

SOLICITING A VENDING CONTRACT BID

Two Options

Districts can use either an invitation for bid (IFB) or a request for proposal (RFP) to competitively bid vending contracts for foods and beverages. This fact sheet explores some key differences between the two options.

California state law¹ requires school districts to competitively bid contracts in which the district grants advertising rights. Since school vending contracts for foods and beverages invariably grant advertising rights by permitting vendors to advertise their products and logos on school property, the law's competitive bidding requirements apply to school vending contracts.

Districts can use either an *invitation for bid* (IFB) or a *request for proposal* (RFP) to comply with the law. Some key differences between these two options are examined in this fact sheet.

Invitation for Bid

An IFB is a competitive bidding technique that is highly structured, very detailed, and strictly managed. The objectives of this process are to obtain goods and services at the lowest practical cost and to minimize the possibility of graft, fraud, and collusion. School districts often use the IFB process to obtain commercially available goods and services such as janitorial supplies, gym lockers, or construction services.

An IFB document must specify the district's minimum acceptable, functional, technical, and contractual requirements and inform potential bidders of the evaluation criteria governing the award of a contract. Potential bidders are provided copies of the IFB and asked to submit bids compliant to all IFB requirements by a specified date.

Bids must be submitted under seal, which ensures that the contents of the bids are not revealed before the deadline for submissions. Any bid that does not conform to the specific requirements must be judged *nonresponsive* and, as such, cannot be considered for award.

A related state law² requires school districts to accept the lowest responsible and responsive bidder³ or else reject all bids. Once opened, bids may not be modified or altered in any manner, which means that negotiation about the scope of work, amount to be paid, or other contractual terms and conditions is not allowed.

An IFB for a school food or beverage vending contract could include the following elements:

- A technical description of product specifications (e.g., no beverages containing artificial sweeteners, flavorings, or coloring agents; no diet beverages; 100% juice drinks only; no sports drinks)
- Rate schedule (i.e., how much the vendor intends to charge per unit of goods sold and how much of a commission rate the vendor will give the district for each unit sale)
- "Revenue enhancement contribution" formula to determine "best expected value" of the contract (i.e., how much cash or non-cash incentives the vendor intends to pay the district as an inducement calculated by formula)
- Product delivery requirements and rules about product substitutions
- Commission payment schedules
- Financial report requirements
- Advertising guidelines

- Reservations of rights (e.g., district’s reservation of right to award the contract(s) “as a whole,” “individually,” or “any combination”)
- Bid and contract terms and conditions, including:
 - Rules governing the bid competition
 - Method involved in bid evaluation and the criteria of award
 - Bid protest processes
 - Duration of contract
 - Indemnification and insurance requirements
 - Definition of material breach
 - Conditions for contract termination

Request for Proposals

An RFP is the other competitive bidding process that districts may use when issuing a contract that grants advertising rights. The RFP process is not as rigid as the IFB process, permitting districts greater flexibility in how the solicitation is issued, evaluated, and accepted, and how the contract is awarded.

RFPs differ from IFBs in three primary respects:

1. The requirements (or specifications) portion of the RFP is usually stated in general terms and presents the scope of work as a problem to be solved or a goal to be achieved. Bidders then propose their own individual solution free of precise technical constraints imposed by the district.

2. Selection of the vendor can be based on factors other than or in addition to cost/price alone. All such factors, however, must be included in the evaluation section of the RFP document. Some of the factors that may be considered to make an award under an RFP may include:

- Experience in performing the specific services required.
- Specialized knowledge relating to critical requirements for the project.
- A proven history of effectiveness in projects of similar complexity.
- An effective economy of operation based on factors outside of the particular project so that resources are leveraged to their greatest extent.

3. Proposals may be modified or altered after acceptance—which means that the solicitation requirements, amount to be paid, or other contractual terms and conditions can be negotiated.

An RFP document for a school food or beverage vending contract would likely include most, if not all, of the elements contained in an IFB document—but it would express them in a much less rigid manner. For example, instead of providing potential bidders with a highly detailed technical specifications list of acceptable foods or beverages, an RFP might inform potential vendors of the district’s healthy vending policy and then request that vendors propose products that they think meet the policy standards. This same approach—describing a desired outcome but not necessarily prescribing the method of achieving that outcome—would then be repeated with the other elements contained in the RFP. And, since negotiation is permitted after the proposal has been accepted, final contract terms and conditions will likely be determined by an “offer/counteroffer/acceptance” process.

Which Procurement Process Is Best?

Both of the procurement processes described in this fact sheet can achieve excellent results and neither is inherently better than the other. Ultimately, a school district will select one procurement process over the other on the basis of that district’s business policies, procedures and day to day practices.

Generally speaking, the IFB process is likely to be favored by districts that seek to control all aspects of the solicitation and have the capacity to draft highly complex and very technical documents. However, since the IFB

process doesn't permit negotiation, the district must be confident that it can predict its needs over time and express those needs clearly enough in the solicitation document to receive responsive bids from qualified bidders.

Additionally, insofar as the IFB process relies on stiff competition between bidders to ensure the best possible deal, a sufficient number of qualified and interested bidders needs to exist in order to make the solicitation a success. This may not be the case in rural districts where there are far fewer qualified vendors and service providers from which to choose. In these cases, the RFP process may be the best option.

Advocates' Involvement

The same law that requires school districts to use a competitive bid process for contracts that grant advertising rights also requires districts to provide the public with an opportunity to comment on the proposed *contract* before it is signed. However, for obvious reasons (e.g., anti-competition considerations) the law does not require districts to let the public review the *procurement* document before it is issued.

However, nothing in the law prevents interested parents or nutrition advocates from getting involved in the procurement process while the IFB or RFP is being developed. Such involvement can help ensure that there is internal consistency between the district's nutrition policy and its business practices and can help keep the focus of the solicitation on providing healthy foods and beverages with no or limited advertising.

Some school districts have willingly involved nutrition advocates and other interested individuals in developing their IFB or RFP. Such involvement is likely to increase in response to the federal government's requirement that by 2006 all school districts in the United States adopt a wellness policy that includes nutrition guidelines for all foods and beverages available on campus and involve relevant stakeholders such as parents, students and community members in the process.

If a school district chooses not to open its IFB or RFP process to public input, a California law called the California Public Records Act⁴ can be utilized to obtain the IFB or RFP document once it is in its final form. Though it may be more difficult to influence an IFB or RFP once the district considers it "done," nutrition advocates might still have the opportunity to influence the process through discussions with school administrators or by appearing at a public meeting of the school board in order to inform the members of the board about their concerns.

This fact sheet is provided for general information only and is not offered or intended as legal advice. Readers should seek the advice of an attorney when confronted with legal issues, and attorneys should perform an independent evaluation of the issues raised.

¹ California Education Code §35182.5.

² California Public Contracting Code §20111.

³ With school vending contracts, the criteria of "lowest bid" is replaced by the criteria of "highest/best total expected value" since in these types of transactions district's are not *buying* goods or services from vendors but rather are *selling* advertising rights to them.

⁴ California Public Records Act can be found in Government Code sections 6250 – 6276.48; see also California First Amendment Coalition website at www.cfac.org for information on how to make a Public Records Act request.

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