

GIVENS PURSLEY LLP

SEVEN RECOMMENDATIONS FOR PUBLIC PURCHASING

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Top Considerations for Public Procurement

- ❖ **Best Quality – for service or product**
- ❖ **Best Price – for service or product**
- ❖ **Fair & Competitive Process**

Top Considerations for Private Procurement

- ❖ **Best Quality – service or product**
- ❖ **Best Price – service or product**
- ❖ **Best Interest of the Company**

“Every government expenditure is subject to public scrutiny.... Often, the challenge is based not on what goods and services were acquired but on the process used. We often hear claims that the process was unfair, or biased, or that there was no process, or that the contract was awarded without competition.

All of these claims highlight the reality that spending government funds is very different than buying “stuff” (goods and services) in the private sector. The process is different, the objectives are different, and the private sector does not have to deal with public policy related to procurement.”

Michael Anser, “A Guide to *Public Procurement* for Elected Officials and Public Sector Managers” (2009), pg. v (emphasis added).

Fairness is the Backbone of Public Procurement

“It is public policy that all firms should have an equal chance of obtaining government business. Competition is the cornerstone of the government procurement process.”

Michael Anser, “A Guide to *Public Procurement* for Elected Officials and Public Sector Managers (2009), pg. 7.

Recommendation 1

Limit influence to the extent you can.

Start with a blackout period.

Fairness Also Means Accountability

Recommendation 2

Consider adopting portions of the ABA 2000 Model Procurement Code for State and Local Governments.

**Article 12 – Ethics in Public Contracting
Part B – Standards of Conduct**

§ 12-201 – Statement of Policy.

Public employment is a public trust. It is the policy of the [State] to promote and balance the objective of protecting government integrity and the objective of facilitating the recruitment and retention of personnel needed by the [State]. Such policy is implemented by prescribing essential standards of ethical conduct without creating unnecessary obstacles to entering public service.

Public employees must discharge their duties impartially so as to assure fair competitive access to governmental procurement by responsible contractors. . . .

Various ABA Code Provisions

- ❖ § 12-202 – General Standards of Ethical Conduct.
 - ▲ § 12-202(1) – applies to government employees
 - ▲ § 12-202(2) – applies to vendors and non-employees – creates specific rules and standards of conduct examples

- ❖ § 12-204 – Conflict of interest.

- ❖ § 12-206 – Gratuities and kickbacks.

- ❖ § 12-209 – Use of confidential information for personal gain.

- ❖ § 9-102 – Give Purchasing the authority to debar or suspend a vendor.

Fairness Also Means Flexibility

Recommendation 3

Allow agencies, higher education and elected officials the option of state contracts.

- ❖ Encourage local control of substantive purchasing decisions.
- ❖ Encourage purchasing to assist and guide procurement process.
- ❖ Make it a collaborative process.

**Fairness Means Vendors
Can Seek Relief in Court for
Procurement Decisions
They Feel are Arbitrary and
Capricious**

Recommendation 4

Clarify that vendors can seek judicial review for all purchasing decisions.

“There is no right in judicial review of appeals decided pursuant to Section 67-5733(1)(c)(i). As a result, the Court has no authority to engage in judicial review of the decisions of the director to deny CRI’s appeal.”

CRI Advantage, Inc. v. State of Idaho, et al., Case No. CV-OC-1106751, Ada County, 4th Judicial District, Memorandum Decision and Order (Oct. 5, 2011), pg. 12.

Recommendation 5

Make the loser pay fees and costs associated with administrative appeal and judicial review.

Recommendation 6

Extend appeal deadline and allow for discovery.

- ❖ **5 business days to appeal a procurement decision.**
- ❖ **3 days for agency to produce documents under Public Records Act, with 10-day extension possible.**
- ❖ **Currently, purchasing has 3 options when an appeal is filed:**
 - **Review by Director of Admin**
 - **Assign a determinations officer to review the appeal**
 - **Conduct a contested case hearing subject to appeal**

Recommendation 7

In procurement appeals over a certain amount - \$1 million, \$5 million, \$10 million – a hearing officer should be assigned.

7 Fair Procurement Recommendations

1. Take influence out of contracting to the extent you can. Start with a blackout period.
2. Consider more accountability by adopting ABA 2000 Model Procurement Code standard of conduct and debarment ability.
3. Allow agencies, higher education and elected officials the ability to opt in state contracts and more local control.
4. Clarify that vendors can seek judicial review for all purchasing decisions.
5. Make the loser pay fees and costs associated with administrative appeal/judicial review.
6. Extend appeal deadline and allow for discovery.
7. In procurement appeals over a certain amount - \$1 million, \$5 million, \$10 million – a hearing officer should be assigned.