City Council and the city comptroller defended the law by contending that the city, when acting pursuant to Local Law 36, would not be regulating home lending practices but instead would be operating as a "proprietor" or private market participant. The Council argued that, by discouraging "predatory" loans, Local Law 36 would ultimately result in a healthier city economy and therefore increased tax revenue. The Council further argued that Local Law 36 amounted to the city's determination, as a proprietor, that a contractor is not responsible when it engages in conduct that local law defined as predatory even if that conduct is otherwise legal activity.

Rationale

In striking down the law, Justice Stallman first determined that Local Law 36 is regulatory rather than proprietary. A local law is proprietary only if it manages the local government's relations with its own contractors and advances the local government's own private interests. While the court noted that the city does not have to do business with lawbreakers and may conclude that such entities are not responsible, the court rejected the Council's explanation that Local Law 36 would protect the city's interest as a contracting party rather than individual borrowers. Local Law 36 went well beyond concerns over contractor responsibility and made the city a regulator by establishing a detailed, comprehensive code of lender conduct independent of the standards set forth in state and federal law.

After holding that Local Law 36 amounted to a local banking regulation, the court found the law to be preempted by federal and state banking laws. Having determined that local banking regulations are preempted, the court did not address whether Local Law 36 also violated state procurement laws or whether it constituted an unlawful curtailment of mayoral powers without a referendum.

Validity of Local Law 20

Another case that involves the principles of contracting discussed herein is *The Mayor of the City of*

New York v. The Council of the City of New York.⁹ The city is currently litigating the validity of Local Law 20 of 2001¹⁰ which, like the "predatory lending" law that was struck down by the court, was enacted over the veto of the mayor. Local Law 20 of 2001 would impose requirements relating to the procurement of apparel and other textile products by the city. Under Local Law 20, the city may enter into contracts for the purchase of apparel and textiles only with domestic and overseas manufacturers that: (1) comply with a wide range of applicable laws and codes; (2) do not "abuse" their employees; and (3) pay their employees a "non-poverty wage." Pursuant to Local Law 20, the city comptroller would determine the required wage and benefit levels applicable for each country of origin.

The mayor has made a motion for summary judgment, challenging Local Law 20 as improperly imposing social policy restrictions in violation of state general laws including GML §103, impermissibly interfering with foreign trade laws and the president's ability to determine foreign trade policy, and violating state law and City Charter referendum requirements by assigning executive functions of the mayor to the comptroller and infringing upon the responsibility determination powers of the mayor.

As the corporation counsel reviews city contracts, we are mindful that the primary purpose of a public procurement system is to purchase fairly and efficiently the best possible products at the best possible price. The city, with the assistance of this office, constantly seeks innovative ways to accomplish that goal in a manner that is consistent with all applicable laws.

(1) The rules of the PPB may be found at 9 RCNY §1-01 et seq.

(2) *Matter of New York State Chapter, Associated General Contractors of America v. New York State Thruway Authority*, 88 NY2d 56 (1996).

(3) 9 Rules of the City of New York §2-08(b)(1).

(4) See New York City Administrative Code §6-116.2.

(5) New York City Administrative Code §6-128.

(6) *The Mayor of the City of New York v. The Council of the City of New York and the Comptroller of the City of New York*, New York Supreme Court (N.Y. Co.), Index No. 400583/03, 2004 N.Y. Misc. LEXIS 56 (Jan. 26, 2004).

(7) The City Council acted despite the recent action of the state to provide protections against predatory lending practices that applied uniformly throughout the state. See 2002 Laws ch. 626.

(8) Municipal Home Rule Law §23(2)(f) and New York City Charter §38(5) require that a referendum be held for any proposed local law that curtails the powers of a local elected official.

(9) New York County Supreme Court, Index No. 405082/2001.

(10) New York City Administrative Code §6-124.