
Introduction to Purchasing, Public Procurement, and the Contract



Presented by:
Toby Welch, Senior Buyer

What is the Purchasing Division?

- Entity charged with assisting in and administering the procurement process of non-exempted state agencies.
- Establishing a Contract is the backbone of the procurement process.





West Virginia Purchasing Division

2019 Washington Street, East
Charleston, WV 25305

304-558-2306 – WVPurchasing.gov

BASIC PURPOSE AND POWERS

- Assist agencies with procurement
- Ensure competitive bidding or other approved procurement method
- Contract on behalf of State
- Examine and approve terms of contract/change orders
- Assure all opportunity to bid (No favoritism)

See W. Va. Code § 5A-3-3



Role of Procurement Officer

The agency designated procurement officer is required to:

- Keep apprised of the current statutory and regulatory requirements for state purchasing through training opportunities offered by the Purchasing Division, in accordance with the West Virginia Code of State Rules;



Role of Procurement Officer

- Serve as the first point of contact to provide guidance to internal agency staff regarding purchasing issues;
- Coordinate communication and serve as the point of contact between the agency and the Purchasing Division;



2023 WEST VIRGINIA
AGENCY PURCHASING CONFERENCE
Celebrating 90 Years of West Virginia Purchasing

Role of Procurement Officer

- Review and approve specifications prior to submitting requisitions to the Purchasing Division;
- Review bids and concur with agency recommendation for award prior to submission to the Purchasing Division;
- Maintain proper documentation and files for public record;



2023 WEST VIRGINIA
AGENCY PURCHASING CONFERENCE
Celebrating 90 Years of West Virginia Purchasing

Role of Procurement Officer

- Ensure that agency procurement staff receives proper training, both internally and externally, for agency-delegated processes as well as those for central procurements;
- Perform other related procurement duties as needed.



WHY?

Purchasing is where the money is . . .

- **Aggregate Spend/Save Money**

WHY?

● Response to Criminal Behavior

- Bayless & Ramey – (2016) Various individuals convicted for scheme involving bribery of government officials and funneling engineering work through an inappropriate contract.
- State v. Fahlgren Martin, Inc., 190 W. Va. 306 – (1993) Director of the Lottery convicted of mail fraud and subversion of the bidding process for advertising contract. Directed Lottery employees to falsify bid results and make certain that they recommend vendor as the most “responsible” bidder.
- Wally Barron – (1960’s) Convicted of jury tampering while on trial for the Investright Scandal. Vendors told to pay Florida company for “assistance” in obtaining public contracts.



What is public procurement?



- Answer: Government buying goods and services
- We all know how to shop . . . is it really that different



YES!!



What is public procurement?

Personal v. Public Procurement

- Larger scale
 - Single MS Word license v. 25,000
- Larger impact
 - Statewide healthcare policy v. doctor's appointment
- More Complexity
 - Single lamp v. whole campus



What is public procurement?

Private Sector Business v. Public Procurement

- State has Procurement Laws
 - Criminal penalties for violation
- State has Transparency Laws (FOIA, Open Meetings, Bid Disclosure)
 - Show me competitor's bid
 - Show me your contract with the incumbent
 - Show me how you spent the money



What is public procurement?

Private Sector Business v. Public Procurement

- State has Constitutional Restrictions
 - No Debt (liability limits & Indemnification)
 - No Extending Credit
 - No other State Venue/Law
 - State Sovereignty
- State has Fairness Laws
 - Competitive bidding without favoritism
 - All interested parties get a shot
- State has Ethics Laws
 - No self dealing
 - No control over contracts you benefit from
 - Certification of non-conflict



Entities That Influence Public Procurement

Direct Influence

- Legislature (Code & Rule)
- Purchasing Division (Code & Rule)
- Agencies
- Attorney General's Office
- Privacy Office
- Office of Technology

Contributing Entities

- BRIM
- Ethics Commission
- Finance Division
- wvOASIS
- WV Secretary of State
- WV Auditor's Office
- Vendors/Lobbyists

Procurement Law Tells Us How To Buy: Authorizing Statutes

- **Construction** – W. Va. Code §5-22-1, et seq.
- **Architectural and Engineering Services** – W. Va. Code §5G-1-1, et seq.
- **Commodities and Services** – W. Va. Code §5A-3-1, et seq.
- **Design Build** – W. Va. Code §5-22A-1
- **Exemptions** – Various

Procurement Law Tells Us How To Buy: Procurement Methods

- **Request for Quotation** – W. Va. Code §5A-3-1, et seq.; W. Va. Code § 5-22-1.
- **Request for Proposal** – W. Va. Code §5A-3-10b
- **Expression of Interest** – W. Va. Code §5G-1-1
- **Direct Award** – W. Va. Code §5A-3-10c
- **Cooperative** – W. Va. Code §5A-3-19
- **Emergency** – W. Va. Code §5A-3-15 (revised)
- **Reverse Auction** - W. Va. Code §5A-3-10d
- **Secondary Bidding** – W. Va. Code §5A-3-10e
- **Impossible to Bid List (Section 9)** – W. Va. Code §5A-3-11, W. Va. CSR §148-1-4
- **No Bid Delegated Limit** – W. Va. Code §5A-3-11(b)



Procurement Methods Explained

Competitive Processes

- **Request for Quotation (RFQ)**
 - State establishes specifications/mandatory requirements to be met
 - Award to lowest bidder meeting specifications
 - Most common procurement
 - Construction must be RFQ per W. Va. Code 5-22-1
- **Request for Proposal (RFP)**
 - State suggests what it would like and vendor submits what it can do
 - 2 part evaluation - Subjective Technical and Objective Cost Evaluation
 - Award to highest scoring bidder
- **Expression of Interest (Used for Architectural/Engineering work only)**
 - Compete on quality only
 - Negotiate price and scope of contract with highest ranked vendor



Procurement Methods

Not Competitive, But Vendors Can Challenge

- **Direct Award**

- Procurement method that allows a contract to be issued to a vendor without competitive bidding when circumstances allow
 - The spending unit documents written justification showing that the direct award is in the best interest of the state;
 - The spending unit documents written confirmation that there is no other source or that no other source would be willing or able to replace the existing source without a detrimental effect on the spending unit;

Procurement Methods

Not Competitive, But Vendors Can Challenge

- **Direct Award**
 - The intent to make a direct award is publicly advertised for no less than 10 business days in the West Virginia Purchasing Bulletin, which can be found in the Vendor Self-Service portal within wvOASIS;
 - No other vendor expresses an interest in providing the commodity or service in question.



Procurement Methods

Non-Competitive Procurement – No Challenge

- **Commodity or Service Already Under Contract**
 - Statewide or agency contract
 - Use delivery order to buy from existing contract

- **Impossible to Bid (Section 9)**
 - Director creates list of items impossible to bid
 - Agencies can buy these items without a bidding process
 - Ex: Aviation Fuel, Postage, License Fees, Resale Items



Procurement Methods

Non-Competitive Procurement – No Challenge

- **Commodity or Service Already Under Contract**
 - Statewide or agency contract
 - Use delivery order to buy from existing contract

- **Impossible to Bid (Section 9)**
 - Director creates list of items impossible to bid
 - Agencies can buy these items without a bidding process
 - Ex: Aviation Fuel, Postage, License Fees, Resale Items



Procurement Methods

Non-Competitive Procurement – No Challenge

- **Emergency**
 - Director has authorized emergency contracts as necessary to avoid or abate an emergency
 - Emergency authorizes work to begin with contract to follow
 - Ex: Pipe burst, building crumbling, flood cleanup

Procurement Methods

Non-Competitive Procurement – No Challenge

- **Cooperative (WV-40)**
 - State utilizes the competitively bid contract of another public entity to buy
 - Contract being used must meet certain criteria to qualify for use
- **No Bid Limit**
 - Per Director's exercise of discretion, agencies can procure up to \$5,000 without bidding (aggregated spend)

Procurement Methods

Seldom Used Procurement Methods

- Prequalification/Secondary Bidding
- Reverse Auction
- Design Build Board

Procurement Methods: Purchasing Decision Path

1. Agency procurement officer receives request from agency employee for good or service.
2. Determine procurement method, type, and spend threshold.
3. Develop procurement documents, if required based on spending threshold.
4. Advertise solicitation, evaluate bids, and/or award contract.
5. Complete post award requirements. Consider vendor protests, conduct contract management procedures, and make purchasing documents available upon request. *Vendor protests have not been delegated to the agency. Forward any protests received to the Purchasing Division.



What is a Contract?

- Black's Law Dictionary

- **Contract:** An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.

- Public Procurement

- Enforceable agreement where the State agrees to buy goods, services, or both from a vendor in exchange for money.



What is a Contract?

- **Most Basic**
 - Offer by one party
 - Acceptance by the other party
 - Consideration (exchange of money for stuff)
 - No consideration = Gift (Not enforceable at law)
 - Signed writing required (for most contracts)
- **Public Procurement a little more complicated**
 - Includes Request for Offers

Contract Documents – RFQ and RFP

- **Solicitation Document = Request for Offers**
 - Why can't solicitation be an offer – if it were, multiple bidding vendors could bind the State by submitting a bid and accepting the solicitation as an offer.
 - **Bid Response = Vendor's Offer**
 - **PO / Contract Award Doc. = State's Acceptance**
- *All of these documents are required to create a contract through bidding.*



Contract Documents - Negotiated Contracts

- Unlike contracts established through bidding, negotiated procurements can have one single contract document agreed to and signed by all parties.

When Can the State Negotiate?

- **Expression of Interest**
 - law requires negotiation of price and scope after highest ranking firm selected
- **Direct Award**
 - since there is no competitive bid, and only a posting of the proposed contract for vendor objection, these are completely negotiated agreements
- **Emergency**
 - Also completely negotiated agreements



What Terms Must We Include In a Contract?

Must be able to show a Meeting of the Minds.

- This means a common/joint understanding of the contract between the parties.
- The amount of information required to achieve this varies by contract, industry, and the dispute in question.

Nevertheless, there are certain things that are always required.



Critical Contract Terms

- **Who** – Contracting parties must be identified.
- **What** – Must have adequate description of goods being purchased or service being performed. This includes quantity.
- **When** - Time for delivery or performance must be identified

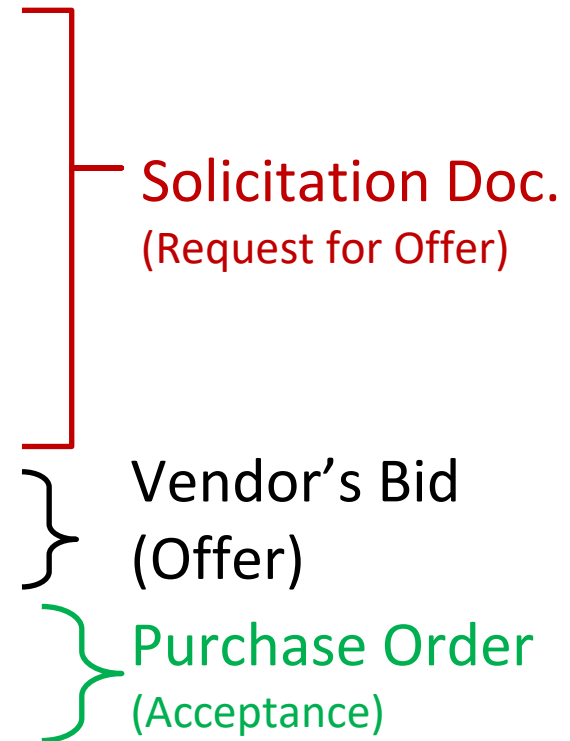
Critical Contract Terms

- **Where** – The place for goods delivery or performance of service must be identified.
- **What Price** – The contract must identify the price being paid.
- **Other Terms mandated by law** – In public procurement there are various contract terms that are included because a state or federal law requires it.



Contract Documents and Critical Contract Terms (RFQ Example)

- Description of Good or Service
- Quantity
- Time of Performance
- Delivery Location
- Terms mandated by law
- Identity of Buyer
- Price
- Identity & Signature of Seller
- Acceptance of bid
- Signature of Buyer (State)



Contract Documents and Critical Contract Terms

- **RFP** - The RFP follows a similar document and terms structure to the RFQ except that most of the required contract terms for an RFP will be found in the Vendor's bid/proposal.
- **Negotiated Contracts** - All contract terms are contained in the single negotiated document signed by all parties.



Critical Contract Terms

As a procurement officer, you will have a large role in ensuring that critical contract terms get included in:

- Specifications contained in outgoing solicitations
- Negotiated contracts



Critical Contract Terms: Description

- Description must be detailed enough to get what you need and exclude what will not work while allowing for competition.
- **Example:**
 - “Vendor shall provide Agency with pencils” is probably not sufficient.
 - “Vendor shall provide Agency with 1,000 pencils that are five inches long, and have a hexagonal shaped shaft, #2 lead, and an eraser” is sufficient.



Critical Contract Terms: Description

Not maximizing competition looks like:

- Specifications mimic brand specifications on trivial requirements
 - “Vehicle must have 375.95 horsepower, a glove box of 29.55 cubic inches, marble grey interior with white thread.”
 - “And a logo that includes the letters “F”, “O”, “R”, “D”.”



Critical Contract Terms: Quantity

- Actual Quantity
 - Tell vendor exactly how many
- Open End
 - Vendor is obligated to supply all that is needed without exact quantity known
 - Must establish reasonable range limits with estimated quantity
- Scope of Work
 - In service contracts, quantity can be a clear scope of services to be provided or estimates of hours

Critical Contract Terms: Quantity

<u>Item</u>	<u>Estimated Quantity</u>	<u>Unit Price</u>	<u>Total</u>
AB Widget	15	\$1000	\$15,000

Critical Contract Terms: Time

- **Actual Date**
 - Activity occurs on a specified date
- **Period of Time**
 - “Must complete construction in 90 days”
- **Reasonable Time**
 - Contract law dictates that even specified dates are flexible within reason unless a *time is of the essence* clause is included in the contract. The Purchasing Division’s General Terms and Conditions include this clause.



Critical Contract Terms: Delivery

- **FOB Destination by default**
 - State terms and conditions require delivery risk of loss and cost on the vendor through the Purchasing Division's specification templates.
 - Deviating from FOB Destination requires accounting for the delivery costs in bid price evaluation scenario.
 - Negotiated contracts have more flexibility here.

Critical Contract Terms: Price

- **Provided by Vendor in RFQ/RFP**

- State creates the framework for price in specifications
- Bid rejected without price
- PRICE MUST BE **EVALUABLE**
- Apples to apples
- Firm
- Include all costs in evaluation

- **Negotiated Contracts**

- Price must be negotiated and included in contract document

Critical Contract Terms: Terms Mandated by Law

- Background Check Provision
- Israel Boycott Provision
- Federal Contract Terms
- HIPAA – Health Privacy
- No Debt Affidavit
- Licensing Requirements



Questions?



Contact Information

- Toby Welch, Senior Buyer
- Toby.L.Welch@wv.gov
- 304-558-8802

