

**Public Procurement:
What is a Contract?**

Presented by: Jimmy Meadows

Goals of Public Contracting

- Ensure full and open competition (Section 1.2)
- Ensure ethical action (Section 1.2)
- Procure goods or services for the lowest price (Section 1.1)

WHY?

Purchasing is where the money is . . .

- **Walley Barren** – Convicted of jury tampering while on trial for the Investright Scandal. Vendors told to pay Florida company for “assistance” in obtaining public contracts.
- **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.

WHY?

Purchasing is where the money is . . .

- **David Baisden (2014)** – Baisden, who served as the county purchasing agent, admitted he demanded Appalachian Tire to sell him tires for his personal vehicle at the same price they were giving the county to put tires on their vehicles. Appalachian refused and lost the county contract to supply tires for the Mingo County fleet. Judge John Copenhaver sentenced him to 20 months in prison \$7,700 in restitution to two companies.

Sources of Contract Law

- Private Sector
 - W. Va. version of UCC
 - Common law – cases decided by appellate courts
 - Statute of Frauds – writing requirement
 - Various subject specific statutes
 - HIPPA
 - Real Estate Recording Laws
 - Intellectual Property Laws
 - Business Entity Laws

Sources of Contract Law

- Public Sector (All of private sector law plus)
 - Constitutional Restrictions
 - State sovereignty
 - Debt restrictions
 - No lending of state credit provision

Sources of Contract Law

- Public Sector (All of private sector law plus)
 - Statutory Requirements
 - 5-22 - construction
 - 5G - A/E
 - 5A-3 - at state level
 - Prevailing Wage
 - Drug Free Workplace
 - No Debt
 - Bonding statutes of Chapter 38 (Mechanic's lien replacement)
 - Freedom of Information Act

Sources of Contract Law

- Changes to Law
 - Bidding laws change almost every year
 - 5-22-1 - Sublist requirement
 - 5-22-3 - No project labor agreement required
 - Prevailing wage significantly different
 - Dept. of Ed. Exempt for Instructional Technology

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.
- **Dept. of Ed. Purchasing Policy**
 - **Contract:** A written, legally binding agreement between two or more parties in which is specified the terms and conditions to which the parties have agreed.

What is a Contract?

- Most Basic
 - Offer
 - Acceptance
 - Consideration
 - No consideration = ?
 - Writing?
- Public Procurement a little more complicated
 - What is a solicitation?

Writing Requirement

- Writing Requirement:
 - Practically and Policy – everything in writing
 - \$5,000 or less – bids not required but contract in writing (policy says approved Purchase Order required)
 - \$5,000 or more – bids required and contract in writing
 - Legally – Statute of Frauds

Writing Requirement

- Statute of Frauds (W. Va. Code 55-1-1) –
 - Contracts must be in writing when:
 - Work lasting over one year
 - Sale of goods valued over \$500. (U.C.C. § 2-201)
 - Answer for debt of another
 - Sale, lease, or devise of land.
 - Agreement upon consideration of marriage
- If not in writing, statute says ability to sue for breach of contract is lost.

Writing Requirement

- Writing Required (minimum):
 - Signed by or on behalf of the parties
 - Identifies the subject matter of the contract
 - States essential elements of the contract

Contract Documents

- Solicitation Document – Request for Offers
 - Why can't solicitation be an offer?
- Bid Response - Offer
- PO / Contract Award Doc. - Acceptance
- Other Documents
 - WV-96
 - Purchasing Affidavit
 - Drug Free Workplace Affidavit
 - Bonds

Contract Documents

- Battle of the Forms:
 - All docs. combine to form contract
 - Knockout Rule and WV-96 cure
 - Audit trail
- What is private sector solution to battle of the forms on more formal contracts?

What is a Purchase Order?

- **Black's Law Dictionary**

- **Purchase Order:** A document authorizing a seller to deliver goods with payment to be made later.

- **Dept. of Ed. Purchasing Policy**

- **Purchase Order:** A written or electronic document issued by the LEA to a vendor authorizing or executing a purchase transaction.

What is a Purchase Order?

- Is PO alone sufficient to form a Contract?
 - Does PO have all contract terms?
 - Did vendor even sign PO?

Critical Contract Terms

- | | | |
|--|---|-------------------|
| <ul style="list-style-type: none">• Description of Good or Service• Quantity• Time of Performance• Delivery | } | Solicitation Doc. |
| <ul style="list-style-type: none">• Terms mandated by law• Price | | |
| <ul style="list-style-type: none">• Acceptance of bid and authorization to Perform | } | Purchase Order |

Critical Contract Terms: Description

- Description must be detailed enough to allow parties to have a “meeting of the minds”
- Example:
 - “Vendor shall provide Agency with pencils” is not sufficient.
 - “Vendor shall provide Agency with 1,000 standard size, yellow, number #2 lead pencils” is probably sufficient.

Critical Contract Terms: Description

- Competition: Must be Maximized
 - Section 1.4 – “If written specifications are required, they must be written in such a manner as to maximize and encourage competition.”
 - Section 3.2.3(b) – “Specifications must not be restrictive (locking in a specific vendor and limiting competition)”

Critical Contract Terms: Description

- Not maximizing competition looks like:
 - Blatant reference to brand or vendor without “or equal”
 - “Vendor must provide Acme paper weights.”
 - “Vendor must provide 3M paperclips”

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
- Open-End
 - Reasonable range limits
 - Estimated quantity helps set range limits
- Course of Dealings Rule
 - May help in Court but don't rely on it

Critical Contract Terms: Time

- Actual Date
- Period of Time
- Time is of the Essence Clause
- Reasonable Time

Critical Contract Terms: Delivery

- FOB Destination, or
- Must account for delivery cost in bid evaluation

Critical Contract Terms: Terms Mandated by Law

- Prevailing Wage
- HIPPA
- No Debt Affidavit
- Licensing Requirements

Critical Contract Terms: Price

- Provided by Vendor
- Bid rejected without price (Unless EOI)
- **PRICE MUST BE EVALUATABLE**
 - Applies to apples
 - Firm
 - Include all costs in evaluation

Contracting Best Practices

- No. 1: Understand What you Buy/Bid
- No. 2: Draft Accurately
- No. 3: Ensure Clarity
- No. 4: Ensure Consistency
- No. 5: Be Concise
- No. 6: Ensure Legality of Provision

Contracting Best Practices

- **No. 1: Understand What you Buy/Bid**
 - **Subject Matter Understanding**
 - Roofing services sold per square
 - Lumber is sold by the board foot
 - Women's jeans in numerical sizes, not inches
 - Sheets differentiated by thread count
 - Horses measured by hands

Contracting Best Practices

- **No. 1: Understand What you Buy/Bid**
 - **Legal Terms of Art:**
 - "All payments must be made *in arrears*" rather than "All payments must be made *in the rear*."
 - "The owner has a right to enter his property using the *right-of-way*" rather than "The owner has a right to enter his property using the *rightaway*."
 - "As is, *Where is*" means there are no warranties.

Contracting Best Practices

- **No. 1: Understand What you Buy/Bid:**
 - **Grammar:**
 - “Vendor *accepts* all responsibility for damage” rather than “Vendor *excepts* all responsibility for damage.”
 - “Vendor is solely responsible for *its* employees” rather than “Vendor is solely responsible for *it’s* employees.”
 - “Vendors shall submit *their* proposals” rather than “Vendors shall submit *there* proposals.”

Contracting Best Practices

- **No. 3: Ensure Clarity – Precise Terms**
 - **Precise** – “Vendor must deliver widgets to Agency within 24 hours of Agency’s order.”
 - **Too Precise** – “Vendor must deliver widgets to Agency at 5:00 p.m. on the day after the order is received.”

Contracting Best Practices

- **No. 3: Ensure Clarity – Vague Terms**
 - **Vague** – “Vendor must deliver widgets within a reasonable time of Agency’s order.”
 - **Too Vague** – “Vendor must paint the house.”

Contracting Best Practices

- **No. 3: Ensure Clarity – Ambiguous Terms**

Never use ambiguous terms

Contracting Best Practices

- **No. 3: Ensure Clarity – Ambiguous Terms**
- *Ambiguous* – “Payment shall be made to Vendor biweekly.”
- *Ambiguous* – “Contractor must demolish the office with drug paraphernalia prior to demolishing the remainder of the structure.”

Contracting Best Practices

- **No. 4: Ensure Consistency**
- Repeated References Examples:
 - *Person or entity*: Referring to the entity providing services to the state as the winning bidder, vendor, contractor, seller, bidder, and its actual corporate name all in the same contract document is not acceptable.
 - Same thing applies to goods or services

Contracting Best Practices

- **No. 4: Ensure Consistency**

- Repeated References Examples:

- Defined Term: "The **Agency** must approve any extension of the terms of this contract to another **agency** prior to such extension."

Contracting Best Practices

- **No. 5 - Be Concise**

"As heretofore stated and notwithstanding anything else to the contrary, the precedent condition relating to grouping and removal of organic waste from the premises shall be fulfilled prior to contract holder's endeavor to recover compensation for completion of the designated achievable outcomes."

Contracting Best Practices

- **No. 5 - Be Concise**

Corrected - "Vendor shall ensure that all grass clippings have been bagged and removed from the lawn prior to seeking payment for cutting the grass."

Contracting Best Practices

- **No. 6: Ensure Legality of Provision**

- **Illegal Term:** County will indemnify Vendor for loss
- **Illegal Term:** County agrees to keep all information in bid confidential.

Rules of Contract Interpretation

- Plain Meaning Rule
- Ambiguity Rule
- Usage of Trade Meaning
- Written Prevails Over Numerical
- Of the Same Kind (Ejusdem Generis Rule)
- Expression of One Excludes Others (Expressio Unius Rule)

Ask for Help

- Vendors
- Coworkers
- Spell check
- Purchasing Buyer
- Agency Attorney

Questions?

Be sure to sign the sign-in sheet!

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