



**COMBATING
FRAUD
IN PUBLIC PURCHASING**



**Office of the Attorney General
State of New York**

Antitrust Bureau

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INTRODUCTION AND OVERVIEW

Federal and State laws, both civil and criminal, require that suppliers compete on the merits when seeking seeking public contracts or providing goods or services to public entities. Fostering competition is a public policy priority. Agreeing with a competitor to do otherwise is a felony. We have written this guide for people who work in public purchasing to explain the specifics of that law and process generally. Each individual case may differ on the facts and circumstances but this general overview and suggestions will help to identify or detect fraudulent or suspicious behavior in public contracting.

QUESTIONS TO ASK WHEN REVIEWING BIDS

1. Does the successful bidder repeatedly subcontract work to companies that either submitted higher bids on the same projects or contract? Does someone pick up a bid package for the project or contract but did not submit a bid?
2. Did qualified bidders fail to bid?

Qualified bidders are those who either have the administrative and professional capabilities to provide the service or supplies, or have the financial capability of bidding the contract and whose geographical location allows them to give serious consideration to the project.



3. Do certain contractors repeatedly bid against one another (may indicate complementary bidding) or not bid against one another (may indicate market allocation)?
4. Does a particular contractor always win in a given geographical area?

Other local purchasing agents can help provide this information. You can plot the results on a color shaded map.
5. Does a particular contractor fail to cross a particular territory or boundary line in their bidding when there is no physical or regulatory barrier to explain that behavior?
6. Are there contractors who bid frequently but fail to win? (Are these same contractors involved in private work, or do they work to provide supplies solely on governmental contracts?)



This could indicate that the contractor is making money by merely submitting fake complementary bids to create the appearance of competition.

7. Are bid items in the contract identical?

This does not necessarily mean there is collusion because suppliers often quote the same prices to a number of bidders. It is a significant matter, however, when the identical bid involves a service or a service-product item. The chances that two different contractors are charging the identical amount for a particular service should raise red flags.

8. Have these contractors been convicted of bid-rigging in other states or jurisdictions or are they now under investigation by another state or jurisdiction?



This does not necessarily mean they have rigged bids in your jurisdiction. It is difficult for a contractor to turn integrity on and off, however; therefore, extreme suspicion should be the order of the day.

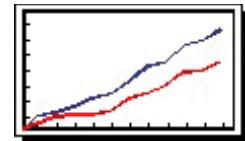
9. Did the contractors bid as a "joint venture" when either contractor had the administrative, professional, and financial capability of bidding the contract individually or as a prime contractor?

10. Has the contractor in the past bid varying amounts for similar line items on different projects but within the same geographical area?

Look for price variances that do not accord with the price index.

11. If the original bids are thrown out, do the same bidders either fail to rebid, or, if they do rebid, are they in the same bid ranking on rebid?

Some investigations have turned up "gentlemen's" agreements that the low bidder will also prevail on the second bidding, sometimes referred to as "the code of the West."



12. By plotting contracts on a graph over a fixed period of time, does there appear to be a percentage balancing of the total contracts, total items, or total dollar volume won by each of the contractors in a given geographical area?

13. Do the contractors in a given geographical area always fall within one or two percentage points of the bid estimate?

14. Have there been any new bidders bidding in the geographical area within the last five years?

If there have not, then more profitable opportunities for bid-rigging exist.



15. Does a successful bidder repeatedly use unsuccessful bidders as subcontractors on the same contract?

This could be by arrangement.

16. Does the typeface, names, email addresses, or telephone numbers used in the contract paperwork or communication appear to be the same?

Sometimes the contractor chosen by the conspiracy to be the successful bidder will prepare all the bids.

17. When the successful bidder arrived with his bid, did he or she also present the bids of other bidders?



18. Do the prices of contracts drop when a new bidder bids comes into a given area?

This could indicate the new bidder is not a part of an ongoing conspiracy and the conspiracy had to "bid hard" (submit an honest, competitive bid).

19. Have any government personnel noted prime contractors meeting together close to the time of the bid opening?

This, of course, does not mean they were violating the law, but it should put the contracting officer on alert.



20. Are all of the bidders real companies?

Bid riggers might use “fictitious bidders” or related companies to comply with competitive bidding laws.



21. Do the people getting the work done understand and follow these rules?

Getting competitive pricing is hard work, and some employees benefit from active supervision. In addition, unfortunately, on occasion, government employees have become participants in criminal conspiracies in return for payoffs from the conspirators.





SUSPICIOUS STATEMENTS MADE BY VENDORS

Price Fixing Red Flags

Sometimes, statements made by marketing representatives or suppliers may suggest that price fixing is involved. Examples of such statements that are suspicious and may indicate price-fixing, include:

- a. Any reference to "association price schedules," "industry price schedules," "industry suggested prices," "industry-wide" or "market-wide" pricing.
- b. Justification for the price or terms offered "because they follow industry (or industry leaders) pricing or terms," or "follow (a named competitor's) pricing or terms."
- c. Any reference to "industry self-regulation," etc., such as justification for price or terms "because they conform to (or further) the industry's guidelines" or "standards."
- d. Any references that the representative's company has been meeting with its competitors for whatever reason.
- e. Justification for price or terms "because our suppliers, etc., require it" or "because our competitors, etc., charge about the same," or "we all do it."



Market Split Red Flags

Statements by marketing representatives or in company promotional materials may also suggest the existence of agreements

among competitors to divide territories or customers. (This is also known as market allocation and, like price-fixing, is *per se* illegal.) Highly suspicious examples are:

a. Any reference that the representative's company "does not sell in that area," or that "only a particular firm sells in that area," or "deals with that business."



b. Statements to the effect that a particular representative (of a competitor) should not be making a particular proposal to you, or should not be calling on you.

c. Statements to the effect that it is a particular vendor's "turn" to receive a particular job or contract.



Talking With Your Colleagues and the Attorney General's Office

Communication among purchasing agents that procure the same services or commodities can reveal whether vendors are selling to some agencies but not to others, or if vendors appear to be limiting their selling to particular or selective units within a given agency. This is one of the most effective ways to monitor the procurement process in your area. Regular communications are strongly encouraged.



CHECKLIST FOR COLLUSION



Price-fixing:

- ___ 1. Identical bids were received from:

- ___ 2. A number of bids were submitted that were 15 percent or more higher than the published price sheets, information, or previous bidding of those bidders.
- ___ 3. Bid amounts may include resale price suppliers or others "require" to be charged.

Bid-rigging and Allocation of Customers:

- ___ 4. Low bid is 15 percent more than previous low bid for comparable goods or services.
- ___ 5. The low bidder bid is 15 percent higher or lower on a line item than it was in the past.
- ___ 6. Unusually low percentage of potential bidders actually bid.
- ___ 7. The low bidder continues to bid in only one geographical area without any apparent reason.
- ___ 8. A contractor appears to be unwilling to cross a particular geographical boundary line for no apparent reason.
- ___ 9. Regular rotation or sharing of bids among potential bidders occurs.
- ___ 10. The line items bid are identical among certain of the bidders, particularly for service items.
- ___ 11. A number of potential bidders continue to pick up

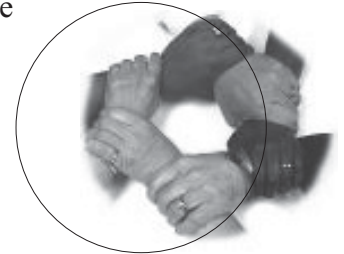




**Group Boycotts-
Refusals to Deal:**

bid documents but fail to bid.

- ___ 12. There are contractors who regularly bid and do not win or have failed to bid against one another.
- ___ 13. Two or more contractors bid on a joint venture even though it is possible either could have bid the contract alone.
- ___ 14. The original bids on the contract were rejected and the contract was rebid; however, only one bid was received on rebid. That bid was that of the low bidder on the first advertisement.
- ___ 15. There have been no new bidders in a particular geographical area although there were other contractors with potential to bid the area.



- ___ 16. A bidder refused or may have refused to deal with a subcontractor who bid against him.
- ___ 17. A bidder required or may have required a subcontractor to buy materials exclusively from him.
- ___ 18. A bidder withdrew or may have withdrawn because of a feared cut-off of supplies or credit from other enterprises.

Tie-ins:



- ___ 19. A bidder with important resources required or may have required the purchase of other items as a condition for doing the work.
- ___ 20. A bidder required or may have required subcontractors to purchase additional items at high cost as a condition for participating in the project.

STEPS TO ENCOURAGE COMPETITION



Purchasing officials can assist in the enforcement of antitrust laws and get better value for the public not only by actively detecting bid rigging but by taking positive steps to stimulate competition.

The key to detecting bidding irregularities is to be aware of the circumstances surrounding your bids. One of the best ways to do this is to constantly check with other procurement officials in your geographical area and compare prices on various goods and services. This data will allow you to make judgments about the prices and bids you are getting from vendors.

A brief review of some procedures that can easily be implemented by local officials is provided to assist in this process.



1. Insist on compliance with bidding procedures.

Review bids that you receive carefully to determine that all conditions imposed by the State are met, proper bonds have been supplied, all non-collusion statements are properly completed, and all required paperwork signed. Force the vendors into providing carefully executed bids.

2. Expand your list of bidders.

An illegal collusive agreement is harder to reach, implement, and maintain with each additional alternative bidder. To reduce the ability of vendors to collude, solicit as many vendors from as many sources as you can.

3. Know who you are doing business with.

Check other agencies to determine whether a vendor is reliable, responsible, or has been indicted or convicted of any related crimes. Consider instituting a

questionnaire that forces vendors/contractors to supply you with information that can be used to help determine bidder responsibility. As you should be aware, New York does not have a debarment or suspension statute that allows us to totally eliminate those vendors accused and/or convicted of bid rigging violations. A review usually must be done on a case by case basis to determine vendor "responsibility." After a review, a vendor can be found "not responsible" and a bid could be awarded to the next lowest bidder.

4. Prepare clear specifications.



Work hard on writing clear, concise specifications that guarantee that you get the product that will perform the job without restricting the alternatives unnecessarily. Specification writing is probably the single most important step in the process.

Avoid limiting competitive alternatives in your specifications:

- | |
|---|
| <p>a) <u>Do not</u> tailor your specifications to one particular product or supplier to force the outcome of a bid. With rare exception, any bid that reads "no substitutes" is illegal and ill-advised.</p> <p>b) <u>Do not</u> use specifications that are copied from manufacturer's literature.</p> <p>c) <u>Do not</u> use brand names in specifications unless you are demonstrating the characteristics of a product and then <u>only</u> if you add "or equivalent" and are ready to accept any product reasonably equivalent after fair examination.</p> |
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5. Be careful of the certain techniques that we have seen in various parts of the State during our investigations.

- a) Do not use contract extensions to continue purchasing from a vendor after a contract term expires unless it is a true emergency. Contract extension

language must be included in the original contract and any price increase should be pegged to the CPI or a show cause statement.

- b) Do not award open-ended contracts with no estimate of usage or a time frame for the life of the contract.
- c) Do not break the value of a contract down into small amounts that fall under the legal limits imposed by General Municipal Law (awarding a series of \$2,000 and \$3,000 contracts within a year for the same or similar products). Courts have ruled that similar products, purchased from the same vendor, should constitute one contract.
- d) Do not grant contracts without competitive bidding under the professional services exemption, when the service does not fall into the generally accepted definition provided for in the statute.
- e) Do not allow school districts to purchase products from a town contract. There is not provision in the law for this activity. Schools may purchase off state contracts, county contracts, and regional BOCES contracts.
- f) Do not bring all potential bidders together, which may get them talking to each other and possibly lead to collusion.

