

Piggybacking and Other Procurement Strategies: Possibilities and Limits

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AGENDA

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- Frequently Asked Competitive Bidding Questions
- Key Competitive Bidding Considerations for Future Success



Introduction to the Competitive Bidding Process



Purpose of Competitive Bidding

- Guard against favoritism, improvidence, fraud, and corruption, allowing interested vendors a fair and equal opportunity to compete.
- Foster honest competition 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.
- Facilitate the acquisition of goods and services of maximum quality at the lowest possible cost.
- When done right, can realize greater monetary benefits and product satisfaction because of the time invested.



Competitive Bidding Requirements

Competitive Bid: A public solicitation to elicit the submission of sealed proposals or offers from qualified vendors.

- School districts and municipalities must advertise for competitive bids when procurements exceed certain thresholds:
 - Purchase contracts exceeding **\$20,000**
 - Purchase contracts include service work contracts but exclude contracts necessary for completion of public works under Article 8 of the Labor Law.
 - Contracts for public work exceeding **\$35,000**

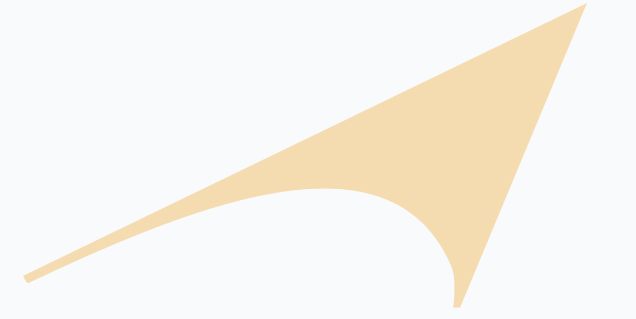


Preparation of Specifications

School districts must create a **specification document** for all bidders to provide them with information necessary to prepare their bids.

- This document should include:
 - Nature of the goods or services to be provided
 - Common standard by which the District will measure the various bids
 - Basis on which the bids will be evaluated and let
 - Clear and defined terms sufficient for the vendors to form intelligent bids

Any material or substantial non-compliance with the specifications must disqualify the bidder.



Basis for Awarding the Contract



The Lowest Responsible Bidder

The lowest responsible bidder is the bidder who *materially or substantially* meets the bid specifications.

- **Lowest:** Bidder who can provide quality goods and services at the lowest possible price.
- **Responsible:** Evaluate the bidder's financial acumen, qualifications, previous work experience, ability, reliability, and other relevant factors when determining if a bidder is "responsible." *See Anchor Equipment v. NYOGS*, 66 A.D.2d 987 (N.Y. App. Div. 4th Dept. 1978).

Any bidder determined irresponsible is entitled to reasonable notice and an opportunity to be heard prior to such determination. *See GML § 103-g.*



“Best-Value” Procurement

Amended Article 5-G of the General Municipal Law to provide an *alternative* to the lowest responsible bidder requirement. *See* Ch. 608, Laws of 2011.

A contract is awarded based on **best-value** when the responsive and responsible vendor’s contract optimizes *quality, cost, and efficiency*.

- Awarding contracts based on best-value must rely on objective and quantifiable analyses (i.e., cost-benefit analysis). *See*, State Finance Law § 163.
- Only applies to **purchase contracts**.
 - Excludes any purchase contract necessary for the completion of a public works contract pursuant to Article 8 of the Labor Law.



Challenging the Bidding Process

If a school district or municipality acted contrary to the clearly defined competitive bidding procedures, the process may be challenged in certain instances:

- Conspiracy to prevent the competitive bidding process. GML § 103(e).
- Taxpayer challenges under GML § 51.
- Challenge to the process by an *unsuccessful* bidder pursuant to CPLR Article 78.



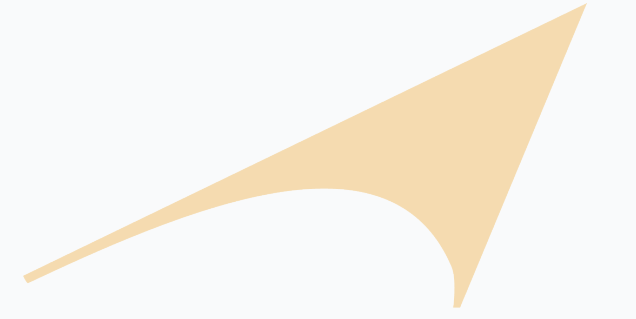
Exceptions to the Competitive Bidding Requirements



Exceptions to Competitive Bidding

There are several exceptions to the competitive bidding and offering requirements:

- Purchases made through the New York State Office of General Services
- Purchases made through certain county and federal contracts, or contracts let by other states or political subdivisions
- Emergency purchases
- Professional services
- Purchases from a legitimate sole source



Piggybacking Procurement Exception



Piggybacking Exception

- In 2012, the state authorized qualifying municipalities to procure certain goods and services by **piggybacking** onto existing municipal contracts both within and outside New York State. See *Ch. 308, Laws of 2012*.
- **Section 103(16)** of the General Municipal Law authorizes piggybacking for "*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.*"



Piggybacking Prerequisites

Prerequisite 1: The contract onto which the school district piggybacks must have been let by the United States or any agency thereof, any state or any other political subdivision or district therein.

- Political subdivisions include a county, city, town, village, school district, BOCES, or other district corporations.
- This definition of qualifying entities includes political subdivisions and districts both within as well as outside New York State.



Piggybacking Prerequisites

Prerequisite 2: The contract must have been made available for use by other governmental entities.

- The underlying contract must include specific language that makes clear that the contract will be made available to other municipal entities, under the same terms and conditions as are included in the underlying contract.
- A contracting vendor cannot unilaterally offer to extend existing municipal contract terms to another municipal entity using piggybacking authority in the absence of explicit language in the underlying contract authorizing such an extension of contract terms.



Piggybacking Prerequisites

Prerequisite 3: The contract must have been let to the lowest responsible bidder or on a basis of best value *in a manner consistent with* GML § 103.

- If the contract is a non-New York contract, the competitive bidding procedure of the contracting state or political subdivision *must* be consistent with the competitive bidding procedure of GML § 103:
 - Public solicitation of bids
 - Submission of sealed bids or offers, or similar procedures designed to protect the integrity and confidentiality of the process
 - Preparation of specifications
 - Award to the lowest bidder or on best-value



Piggybacking and Capital Projects

Section 103(16) does not specifically exclude public works contracts. However, in *Lynch v. Maine-Endwell*, the Petitioners argue the “*in a manner consistent with [GML § 103]*” language creates uncertainty.

- The Petitioners question whether piggybacking may be used for capital projects.
- Specifically, the Petitioner argues the reference to Article 8 of the Labor Law in GML § 103(1) and the exclusion of purchase contracts from best-value bidding precludes piggybacking for public works contracts.
- In the Petitioner’s view, allowing piggybacking for any construction or capital work undermines the competitive bidding process.



Piggybacking and Capital Projects

The Respondent in *Lynch* argued § 103(1), (2), and (3) do not apply whatsoever and the underlying contract need not follow the purchase contract limitations set forth in § 103(1). The Respondent relies on a recent Commissioner of Education decision:

- *Appeal of Crisorio*, Dec. No 18,405 (2024).
 - The Commissioner held that a school district may use piggybacking if the underlying contract satisfies the requirements of § 103(16).
 - The Commissioner stated that any reliance on the exclusion of purchase contracts from best-value bidding, like the Petitioner's reliance in *Lynch*, is misplaced because piggybacking is exempt from the typical competitive bidding requirements of § 103(1).



Piggybacking and Capital Projects

Although *Lynch* has not been decided, it currently appears that school districts may permissibly use piggybacking arrangements for construction or capital work when an underlying contract satisfies the § 103(16) prerequisites.

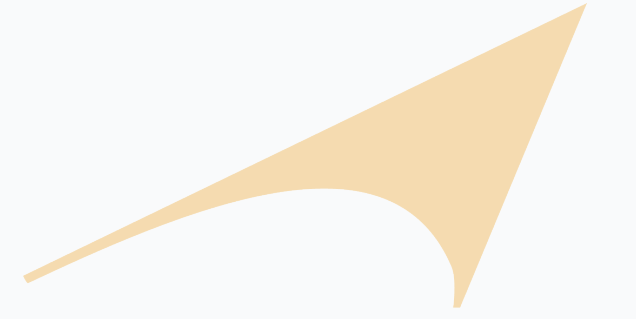
- Therefore, consistent with *Crisorio*, but subject to a decision in *Lynch*, it appears the underlying contract for capital work can be let on the basis of either competitive bidding or best value, as described in § 103(1).



Piggybacking and Capital Projects

This conclusion is supported by the legislative history of the § 103 piggybacking exception.

- The legislative history references several construction and capital projects that piggybacking arrangements may be used for.
- For example, the NYS Association of Town Superintendents of Highways notes how the piggybacking provision will help revitalize local infrastructure including roads and bridges.
- Piggybacking was not exclusively reserved for office supplies, janitorial materials, and other administrative or maintenance supplies.



Other Important Exceptions and Considerations



Professional Services Exception

One of the more prominent exceptions to competitive bidding include professional services.

- Includes attorneys, engineers, and other services requiring specialized or technical skills, expertise, or knowledge, the exercise of professional judgment or a high degree of creativity.

To increase competition, school districts can require Requests for Proposals (RFPs), providing detailed information about the services requested and the minimum requirements necessary to win the contract.

- RFP procedures should be fair and comprehensive to ensure the district receives high quality services under favorable terms and conditions.



Locally-Adopted Policies

Each school district must adopt appropriate procurement policies and procedures for goods and services not required to be competitively bid.

- These policies must:
 - Be annually reviewed
 - Identify who is responsible for purchasing
 - Ensure such policies are current
 - Assure the prudent and economic use of public moneys in the best interest of the taxpayers
 - Be specifically tailored to the municipality or school district based on its size and operational capabilities



Locally-Adopted Policies

Categories within local procurement policies and procedures required by GML § 104-b include:

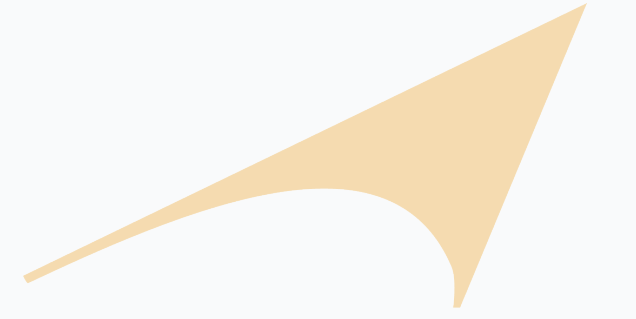
- Purchase contracts below \$20,000
- Contracts for Public Work below \$35,000
- All procurements exempt from § 103:
 - I.e., preferred sources, state contracts and certain federal contracts, county contracts, accessing a contract let based on the best-value through piggybacking, emergency procurements, insurance, true leases, sole source, professional services, certain food, hospital, or nutrition program purchases, and second-hand or surplus materials.



Model Locally-Adopted Policy

The New York State Office of the Comptroller released model procurement policies for school districts and local governments. This model policy suggests including the following sections:

1. Purpose of the Procurement Policy
2. Determining Whether Procurements are Subject to Biddings
3. Statutory Exception to Quotation/Proposal Requirements
4. Methods of Competition to be used for Non-Bid Procurements
5. Adequate Documentation
6. Awards to Other than the Lowest Responsible Bidder
7. Items Excepted from this Policy
8. Individual(s) Responsible for Purchasing
9. Input from Officers
10. Annual Review Procedure
11. Unintentional Failure to Comply
12. Resolution Adopting the Policy



Frequently Asked Competitive Bidding Questions



FAQ #1

May the specifications be amended after advertisement and before award?

- Permitted if to clarify ambiguity or address change in circumstances.
- Adequate and equal notice must be given to all bidders.
- *See Progressive Dietary Consultants v. Wyoming County, 90 A.D.2d 214 (N.Y. App. Div. 4th Dept. 1982).*



FAQ #2

May a bidder withdraw a submitted bid?

- If demonstrated mistake by bidder pursuant to standards established by GML § 103(11).
- If no award within 45 days. GML § 105.



FAQ #3

Can you reject all bids and re-advertise?

- Only if:
 - There is a sole bidder
 - To ensure integrity of process
 - If valid expectation of lower cost
 - *See GML § 103(1); Conduit & Foundation Corp. v. Metropolitan Transit Authority, 66 N.Y.2d 144 (1985).*
 - If clearly reserve right in bidding documents.



FAQ #4

Can you negotiate with a bidder after the bids are opened but prior to award?

- Only with low bidder
- No material changes to the specifications are permitted
- Permitted if to gain cost concessions, so long as no coercion.
- *See Fischbach & Moore v. NYC Transit Authority, 79 A.D.2d 14 (N.Y. App. Div. 2nd Dept. 1981).*



FAQ #5

May the contract resulting from the bid award be modified?

- The contract may be modified post-bid if the modification is merely incidental to the contract (i.e., is not so substantial as to constitute a new undertaking)
- *See Albert Elia Bldg. Corp. v. NYS Urban Development Corp.*, 54 A.D.2d 337 (N.Y. App. Div. 4th Dept. 1976).



FAQ #6

If the contractor defaults, must we rebid?

- Re-bidding is generally required if a municipality awards a contract to complete work after a default by the original bidder. However, re-bidding may not be required if, for instance, a surety completes the work pursuant to a performance bond.
- *See Spencer, White & Prentis, Inc. v. Southwest Sewer District*, 103 A.D.2d 802 (N.Y. App. Div. 2nd Dept. 1984); app. den., 63 N.Y.2d 607 (1984).



Key Competitive Bidding Considerations for Success



Key Considerations

- Create as much competition as possible by establishing clear procedures and advertising to attract prospective vendors.
- Consider using e-Procurement systems or other widely accessible media to disseminate information regarding your prospective procurements plans.
- Prepare a calendar to facilitate and coordinate purchase dates and to allow sufficient time for adequate planning, advertising, review of vendor qualifications, and possible readvertising.
- Train your purchasing agents and other procurement officials on the appropriate laws and local policies governing competitive procurement.

Questions?



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