

I N S I D E T H E M I N D S

Government Contracts Compliance

*Leading Lawyers on Cooperating with Government
Investigations, Navigating Reporting Rules, and
Implementing Compliance Programs*

2011 EDITION



ASPATORE

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The Dos and Don'ts of
Contracting with
City Governments

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Introduction

I have been practicing government relations law for approximately sixteen years. In my current practice, I represent clients in connection with a multitude of issues involving municipal governments, including land use and zoning, procurement/competitive bidding matters, government contracts, public-private real estate projects, code enforcement, building code issues, and lobbying. I am a former first assistant city attorney for Miami Beach; therefore, I have legal experience in this field as both a government lawyer and as a private practice lawyer.

Ethics Legislation and the Cone of Silence

One of the most important current trends in the government contracts field is compliance with ethics legislation. In order to deal effectively with the issues presented by such legislation, lawyers who represent clients that are bidding on government contracts need to prepare in advance and be well versed in the specific ethics requirement of the particular jurisdiction.

In recent years, concern has arisen about the influence of lobbyists on city procurement processes—a concern that relates to everything from competitive bidding on road paving projects to public-private real estate developments. (Since lawyers are typically included within a city code’s definition of “lobbyists,” I use those terms here interchangeably.) To stem the influence of lobbyists, some cities have created laws that impose a “cone of silence” from the date that a request for proposals (RFP) is issued to the date that the bid is awarded or the city manager makes his recommendation on the bid to the city council. While the cone of silence is in effect, with certain exceptions, lobbyists are barred from communicating with the city council or the city administration to try to influence which bidder will be selected. Although a lobbyist can speak to the head of the procurement department to discuss procedural issues, he or she cannot speak with a member of the city council to discuss the merits of their client’s bid or the weaknesses in a competitor’s bid.

Therefore, it is advisable for lobbyists to communicate with the city administration and elected officials before the RFP is issued and the cone of silence is in effect. For example, in the case of an RFP for road paving, a

lobbyist should introduce his or her client to the members of the public works department in advance so that they can develop confidence in his or her client's company, understand their qualifications and their excellent abilities. That way, by the time the RFP is issued and the cone of silence commences, they have already introduced themselves to city officials and developed goodwill. If they wait until the RFP is issued to make such introductions, they will be barred from doing so.

In some cities, the cone of silence is lifted when the city manager makes his or her recommendation to the city council. This situation allows a small window of time for lawyers and their clients to talk to council members, as the city manager's recommendation will often be made only a couple of days in advance of the council meeting. In these cases, lawyers need to be ready to move quickly to present their case to the council members when the cone is lifted.

Disclosure Issues

Another related and key issue in city government contracting is preventing conflicts of interest. Cities want to know that there is no corruption or illegal relationship between the bidder and a city official, either elected or appointed. Consequently, many cities will now ask bidders to submit a full ownership disclosure of their company as part of their bid. Lawyers are advised to discuss the disclosure requirements in advance with their clients to ensure that their client is willing to comply and to prevent their client from being disqualified in a bid process due to inadequate disclosure.

For example, assume that a bidder's company has ten partners. When bidding on a government contract, a city may want to make sure none of these ten partners has a relationship (familial, business or otherwise) with any council member. Full ownership disclosure assists a city in that objective. Some companies that have not bid on many government contracts in the past may not be accustomed to disclosing their full ownership structure in a bid and may be hesitant about doing so—they like maintaining the privacy of their ownership information. Moreover, any information submitted as part of a bid usually becomes public record, accessible to the press, competitors, and the public at large. So for example, six months after the bid process is finished, a newspaper reporter could

make a public records request and pore through the ownership records of any company that has submitted a bid.

Unfortunately, if a company does not wish to disclose its ownership situation because it is a privately-held entity and protective of such information, such a failure to disclose could constitute grounds for an objection from another bidder in the process and can lead to the disqualification of the bidder. It is important to keep in mind that if there are multiple bidders competing against one another, you can expect that each bidder will be watching what every other bidder is doing. In fact, a bidder can get copies of the bids submitted by every other bidder after they are submitted and can raise objections based on ownership disclosure or other violations. Companies that do not do their homework in submitting a complete application can find themselves disqualified.

The Bidding Process: Key Options

Typically, when a city wants to enter into a contract for services such as road paving or the purchase of goods, that contract will generally be opened up for competitive bidding because the city wants to ensure that it will get the best price. Some contracts, such as those for professional services (e.g., legal or accounting services), are considered unique services and generally do not go through a public bid process.

There are multiple ways to seek bids on government contracts. First, there is the RFP process, or request for proposals, as previously noted. In this process, the city will issue an RFP listing the scope of services it is seeking or the goods it wants to buy. For instance, the RFP may seek bids to hire a company to pave six blocks in the city. The RFP may further specify that the work must be done in a stated amount of time and using a certain type of asphalt. The city will then specify a time frame within which contractors need to turn in sealed bids. After bid opening, the city will view, compare, and rank the proposals. After selection of the top bidder, the city will then negotiate a contract with that company.

Another way to bid out a government contract is through an RFQ, or request for qualifications. In that circumstance, instead of listing the specific details of a work project or the services it is seeking, the city will hire a

company first and then develop the work project details later. Consequently, the city will ask bidders to submit their qualifications and experience regarding the proposed type of work, along with other details such as the size of their company and so on. As in the RFP process, contractors submit sealed bids, which the city will then compare and rank.

Choosing the Winning Bid

Once the bids are submitted, a city will usually appoint a selection committee comprised of a combination of government employees and citizens to review the bids. In some cases, bidders—either all of them or a short list of three or four—are given the chance to elaborate on their bids through oral presentations and answer questions from the selection committee. The selection committee makes its recommendations to the city manager. Finally, the city manager will make a recommendation to the city council. The recommendation usually involves ranking the top two or three bidders, in case the city is unable to come to terms with its first choice.

Bid Protest Issues and Considerations

In many cases, a bidder who thinks they should have won the bidding process will file a bid protest. They may claim, for example, that the winning bidder should have been disqualified because their bid did not contain an ownership disclosure, or did not contain a proper construction bond, or included five references for their past work when the RFP required six. Generally, a bidder cannot deviate materially from the requirements of the RFP. A city has wide latitude to determine whether a deviation from an RFP is material or non-material.

For example, assume that the bidders on a government contract need to submit five references of their past work and bidder number one submits only four. Assume further that the bidding process involves a \$24 million contract with an eighty-page bid response and the bidder submitted everything else that was required—e.g., their financial statements, resumes, a description of their work, insurance requirements, bonds and so on. Bidder number two may say that the city should disqualify the first bidder because the bid was missing one reference. In most cases, a city will deem that to be a non-material deviation and let the bid go forward.

On the other hand, let's say that a city issues a request for bids to paint city hall and the contract specification in the RFP requires grade A1 paint. Ten bidders submit proposals, all with different prices—but the bidder that comes in lower than anyone else's proposes to use grade A2 paint. In that circumstance, bidder number two is probably going to challenge the bid, claiming that they could have been the lowest bidder if they, like the other bidder, had bid based on a lower grade of paint. This circumstance would present a relatively clear case of a material deviation from the bid requirements. As a result, the bidder who proposed to use the A2 paint would likely be disqualified.

Unfortunately for government lawyers, it is often not exactly clear whether the subject deviation is material or immaterial, considering all of the factors. Ultimately, there are going to be gray areas when a governmental body or a court is going to have to make a decision about whether a deviation is or is not material.

Many cities have established bid protest requirements, which include a deadline by which bidders must file their protest or be assumed to have waived their objections. Many of these requirements provide very small windows of time. This fact makes it even more important for lawyers to be knowledgeable in advance of bid protest rules and to advise their clients accordingly. There is not much time to “learn on the job” in such cases.

Key Developments in Government Contract Law

In summary, with respect to new developments in this area, the passage of ethics legislation is one of the biggest trends with regard to government contracts. The desire of city governments to achieve greater transparency in the contracting process has led to a series of new rules in the bidding process, such as ownership disclosure requirements. Simply put, cities want to know with whom they are dealing. Cities have been embarrassed in the past to find out that they have entered into a contract with a company whose owners had previously been indicted, or which is involved in a lawsuit based on poor performance elsewhere. Cities also want to avoid even the appearance of conflict of interest issues and have a strong desire to prove that they are running open and honest governments.

Obviously, this trend increases the cost to bidders because it typically requires them to comply with more regulations. As a result, they need to hire counsel to analyze and examine multiple issues. This regulatory complexity increases bidders' administrative costs (and ultimately bid quotes) and makes contract bidding a more intrusive process, certainly from the standpoint of ownership disclosures.

Another aspect of the new disclosure trends in government contracting relates to campaign financing. Many times, companies that are expecting to bid or are already bidding on city projects seek to donate to political campaigns, since they want to be viewed in a positive manner by city officials. However, many cities now restrict the ability of vendors and potential vendors to donate money to political campaigns. In some cases, if a potential vendor has donated to a campaign, that company could be barred later from bidding on a project. Therefore, it is important for lawyers to advise their clients of such restrictions to ensure a lack of bidding obstacles later.

Clearly, the emphasis on ethics legislation has spawned a whole series of requirements and restrictions that relate to competitive bids. Those companies that are not apprised of what they can or cannot do in this area proceed at their own peril.

Common Client Misconceptions about Government Contracts

Contractors that do a significant amount of work with government agencies are generally fairly well-informed about how the government contracting process works, whereas those who have not often bid for government contracts are obviously more prone to misconceptions. Simply submitting the lowest priced bid is often not enough. For instance, a contractor may underestimate the significance of the political process when they are submitting a bid. That is why many lobbyists and their contractor clients make sure that they get to know their elected officials in advance of the bidding process. The past track record of a bidder is another factor. For example, if a contractor has worked with the city over the past ten years and has developed a good relationship with the city, then the city is more likely to award the contract to that company even if they are not the lowest priced bidder. Further, the low bidder could run into problems if the second-

ranked bidder hires a lobbyist or lawyer and tries to raise technical objections in order to disqualify the first bidder. The more profitable the contract, the more likely it is that contractors will hire attorneys and lobbyists. Lawyers should inform their clients that they should be proactive and have their own legal team on board, so that in case someone raises a bid challenge or an issue they are prepared to deal with it quickly and effectively.

Effective Practices When Working with Government Agencies

It is important for an attorney in this practice area to be well prepared and fully familiar with the city code and other requirements before dealing with government agencies in the contract bidding process. Such preparation minimizes the chances that he or she will be embarrassed by having missed a deadline, ignored a rule or requirement, or advised their client improperly and to their detriment. In addition to being fully prepared, it is very important for lobbyists to maintain a good relationship with government officials—a relationship that is cordial and in which the lobbyist is known for his or her integrity. Government officials will be more receptive to such lobbyists. Such lobbyists also will have greater access to the multiple officials who are involved in the bidding process. Conversely, lawyers who are frequently making threats of litigation in connection with bid processes or who embarrass public officials in letters or when standing in front of a podium are going to be less effective in this practice area. Naturally, a lawyer must be ready to raise objections, but they should be done in a way that is professional and non-personal. A failure to behave with integrity and make accurate points will lead to a loss of credibility, not only in the instant bid matter but in others in the future.

Developing Effective Compliance Programs

When a company is awarded a bid, the city administrators will typically sit down with that company and negotiate a contract that will set forth all the legal minutiae, the price, the timelines, and everything else that needs to be included in the contract. The contract will then typically return to the city council for a vote to approve the final agreement between the city and that contractor. Immediately after that process occurs, it is very important for someone in the company to become very familiar with all of the obligations

contained in that contract. If city officials repeatedly have to remind a vendor of missed deadlines or obligations, that damages the vendor's reputation and their chances of getting future work. Therefore, it is very important for someone who understands and is conversant in reviewing government contracts to make a list of all the obligations and timelines that are involved. If nobody at the company is conversant in that area, they should have a lawyer go through the contract, outline it for them, and explain in layman's terms the multiple obligations. Ultimately, that process is the single most important factor in developing an effective government contract compliance program because if a client is not fully aware of what a contract requires, it likely will not have effective compliance. Some of these contracts are quite lengthy. Therefore, outlining and distilling its contents should be the first step in ensuring proper compliance.

It is advisable for a client to delegate the task of contract compliance to a particular individual in a company. For example, several different departments in a company may each have a piece of the company's obligations under a contract; there could be a marketing aspect to the contract, as well as a construction and an administrative aspect. However, there should be one person who is in charge of contract compliance and who is monitoring what each of the departments is supposed to be doing. That individual should give the department heads advance notice before each deadline occurs.

Looking to the Future

It is unlikely that public bidding is ever going away, because governments have a strong motivation to want the lowest priced, highest quality product or service. Similarly, with respect to ethics legislation, I do not foresee a softening of ethics requirements in relation to the bidding process in the near future. Although there will be changes to the rules from time to time, I do not anticipate a material lessening of requirements in the short term. For instance, I do not see the ownership disclosure rules being abolished or cones of silence being eliminated. Although these requirements are sometimes overbearing and may go beyond what is necessary, it is very difficult politically for a council member to vote to abolish such laws. Voting against ethics legislation is akin to voting against apple pie and the American flag. Everybody is in favor of transparency, doing business in the

open, and establishing an even playing field. Therefore, there are few council members who would vote against ownership disclosures or a cone of silence that would enable lobbyists to have a greater role in the bidding process. There has been no shortage of political corruption cases across the nation; consequently, I believe that the passage of ethics legislation will continue and possibly strengthen. Again, in some cases these laws will be burdensome, overbearing, and go beyond what many would feel are reasonable regulations, but I believe that there is too much political risk involved for anyone who would vote to pull back on or soften ethics legislation. As a result, these laws are likely to stay in place.

Unfortunately, if you want to lobby for or represent a client in a contracting matter, many cities are now imposing expensive lobbyist registration fees. For example, a city could charge a \$500 registration fee per lobbyist per matter. Therefore, if you are dealing with four different executives who wish to speak to government officials, they will need to pay \$2,000 in fees just to be able to talk to city officials.

Another key issue in this area pertains to the fact that the cone of silence, in some cases, goes too far. I believe many elected officials want to be able to hear from the actual companies/bidders in the contracting process and ask them questions—not necessarily in a full commission meeting, but in a more informal setting in order to really get to know the prospective contractors. However, that is not possible if the cone of silence is not lifted until after the city commission has already made its decision. In that circumstance, you are not allowed to talk to a council member until after the city manager makes his or her recommendation; so even if the city manager is wrong, you are not allowed to contradict what he says in a private meeting with a councilman. That rule gives the city manager and their staff a huge ability to get what they want, because they have essentially silenced anyone from taking an opposite position.

Final Thoughts

In order to succeed in the government contracting process, you need to be prepared and do your homework. You need to get to know the city council well in terms of the way they work, what their objectives are, and what their bid rules are in case you need to file a protest. Your client needs to

assemble a possible team of lawyers or lobbyists in case something comes up, and they need to assert their rights. These tasks should not be done at the last minute. Well-prepared lawyers and their clients that work in this field will meet with city officials and talk to them well before they have disseminated the RFP booklet that sets out the scope of the bid. In fact, such advance meetings may enable your client to gain the ability to influence what the city puts into that RFP booklet. For example, if the city is requesting bids from companies to install windows and your company has an accreditation from a national window association, it behooves you to make sure that the city puts that membership requirement in their RFP. Simply put, it is unwise to try to win a bid on the day of the city commission meeting when the item is up for a vote, and everybody gets just two to three minutes to speak. Rather, you are more likely to win because you submitted the right bid, you were ranked one or two, and you developed the right relationships with city officials.

Key Takeaways

- It is important for an attorney in this practice area to be well prepared and fully familiar with the city code and other requirements before dealing with government agencies in the contract bidding process. Such preparation minimizes the chances that he or she will be embarrassed by having missed a deadline, ignored a rule or requirement, or advised their client improperly and to their detriment.
- In addition to being fully prepared, it is very important for lobbyists to maintain a good relationship with government officials—a relationship that is cordial and in which the lobbyist is known for his or her integrity. Government officials will be more receptive to such lobbyists. Such lobbyists also will have greater access to the multiple officials who are involved in the bidding process.
- Conversely, lawyers who are frequently making threats of litigation in connection with bid processes or who embarrass public officials in letters or when standing in front of a podium are going to be less effective in this practice area. Naturally, a lawyer must be ready to raise objections, but they should be done in a way that is professional and non-personal. A failure to behave with integrity

and make accurate points will lead to a loss of credibility, not only in the instant bid matter but also in others in the future.

- It is very important for someone who understands and is conversant in reviewing government contracts to make a list of all the obligations and timelines that are involved. If nobody at the company is conversant in that area, they should have a lawyer go through the contract, outline it for them, and explain in layman's terms the multiple obligations.

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Mr. Tachmes has extensive experience representing developers, property owners and other clients in connection with governmental matters, including site plan and zoning approvals; historic preservation issues; building code, fire and code compliance matters; procurement/public bid projects; and related local government items. He also has substantial experience in the area of real estate transactions, including the purchase, sale, leasing, and financing of commercial projects.

Mr. Tachmes is a former first assistant city attorney for Miami Beach. While with the city, he concentrated his practice in the areas of public-private real estate development and other transactions. Mr. Tachmes served as counsel to the city in connection with the Loews Miami Beach Hotel project, involving the development of a \$150 million, 800-room convention center hotel and parking complex on public land. The project is one of the largest public-private transactions, in terms of its overall cost, in Miami Beach history. Mr. Tachmes also served as counsel to the city on the Royal Palm Crowne Plaza Resort project, a \$60 million, 422-room hotel on public land, adjacent to the Loews hotel.

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