

SOLICITING A VENDING CONTRACT BID

What to Include

California state law requires school districts to enter into contracts for sodas and other non-nutritious foods and beverages through a competitive bidding process. This can be done via either an invitation for bid (IFB) or a request for proposals (RFP). In this fact sheet, the Public Health Law Program offers guidance on key issues related to soliciting healthy vending bids or proposals.

School purchasing and contracting is supported by taxpayer's money and is subject to public oversight at the federal, state and local level. This complex web of laws ensures that school purchasing and contracting is done on a fair and objective basis, in the best interest of the district, and at the lowest cost to the taxpayer or the highest and best return to the district.

One of the fundamental governing principles of public procurement and contracting is competition between vendors. Competition helps districts obtain goods and services at the lowest practical cost; can help districts raise revenue by stimulating "bidding wars"; and also helps minimize the possibility of graft, fraud, and collusion. In California, school districts are required by law¹ to: (1) competitively bid all contracts for materials, equipment, and supplies worth \$50,000² or more; and (2) issue the resulting contract to the lowest responsible bidder or else reject all bids.

Another California law³ requires school districts to competitively bid contracts in which the district grants advertising rights. This law applies to school vending agreements since contracts for foods and beverages invariably grant advertising rights by permitting vendors to advertise their products and logos on school property in exchange for the district's receipt of cash or non-cash compensation.

Districts can use either an *invitation for bid* (IFB) or a *request for proposal* (RFP) to comply with this law. An IFB is a competitive bidding technique that is highly structured, very detailed, and strictly managed. The IFB document describes in technical terms exactly what goods or services are needed by the district and what the contract terms and conditions of the contract will be. Bidders must respond by sealed bid to the IFB precisely as directed or be eliminated from the competition. No negotiation is permitted at any stage of the solicitation, and the district must award the contract to the lowest (or highest) responsible bidder or else reject all bids.

An RFP, on the other hand, is a less rigid process. It permits districts greater flexibility in how the solicitation is issued, evaluated, and accepted, and how the contract is awarded. RFPs usually describe the solicitation purpose in general terms and present it as a problem to be solved or a goal to be achieved. Bidders then propose their own individual problem solution free of precise technical constraints. Selection of the vendor can be based on factors other than or in addition to cost/price alone, provided that all such factors are included in the evaluation section of the RFP document. Unlike an IFB, negotiation between the two sides is allowed.

NOTE: To learn more about the differences between an invitation for bid (IFB) and a request for proposals (RFP), see "Soliciting a School Vending Contract: Two Options," another fact sheet developed by the Public Health Law Program, available at www.phlaw.org.

How to Use an IFB/RFP to Improve Vending Operations

Districts can improve the nutritional value of the foods and beverages sold in vending machines, possibly obtain more revenue, and certainly do a better job of maintaining control over vending operations if they incorporate these objectives into their solicitation document and, by extension, to their vending contract as well.

Please note: Because of the fundamental differences in approach and structure between an RFP and an IFB, it is not possible in this fact sheet to offer more than general guidance. Depending on which document is selected, districts will need to customize these recommendations to meet their individual needs.

Procurement and Contracting Requirements

Authority to Contract

A question often arises over who has the authority in a school system to enter into contracts. The answer is found in the California Education Code,⁴ which defines the power of school districts and campus-level administrators to enter into legally binding agreements. Though the ultimate power and responsibility rests with the governing board, the board can delegate its power to contract to the superintendent and to persons the superintendent designates. However, in order for a contract negotiated by a lower tier administrator to become legally binding on the district, it must be formally approved by the governing board. *If this step is omitted, the contract is invalid and cannot be enforced.*

Procedural Requirements

When must a vending contract be put out to bid? As stated earlier, districts must issue either an RFP or an IFB prior to entering into a contract in which the district grants advertising rights. Though advertising rights are not defined by statute, the state legislator who authored the bill⁵ gave the following channels as examples:

- Vending machine fronts
- Sporting event scoreboards
- Billboards
- Posters
- Book covers
- Ads in classroom-oriented programs like those found in classroom magazines and television programs
- Internet (e.g., “free” computers provided to schools by internet service providers in exchange for the right to advertise products via the internet browser)
- Corporate-sponsored educational materials (e.g., multimedia teaching kits, videos, software, books, posters, workbooks)
- Corporate-sponsored contests and incentive programs

As this list illustrates, unless a district bans advertising completely, it is likely that food or beverage vending contracts will involve advertising rights. Consequently, before a district can enter into a legally binding transaction involving these rights (whether written or oral), the district must issue an RFP or an IFB.

IFB/RFP Objectives

1. Establish the purpose of the solicitation, and take control of the process. Two California laws⁶ establish the minimum standards for foods and beverages sold in school vending machines. Both laws permit districts to establish higher standards at the local level. Regardless of which route a district takes, districts should include the following in their solicitation package:

- A statement that the objective of the IFB/RFP is to procure healthy food or beverage products

- A copy of the standards contained in the applicable state law or, as appropriate, a copy of the standards contained in the district's healthy vending policy
- The technical specifications for the permitted foods or beverages (e.g., no artificial colors, no high fructose corn syrup, no caffeine), if relevant and available

The benefit of explicitly and unequivocally stating the district's healthy vending objective is that it signals to the vendor the importance of this requirement and gives a context for all the subsequent elements of the solicitation. In mirror fashion, the vending contract that results from the solicitation should also state that the district's objective of entering into the contract is to make healthy food or beverage products available. Such clarity can help resolve disputes about the interpretation and enforceability of the contract in the district's favor.

The benefit of providing technical specifications for all products permitted to be sold is that it places the district in control of the solicitation, and helps ensure that only conforming items will be vended and that no substitution of products will be permitted.

Another important way for the district to take control of both the solicitation and vending operations once the contract is signed is to establish in the IFB/RFP that the district will retain *sole discretion* regarding the number and placement of vending machines (not "mutually determined"). One important reason for this clause is that principals at individual school sites should be able to decide not to have vending machines placed on their campus at all.

2. Align healthy objectives with advertising rights. Though districts are free to prohibit advertising of any kind on school property, some districts may choose to permit the vendor to advertise products that conform either to state law or to local district policy. For those districts, the IFB/RFP should state explicitly:

- Which products can and cannot be advertised
- Where advertising will and won't be permitted
- The requirement that the vendor obtain prior written approval from the district before installing or employing advertising on school property

Remember, advertising can take many forms. In addition to the examples given earlier, advertising may include the placement of a vendor's trademarked logo or other identifying mark on such items as cups and straws, menu boards for school snack bars, vendor incentive gifts such as athletic coolers or recycling bins, product posters, and sports scoreboards or school signage.

Miscellaneous Issues

Financial Oversight

Districts will benefit financially if they take control of the vending program after the contract is issued. The best way to achieve control is to build program oversight and financial accountability into the IFB/RFP itself. Vendors should be required to:

- Meet at least once a year with the district to improve communication and customer service
- Provide monthly financial reports to the district that document the commission payments that are due
- Provide district access to machine counters so that the district can monitor actual sales against reported sales
- Permit an audit of books and records pertinent to the district's vending contract

Compliance with Federal Law

Virtually every school district in California participates in at least one of the federal Child Nutrition Programs (National School Lunch and School Breakfast Programs). Consequently, districts must comply with applicable federal rules in order to continue to receive funding.

Currently, only one federal rule⁷ affects foods and beverages sold in vending machines. That rule prohibits schools from selling foods and beverages of “minimal nutritional value”⁸ in food service areas during designated meal periods.

Although this rule’s limiting effect may be felt in states which have taken the federal guidelines as their own, its effect is not particularly significant in states such as California, where more comprehensive standards have been adopted.

That said, since Congress may from time to time amend the laws related to the federal Child Nutrition Programs,⁹ it is important for districts to monitor federal legislation to ensure that their IFB/RFP complies with all applicable federal law and regulation.

Energy-Efficient Machines

Invariably, schools pay for the electricity that illuminates and refrigerates the vending machines, 24/7. Energy is expensive, but it is rarely factored into the district’s calculation of how much money it will earn under the contract. Districts can minimize their loss by requiring the vendor to supply state-of-the-art, energy-efficient vending machines.

Machine Stocking and Servicing

If machines go unrepaired or are not stocked on a regular basis, schools will not earn a commission rate on all possible sales. An IFB/RFP should be explicit about the response time for machine servicing and stocking.

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 Public Contracting Code §20111.

² This figure is adjusted annually by the Superintendent of Public Instruction. The 2006 amount was \$65,100.

³ California Education Code §35182.5.

⁴ California Education Code §17604.

⁵ California State Assembly Member Mazzoni.

⁶ Chapter 235 Statutes of 2005 and Chapter 237 Statutes of 2005.

⁷ Code of Federal Regulation §210.11 Competitive Food Services.

⁸ Categories of foods of minimal nutritional value include soda water; water ices; chewing gum; and certain candies (hard candy, jellies and gums, marshmallow candies fondant, licorice, spun candy, and candy-coated popcorn).

⁹ In 2006, Senator Harkin introduced SB 2592 (still pending) which would amend the Child Nutrition Act of 1966 by redefining “foods of minimal nutritional value” and extending the prohibition against the sale of these foods to the entire campus during the school day and not just to food service areas during meal time.

For technical assistance regarding school vending contracts, contact:

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