

# The Firehouse Lawyer

Volume 16, Number Eight

August 2018

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## STATE AUDITOR ISSUES GUIDANCE ON PIGGYBACKING

This month the State Auditor's Office (SAO) Performance Center did a really good thing—it published a "guidance"—and provided advice about using the bid awards of other agencies instead of going out to bid for purchasing, which is commonly known as "piggybacking." This article summarizes the key points of the guidance and adds our comments for local governments to consider when piggybacking on others' bid awards, process, and documents.

Like the SAO did, we disclaim any inference that this article constitutes legal advice; it is merely intended to inform and educate in the abstract. When faced with one of these issues, you should consult legal counsel who emphasizes this area of the law. But you should refer to the guidance and the checklist included in the appendix and this article. You can find the guidance at [performance@sao.wa.gov](mailto:performance@sao.wa.gov).

Essentially, piggybacking is cooperative purchasing or procurement authorized by RCW 39.34.030. The "lead agency" whose bid process you might want to piggyback on does most of the work, in a sense. The lead agency must (1) comply with its own bid laws and requirements; (2) advertise in accord with its own advertising requirements, as set by law and internal policies; (3) post the bid or ad on its website or provide an access link to the state's web portal so the posting can be found; and (4) include in its documents language that the bid can be piggybacked upon (this lets the vendor know of the piggybacking option).

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The agency that wants to piggyback must execute an interlocal agreement (ILA) under chapter 39.34, wherein the lead agency allows the other agency to piggyback. We have (and have seen those of other counsel) a simple one-page ILA for that purpose.

The agency also needs to follow its own procurement requirements and policies, in addition to RCW 39.34. Those policies should include language that directly contemplates such piggybacking and other cooperative purchasing. The piggybacking agency should review the original contract documents and make sure that was not a piggybacking contract itself, and was actually a competitively bid procurement.

The guidance, and our experience, tells us that there are some tricky issues, so the piggybacking agency also needs to consider the following:

First, review the original lead agency procurement to ensure that the piggybacking agency's needs or specifications are not materially different. For example, if you found that you need several extra items added to the base price, make sure that does not differ materially from the original contract price. I do not think a variance of less than 20% should invalidate the piggybacking. Also, make sure the offer of the vendor to piggyback is still valid; a stale contract more than two years old probably will not work!

Second, make sure the type of lead agency operates under the same bid law as the piggybacking agency does. It matters, for example, if the lead agency awarded a contract under a statute allowing contract awards to other than the lowest responsible bidder, if

your statute requires an award to the lowest responsible bidder.

Third, make sure the contract is properly awarded under bid thresholds, for example, if it is a deal involving both products and services. We had that situation recently, and concluded it is not just a services contract, if the contract performance also provides for the purchase of over \$10,000 in equipment.<sup>1</sup>

It should go without saying that the piggybacking agency must preserve all documents needed to show your compliance with the applicable laws and policies, including, of course, all of the requirements stated above in this article and in the guidance. Retain all lead agency documents that you rely on. Retain all of your own contracts, and research product, including any legal advice you may have gotten about your compliance with RCW 39.34.030, as well as minutes or resolutions of the board with regard to the procurement, just as you would with a sole source declaration and opinion of counsel justifying that declaration. Don't forget the ILA with the lead agency, unless of course you have a blanket cooperative purchasing agreement with that agency, meeting all of the usual elements that RCW 39.34 requires.

What about using cooperatives, whether headquartered in Washington state or out of state? An example would be the widely used Fire Rescue GPO. Obviously, first you need to be a member of the cooperative.

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<sup>1</sup>

<https://www.firehouselawyer.com/Newsletters/July2018Final.pdf>

This subject has been a recent bone of contention with the SAO, and this guidance only deals with it in a perfunctory way. Detailed discussion was apparently beyond the scope of the guidance and therefore the scope of this article as well. Suffice it to say for now that we do not advise clients to use cooperatives without first calling counsel and asking for detailed legal advice. The SAO basically said in the guidance that the agency should measure the cooperative against the requisites of RCW 39.34.030(2). The SAO also stated that it does not "evaluate cooperatives or provide an approved list." You are left to make your own determination at your own risk, so you should consult legal counsel for specific advice about the cooperative proposed.

### **How Does the Deliberative Process Exemption Work?**

Public agencies, when asked for drafts of certain documents, often rely on the "deliberative process" exemption set forth under RCW 42.56.280 to withhold those draft documents, or any correspondence related to those draft documents, in their entirety. Be careful. This exemption is only applicable to the extent that the draft documents, or correspondence related to those draft documents, "reflect policy recommendations and opinions and are not simply the raw factual data underlying a decision." *West v. Port of Olympia*, 146 Wn.App. 108 (2008). In other words, to the extent that members of any agency discuss facts underlying a particular decision, so long as those facts are not coupled with a policy recommendation, in the same record, those facts are not exempt under RCW 42.56.280.

### **SAFETY BILL**

All of your employees/volunteers must "[T]ake care of all personal protective equipment (PPE) properly." WAC 296-800-12005. One might argue properly maintaining one's own PPE is an essential function of the position the employee holds or desires.

### **DISCLAIMER**

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