

Chapter 1 CONTRACTING OVERVIEW

1.1. PROCUREMENT AUTHORITY

The requirements for service contracting are explained in the following chapters. Agencies derive legal authority for services contracting either from the agency's own enabling act or from Executive Order 25. Examples of some agencies with independent purchasing authority that includes authority to purchase services include the Iowa Lottery, the Iowa Communications Network, and the Department of Transportation. A copy of the Executive Order is included in this *Guide* at Appendix E. Rules regarding service contracting are set forth in **11 IAC chapters 106 and 107**. A copy of the rules is included in this *Guide* at Appendix H.

1.2. COMPETITIVE PROCUREMENT – WHEN YOU NEED IT, WHEN YOU DON'T

It is always advisable to use a competitive procurement process for services. Competition is required for service contracts when the estimated annual value of the services contract is equal to or greater than \$5,000 or when the estimated value of the multiyear services contract in the aggregate, including any renewals, is equal to or greater than \$15,000 unless there is adequate justification for a sole source or emergency procurement pursuant to rule **106.7(18) or 106.8(18)** or another provision of law or if you obtain the service from an intergovernmental agreement. In keeping with the state's public policy favoring competition, use of competition is recommended when feasible even if competition is not technically required. Executive Order 25 also encourages agencies to use reasonable efforts to ensure that they use public funds to purchase services in a way that obtains the best value. You are well advised to use competitive procurement. Here's why:

- • **Increased Participation** – A competitive process provides a greater number of firms an opportunity to submit proposals/offers to the state and encourages qualified firms to participate.

- • **Lower Prices** – Full and open competition reduces costs since prospective contractors submit their best offers to obtain contracts.
- • **Higher Quality** – Service Providers who develop proposals in a competitive environment pull together the strongest management and technical teams available.
- • **Innovation** – Issuing solicitations to a number of service providers gives an agency the opportunity to select from the most qualified and skilled talent available in the marketplace. An agency may find a service provider's alternative approach to solving a problem more effective than that initially envisioned by staff.
- • **Favoritism** – Unfounded or not, accusations of favoritism can hurt your agency and mar its reputation. Conducting a fair and open competitive process will help avoid any such claims.
- • **Unsavoring Publicity** – Even the best-prepared contracts can go awry. When they do, you are in a more defensible position when you have competitively bid your project.

1.3. 1.3. DEFINING SERVICES

11 IAC chapters 106 and 107 define services as:

“Service” or “services” means work performed for a department or establishment or for its clients by a service provider and includes, but is not limited to:

1. Professional or technical expertise provided by a consultant, advisor or other technical or service provider to accomplish a specific study, review, project, task, or other work as described in the scope of work. By way of example and not by limitation, these services may include the following: accounting services; aerial surveys; aerial mapping and seeding; appraisal services; land surveying services; construction manager services; analysis and assessment of processes, programs, fiscal impact compliance, systems and the like; auditing services; communications services; services of peer reviewers, attorneys, financial advisors, and expert witnesses for litigation;

architectural services; information technology consulting services; services of investment advisors and managers; marketing services; policy development and recommendations; program development; public involvement services and strategies; research services; scientific and related technical services; software development and system design; and the services of underwriters, physicians, pharmacists, engineers, and architects; or

2. Services provided by a vendor to accomplish routine functions. These services contribute to the day-to-day operations of state government. By way of example and not by limitation, these services may include the following: ambulance service; charter service; boiler testing; bookkeeping service; building alarm systems service and repair; commercial laundry service; communications systems installations servicing and repair; court reporting and transcription services; engraving service; equipment or machine installation; preventive maintenance, inspection, calibration and repair; heating ventilation and air conditioning (HVAC) system maintenance service; janitorial service; painting; pest and weed control service; grounds maintenance, mowing, parking lot sweeping and snow removal service; towing service; translation services; and travel service.

Contracts for services may be awarded to individuals, joint ventures, partnerships, corporations, or non-profit organizations.

1.4. PROCUREMENT OF SERVICES

Competitive procurement of some types of services involves evaluation of proposals based on multiple factors, rather than relying on price as the determinant factor. Agencies determine the weighted value of evaluation criteria and negotiate the contract based on these criteria. This is a different type of procurement process than when the only factor is determining the lowest cost submitted by a responsible bidder.

Services are often more subjective in nature and, therefore, more difficult to specify than services or products procured through an invitation to bid process. Intangible properties such as human effort and impartial advice cannot be bought and sold in the same way as supplies or equipment. Evaluation criteria for service procurements may

include quality, reputation, experience and technical capabilities among the evaluation criteria. Cost or price is an element in evaluation but the selection need not be driven by price. The solicitation document must clearly set forth the evaluation criteria.

1.5. ETHICS AND CONDUCT

State employees contracting on behalf of the State must maintain the highest ethical standards and avoid any real or apparent conflict of interest. Ethical conduct on the part of state employees participating in the contracting process helps to ensure the fairness of the process. While State statutes address specific responsibilities of State employees in contracting, general ethical principles also apply.

Conflicts of Interest: Generally, a conflict of interest exists whenever a person serving the public may gain a private advantage, financial or otherwise, through their public capacity. You can have a conflict of interest even though you never seek a private advantage or actually gain one.

Iowa Code section 68B.2A(1) prohibits state employees from engaging in “any outside employment or activity which is in conflict with the persons official duties and responsibilities.” The statute contains a list of things that are deemed to be unacceptable conflicts of interest. However, state employees should keep in mind that the list is not exhaustive; unacceptable conflicts of interest could exist in other situations as well.

Examples of unacceptable conflicts of interest include:

- ▪ Outside employment involving the use of the State’s time, facilities, equipment and supplies or the use of employment with the State “to give the person or members of the person’s immediate family an advantage or pecuniary benefit that is not available to other similarly situated members of the general public.” Iowa Code section 68B.2A(1)(a).
- ▪ Outside employment involving the receipt of money or other consideration by the person or member of the person’s family “for the performance of any act that the person would be required or expected to perform as a part of that person’s regular duties or during the hours which the person performs service or work for the

state.” Iowa Code section 68B.2A(1)(b). This provision does not prohibit a state employee from operating a side business as long as the employee does not contract to be paid separately for services that he or she would be obligated to perform as part of his or her state employment and the employee performs the services on his or her own time using his or her own equipment and supplies. You should note, however, that other considerations, including individual agency policies, might preclude operating a side business.

- ▪ Outside employment that “is subject to the official control, inspection, review, audit, or enforcement authority of the person during the performance of the person’s duties or office of employment.” Iowa Code section 68B.2A(1)(c).

Penalties for violation of the Section 68B.2A include criminal liability (violation is a serious misdemeanor) and job-related discipline or sanction. See Iowa Code section 68B.25. If you are working on a contract involving federal funds, there may also be federal restrictions on conflicts of interest that you are obligated to comply with.

Sales to State Agencies: Iowa Code section 68B.3 prohibits state employees from selling, in any one occurrence, goods or services having a value in excess of two thousand dollars unless the sale is made pursuant to an award or contract let after public notice and competitive bidding. (This \$2,000 threshold applies only to sales a state employee may make to a state agency. This threshold is separate from the bidding threshold requirements discussed in chapter 5.) There are exceptions for certain kinds of services. You should consult with legal counsel if you need further assistance regarding these provisions.

Penalties for violation of section 68B.3 include criminal liability (violation is a serious misdemeanor) and job-related discipline or sanction. See Iowa Code section 68B.25.

Gift Law: Service providers and potential service providers are restricted donors; and you should not accept or solicit gifts from them. Public employees, and members of their immediate families, may not solicit, accept or receive gifts from restricted donors. Iowa Code subsection 68B.22(1). The statute defines “restricted donors” to include several categories of persons. One of the categories is a person who “is seeking to be

a party to any one or any combination of sales, purchases, leases, or contracts to, from, or with the agency in which the donee holds office or is employed.” Iowa Code section 68B.2(24). Restricted donors are also prohibited from offering or giving gifts to public employees. Iowa Code subsection 68B.22(2). There are several exceptions to the gift law. You should familiarize yourself with the statute and consult with legal counsel if you have questions about the applicability of the gift law.

Penalties for violation of the gift law include criminal liability (violation is a serious misdemeanor) and job-related discipline or sanction. See Iowa Code section 68B.25.

Disclosure of the Contents of Sealed Bids: Iowa Code section 72.3 prohibits public officers from revealing the contents of any sealed bid to anyone. Section 72.4 imposes criminal penalties for violation of 72.3. As a result, if you are conducting a procurement process or serving on an evaluation committee, you should not discuss the contents of the proposals with anyone other than other people who are legitimately involved in the evaluation process (i.e. the issuing officer, members of the evaluation committee, or a member of the Attorney General’s office who is advising the agency on the evaluation process).

Bribery: Iowa Code section 722.1 makes it a crime to bribe a public official. Offering, promising, or giving something of value or a benefit to a public official with the understanding that it will influence the actions of the public official constitutes a bribe. It is a class “D” felony to bribe a public official. Section 722.2 makes it a class “C” felony for a public official to accept a bribe. Soliciting, accepting, or receiving something of value or a benefit to the public official with the understanding that it will influence the actions of the public official constitutes a bribe.

Additional General Principles

In addition, state employees involved in the contracting process **should not:**

- ▪ Have a personal or financial interest in the contract (for example, a state employee should not serve on an evaluation committee if the employee has a financial interest in one of the bidders).
- ▪ Disclose confidential information gained during the contracting process.

- ▪ Use one's official state position to obtain special privileges or exemptions or to grant special privileges to others.

1.6. SERVICE PROVIDER CONFLICTS OF INTEREST

Agencies need to provide a level playing field to all potential Service Providers that may want to respond to a competitive selection process. Potential Service Providers may have conflicts of interest that could make the playing field "un-level" if they are not addressed. Occasionally a conflict of interest is severe enough to disqualify a potential Service Provider from being eligible to receive a contract, but it is often possible to ensure a level playing field without disqualifying a potential Service Provider. As a result, it is important that you think about whether there are any potential conflicts of interest and deal with them *before* you issue an RFP or other competitive selection process. If you are using the Department of General Services to procure the services, you must disclose any potential conflicts of interest to the DGS purchasing officer. You may also need to discuss these issues and possible ways to resolve them with your Agency's assistant attorney general.

Here are some examples of potential conflicts:

- ▪ **Service Provider Helped Set the Ground Rules**

One type of conflict occurs if the Service Provider had an opportunity to influence the selection process. For example, if you used a Service Provider to help you write an RFP, that Service Provider might have an unfair advantage over other potential Service Providers because the Service Provider who wrote the RFP for you could have written the RFP in a way that favors itself. The major concern with this type of conflict of interest is that one potential Service Provider has the opportunity to set the ground rules by which all of the competitors for the contract will be judged, but it also gives that Service Provider more time to put together its proposal than other competitors have. This same problem may exist if you sought the input of some, but not all, potential service providers while working on the scope of work for your solicitation document.

Ideally, you should consider this issue before you hire a Service Provider to help you write an RFP or before you start seeking information from potential Service Providers about what types of services are available. If you hire a Service Provider to help you write an RFP, it is only fair to tell that Service Provider up front that it will not be able to submit a proposal in response to the RFP. One way to try to avoid these problems is to issue a Request for Information (RFI) that you make available to all potential Service Providers. RFI's may sometimes help to "undo" an appearance of a possible conflict if you received information from some potential service providers while you were working on your RFP (or other competitive selection document). A sample RFI is included in this *Guide* at Appendix O.

- ▪ **Service Provider has Access to Nonpublic Information**

A second type of conflict of interest occurs when, for some reason, one potential Service Provider has access to nonpublic information that would give it a "leg up" on the competition. This type of concern is sometimes implicated when an Agency has had a contract for services with a Service Provider and it is time to re-bid that contract. One way to deal with this problem is to make the information (or as much of it as possible) available to the other potential Service Providers so that all potential Service Providers have access to the same information. You might establish a Resource Room containing a copy of the existing contract and all other materials that would be relevant to the existing contract and the project so that other Service Providers have an opportunity to review that information and to be on a more level playing field with the incumbent Service Provider. On some very complex RFP's it might be essential that Service Providers review the information in the Resource Room in order to write an effective proposal. In those cases, you might want to make it a mandatory RFP requirement that prospective Service Providers use the Resource Room.

- ▪ **Service Provider Evaluation of Itself**

A third type of conflict of interest occurs when a Service Provider's work under one government contract might require evaluation of its own performance under another government contract. In this situation it may not be possible to alleviate the conflict, and the Service Provider may be precluded from submitting a proposal. If you have

any doubts or concerns about this type of situation, you should discuss them with your legal counsel.

- ▪ **Service Provider Relationship with a State Employee**

Another type of conflict of interest arises when a state employee has a relationship with a potential service provider. Examples of these conflicts include when a potential service provider is a business run on the side by a state employee who works for the agency purchasing the services or when the potential service provider is owned by a family member of a state employee who is in a position to influence the selection process. Information on addressing conflicts of interest involving state employees is included in section 1.5 of this *Guide*.

There may be other fact-specific situations that raise the question of whether there is a level playing field for the potential competitors for a contract. You should talk to your Agency's assistant attorney general and/or the DGS purchasing officer you are working with if you have any concerns that a particular procurement situation does not seem entirely fair to you. As discussed above, it is often possible to address apparent inequities in a way that will not disqualify potentially well qualified service providers from submitting proposals if you deal with them head on before you begin the process.

Appendix B: http://das.gse.iowa.gov/procurement/AppB_ContractsandResources.pdf

Appendix E: http://das.gse.iowa.gov/procurement/AppE_ExecutiveOrderNo25.pdf

Appendix H: http://das.gse.iowa.gov/procurement/AppH_AdministrativeRules.pdf

Appendix O: http://das.gse.iowa.gov/procurement/AppO_RFIannotated.pdf