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★ OHIO ATTORNEY GENERAL ★

COMPETITION MATTERS

Fostering Fair Competition in the Marketplace



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Five Common Mistakes Public Purchasers Make

The articles featured in “Competition Matters” often advise public purchasing agents on suspicious bidding behaviors that can harm the competitive process. Typically, these articles focus on the behavior of vendors, but the behavior of public purchasers also can influence the competition of bidding activity. Here we outline five common pitfalls that public purchasers should avoid in order to ensure that they get the most out of the competitive bidding process.

Common Mistakes to Avoid:

- 1. Readily volunteering the list of prospective bidders.** While it may be tempting to distribute a list of companies that received invitations to bid or picked up bid packets, sharing this information could foster collusion among bidders. If a prospective bidder becomes aware of the identity of other bidders, it becomes easier for potential bidders to form a conspiracy to engage in illegal activity. Keeping the list of bidders private helps ensure that bidders make independent decisions about bid prices, which helps maximize competition. However, public purchasers should be careful to comply with Ohio’s public records laws and may be required to disclose bidder lists in response to a public records request for this information.
- 2. Setting overly specific or restrictive bid specifications (when unnecessary).** A public purchaser’s job includes tailoring bid specifications to the needs of individual projects. But while bid specifications generally should be clear and detailed, they should not be drafted with the intent of awarding a specific bidder. Overly restrictive bid specifications tend to undermine the competitive process and can result in higher costs to the public because they often effectively shut other competitors out of the process. To observe best practices, public purchasers should not copy specifications from a manufacturer’s website or literature and should not use brand names in specifications unless clearly stating “or equivalent.” Note, however, that there is an important exception to this rule for public projects that call for special skills or enhanced abilities based on safety or health-related concerns that only specific vendors or manufacturers can fulfill.
- 3. Using contract extensions to continue purchasing from a vendor after a contract expires.** When public purchasers use contract extensions to maintain existing partnerships beyond the initial term, they may be circumventing the competitive bidding process. Contract extensions foreclose would-be competitors from offering alternative (and possibly lower) bids after a contract would otherwise expire. Thus, avoiding contract extensions can help decrease local governments’ and taxpayers’ costs.

4. Awarding open-ended contracts that have no usage or time limits. Contracts for public projects that do not contain a time frame for completion or an estimate of usage unnecessarily risk extending the contract beyond what the project requires. Without such terms, public purchasers may be forced into a continuing relationship with a vendor that could increase costs. On the other hand, carefully defining the scope of the project by including such terms can allow public purchasers to contract with vendors based on the needs of the project and get the full benefit of healthy competition.

5. Breaking a contract into smaller amounts to avoid the bidding process. As a general rule, similar products and services purchased from the same vendor should constitute one contract. When the purchaser breaks a contract down into smaller amounts to avoid publicly bidding the project, this thwarts the competitive bidding process and may violate Ohio's competitive bidding statutes. While there may be valid justifications for splitting a contract into several smaller ones, the desire to avoid the hassle of competitive bidding is not one of them.

Alum Investigation Continues; Municipalities Urged to Submit Information

The Ohio Attorney General's Office is continuing to investigate an alleged bid-rigging scheme affecting purchasers of aluminum sulfate, otherwise known as alum.

Alum is a chemical that is used to treat both waste and drinking water.

The Ohio Attorney General is authorized by law to represent municipalities and public entities in antitrust matters such as this one. If your municipality or other public entity uses alum, or another similar water treatment chemical called ferric chloride, please contact the Attorney General's Antitrust Section to send us information about your water treatment facility's chemical purchases. Visit the [water treatment purchases page](#) of our website to find links you can use to submit information.

Your information is vital to helping us determine who may have been affected by this alleged conspiracy and the amount by which each may have been harmed. Time is of the essence, so we hope to hear from you soon.

Bid-Rigging at Tax Lien Auctions

Tax lien auctions are commonly used by counties, municipalities, and other local government entities to deal with tax-delinquent properties. When a property owner fails to pay taxes on the property, the political subdivision in which the property is located may attach a lien for the amount of the unpaid taxes. In many states, local governments are authorized to sell such liens, either individually or in a bundle. Tax lien auctions – like all auctions – may be susceptible to anti-competitive activity by bidders.

In 2013, a federal grand jury in New Jersey indicted six investors for their roles in a conspiracy to rig bids at auctions conducted by New Jersey municipalities for the sale of tax liens from 1998 to 2009 ([U.S. v. Wolfson, et al.](#), Case No. 2:13-cr-00748). According to the indictment, the conspirators would arrange ahead of time which of them would bid or not bid on certain lots, or would otherwise structure their bids in such a way as to predetermine the outcome in favor of one of the conspirators. At times they allegedly would flip a coin or draw numbers out of a hat or a deck of cards to determine who would purchase certain tax liens.

By eliminating competition among themselves, the bidders kept the interest rates on the liens they purchased artificially high. (At tax lien auctions, investors bid on the interest rates property owners will have to pay. The bidding starts at an 18 percent interest rate, but with competition, it can be driven down as low as 0 percent.) As a result of the conspiracy, property owners and those struggling to save their

homes from foreclosure were made to pay higher interest rates on their tax debts, according to the U.S. Department of Justice.

To date, at least three businesses and 13 individuals have either pleaded guilty or been convicted as a part of the federal investigation of this scheme and others like it.

If you suspect that your public entity's auction may have been impacted by this type of collusion, report it to the Ohio Attorney General's Antitrust Section. By helping catch unscrupulous bidders who take the risk of using bid-rigging schemes to game the system, you can help ensure that their gambles don't pay off.

We're Looking for Partners to Keep Competition Healthy!

Ohio Attorney General Mike DeWine's Partnership for Competitive Purchasing takes a proactive approach to bid-rigging detection. Our attorneys and investigators regularly work on issues related to anticompetitive activities, giving them the expertise to help you spot bid rigging and price fixing. The partnership offers reviews to analyze bid files for anticompetitive activities and answer your questions or concerns. This is not an audit, but a helpful on-site review to keep competition fair and healthy.

The Partnership for Competitive Purchasing is a voluntary program open to all Ohio public entities, including cities, counties, villages, universities, state agencies, public libraries, and school districts.

Registration for the partnership is free and easy. Just visit the Partnership for Competitive Purchasing page and select "[Enroll in the Partnership for Competitive Purchasing](#)" or call the Ohio Attorney General's Antitrust Section at 614-466-4328.

Need a Speaker?

We have attorneys and investigators available to present to your group with a lively presentation that educates participants on the basics of antitrust law, giving real-life examples of vendor misconduct impacting Ohio public purchasers. If you have an upcoming event and would like a speaker from our office to talk about the Partnership for Competitive Purchasing, bid-rigging detection, or other antitrust issues, contact Karen Pierson at 614-728-2493 or Karen.Pierson@OhioAttorneyGeneral.gov.

We Welcome Your Questions

We encourage you to suggest a topic or ask a question of the legal staff of the Ohio Attorney General's Antitrust Section. Questions will be addressed in future issues of "Competition Matters." (No individuals' or organizations' names will be published.) Please submit your questions or suggested topics to Karen Pierson at Karen.Pierson@OhioAttorneyGeneral.gov.

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