

# Practice Tips

## Competitive Bidding and Purchasing—Ten Tips Designed to Keep You Out of the Papers

*By Beth Anne Wilkening, City Attorney, City of Broken Arrow, Oklahoma*

A few years ago, I was invited by representatives of the Oklahoma Municipal League to make several presentations on the subject of competitive bidding and purchasing. Initially, I was unenthusiastic about this topic and would have placed it squarely in the category of watching paint dry. After all, as City Attorney for the City of Broken Arrow, I had dealt with far more interesting issues such as casinos, kangaroos, *qui tam* lawsuits, officer involved shootings, miniature horses, and various displays of public nudity (not my own, just to be clear).

But as I reflected over my ten year career as the Chief Legal Officer, memories of threatened vendor lawsuits, actual lawsuits, criminal prosecutions (from other Oklahoma cities, just to be clear), beaver removal contracts, purchases of a preserved snake, poison oak, and microbes (glad I missed the Purchase Order on that), and the desire of Staff to be brand-specific came pouring back. The topic of competitive bidding and purchasing, as unsexy as it sounds, is intrinsically one of the more important functions of government. I modified my way of thinking to embrace this opportunity to review the statutes, read applicable case law and Attorney General's Opinions, and ensure that our code of ordinances, Purchasing Manual, and current practices are lawful, transparent, and designed to be most advantageous to both the City and the taxpayers. I also used it as an opportunity to articulate ten rules that I have found to be key in accomplishing the goals set forth above.

My rules for staying out of the papers (both print media and legal) are as follows:

**1. Be thorough.** My fellow Department Directors constantly express frustration over my "belt and suspenders" approach to even the most routine purchases. When I am reviewing fact sheets for Council Meetings, I tend to always go overboard on background information. Although they certainly tire of my endless questions, I constantly remind them that if I do not understand what they are saying, then the general public certainly will not. Also, the tried and true rule in my practice remains that a little bit of work on the front end saves a tremendous amount of work on the back end. Comprehensive background information has been invaluable not only in warding off potential lawsuits, but also in answering questions posed by "Inquiring Minds." This is especially true for Inquiring Minds that peruse the claims list for entertainment.

**2. Angry people file lawsuits.** This rule is tried and true. It is my belief that angry people file lawsuits on the basis of principle alone. I constantly encourage City Staff to treat all bidders, vendors, and citizens with courtesy and respect. I also encourage them to maintain good working relationships with contractors. There are times when things may become contentious, but more often than not, these matters can be handled professionally, even if they become adversarial. Also, being responsive to citizens (especially those who peruse the claims list) and providing them with an abundance of information can be very helpful in warding off litigation and negative media attention.

**3. Don't fall victim to** "Emergencies." If I had a dollar for every time I had a City Staff Member tell me that something was "an Emergency," I would no longer need to draw a paycheck from the City of Broken Arrow. When a particular situation arises that has everyone running around with their hair on fire, I spend a considerable amount of time inquiring about the problem, the solution, and the true need for advancement of the purchase. There are certainly times when a situation warrants immediate action and declaration of an Emergency by the Governing Body. However, these situations need to be true emergencies (like no water, no power, falling walls, and things that are a danger to persons and property). If not, you compromise the process and put your client at risk.

**4. Read the law.** I keep a notebook with state statutes, the Broken Arrow Code, important cases (especially those where people go to jail), the Purchasing Manual, drafts of previous form documents such as Emergency Resolutions, and previous Council Actions. When asked a question, I do my best not to depend upon memory alone and actually review the statute. This is especially important when it is something that you have not seen before. (Like all good municipal attorneys, I have given up saying "I have seen it all.")

**5. Be transparent.** Put all relevant information in the fact sheet. Include benefits, challenges, recommendations, and the rationales behind them. When you neglect to do this, the conspiracy theorists really get the upper hand. For example, if your emergency medical services personnel like a certain type of defibrillator, but that is not the low bid, talk about redundancy and the need for all units to function in

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the officers moved towards him. Officer Blanchard kicked in the door again and, according to the officers, ordered Mr. Brown to drop the knife, telling him they would have to shoot him if he did not comply. Instead of dropping the knife, Brown raised it over his head and advanced. When he came within five to six feet of the officers, Officer Blanchard shot, killing Brown.

Brown's mother disputes that the officers told her son to drop the knife. She claims she heard her son say something to the effect of; "Fine, come in and shoot me between the eyes and kill me." It is beyond dispute, however, that she could not *see* the events that transpired and that she therefore did not know whether her son had threatened the officers with the knife by raising it and advancing towards them.

Nonetheless, the district court held that the mother's testimony that the officers did not tell her son to drop the knife discredited their allegations that Mr. Brown had raised the knife and advanced on them as they testified. The court therefore found a dispute of material fact as to whether the officers had been threatened by Brown (despite the uncontradicted testimony on this point as the officers were the only ones able to see the events) and concluded that qualified immunity was inappropriate.

The Seventh Circuit concluded that its review of the denial of qualified immunity on an interlocutory appeal is limited and that it cannot "determine whether the district court erred in finding that a genuine issue of material fact exists." The Circuit Court therefore determined that it must accept the district court's conclusion that there was a genuine dispute of material fact as to whether Brown had raised the knife and advanced on the officers at the time he was shot--even though this was an inference the district court drew based on the dispute of fact regarding whether the officers ordered Mr. Brown to drop the knife. After so concluding, the Seventh Circuit held that the denial of qualified immunity was appropriate because it was clearly established that the use of deadly force against a non-resisting or passively resisting suspect was unjustified.

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the same way to avoid mistakes in care and treatment of the public. Challenge Staff to explain in detail the rationales for the recommendation. Also, if a mistake is made, remedy it, but be transparent in the process.

**6. Get competent advice.** I have learned over the years to recognize my limitations. If I am concerned about a particular issue in bidding and purchasing, I always contact the best attorneys that I can find. I outline the situation without inserting my opinion and actively listen to what they say about the issue. I also heavily rely on the opinions of my fellow City Attorneys. If I have not seen a particular issue, chances are that one of them has dealt with it.

**7. Provide an opportunity for unsuccessful bidders to be heard.** Occasionally, elected officials will want to limit the amount of time that an unsuccessful vendor will have to present their position in open meetings. I always encourage the Mayor to allow vendor representatives as much time as they want (within reason) and to provide as much information as they see fit. Also, in advance of the meeting, I will typically encourage the vendor to provide information they deem necessary and will include it as part of the agenda packet. Limiting the opportunity to be heard only serves to substantiate their claims of a lack of due process and will also likely lead them to the conclusion that the process is "rigged." A well written fact sheet that provides all information regarding successful and unsuccessful bidders encourages Staff to be thorough in their evaluation and also the opportunity for all positions, even those that are unsuccessful, to be set forth.

**8. Fully explain and justify recommendations to select the second low bidder.** If a governing body deviates from the lowest bid, be prepared to explain the rationale in a professional, non-emotional way. It is critically important in these situations to have all information included in the fact sheet and explain the basis for Staff's recommendation to deviate from the low bidder. Prior performance issues (such as failure to meet demand and delivery deadlines, negative repair histories, and other objective criteria) are extremely helpful in supporting these decisions.

**9. Don't fear use of the table.** If things are not going well and time is not critically important, I believe that there is always value in tabling an item until additional information can be obtained. Sometimes, the heat of the moment can lead to decisions that are not well thought-out and result in litigation. Giving a vendor or contractor the opportunity to provide additional information to Staff can be incredibly helpful in amicable resolution of an issue, particularly in the area of purchasing. As in most instances, time brings clarity.

**10. Justify sole source purchases.** Various Departments and Divisions of the City of Broken Arrow love to sole source equipment. They use words like "redundancy," "integration," and "structural integrity" in an attempt to confuse me into agreeing with their proposed purchases. Not to be fooled, I subject them to hours of inquiry and required explanation on the sought-after equipment and the need to narrow the field to one particular provider. Purchases from State contracts and purchasing consortiums are increasingly popular in my jurisdiction. Although not technically sole source purchases, it is important to ensure that procurement from these entities are allowed by both your local ordinances and state statutes.

I recently was vindicated from my role as "Ms. No" by an open records request wherein a citizen demanded an explanation as to the need for several proposed purchases. Fortunately, I had effectively utilized the "belt and suspenders" approach to the point of bringing my Information Systems representative to the precipice of insanity. Information provided to the Inquiring Mind proved to be satisfactory due to the foundation laid in the fact sheet and as supplemented by Staff.

Hopefully, you will find some of this information helpful (or, at a minimum, mildly entertaining). Happy purchasing to all and best of luck staying out of the papers!