



What constitutes a legal bid?

The following is the transcript of a discussion of competitive bidding issues by former McHenry County College trustee Tim Stratton, current William Rainey Harper trustee Richard Gillette, and ICCTA's former executive director Dr. Gary Davis. In their professional lives, Tim is a municipal attorney and Richard is an electrical engineer. If your board has ever struggled to be fair in its bidding process, some of the following discussion will sound familiar.

Tim: Under the Illinois criminal statutes there are some specific provisions that prohibit interference with the bidding process. Giving certain vendors special treatment, for example, is a violation of Illinois law.

Gary: Thank you, Richard and Tim for being with me today. We are going to discuss the legal requirements of bidding. It's a popular topic at ICCTA. I probably get more calls on bidding than just about any other legal issue affecting our boards. Richard, what do boards want to know about bidding?

Richard: Often when a school, college or small business requests bids there is only one vendor. Let's say the request for bids specified that they wanted to buy a "CIA 1401C." Now I believe when we go out for bids we should specify our need rather than some machine or part number. However, those who prepare the requests for bids tell me that our staff doesn't have the time to say in generic terms what we need. Because they are familiar with a given type of machine, that's what they want to mention in the request for bids.

Now I understand transactional costs. Would it be worth spending \$20,000 to hire an engineer to buy a \$10,000 machine? Of course not. On the other hand, staff could say "We are looking of a device that does this." And they don't have to mention a specific machine, a specific part or a specific company. I worry about requests for bids that say, in so many words, we only want to buy from a given vendor.

Tim: Sure, I think a lot of times you do see that. We always advise our clients is to try to stay away from including manufacturers' names or things you know that can only be provided by one supplier. The appropriate thing to do would be to just list your technical specification and advertise your bid that way instead of saying this is going to be from one supplier. I can definitely see where a badly phrased bid request would raise some constituents' eyebrows. An overly specific bid request might well create political problems even if it doesn't technically violate the law.

Richard: I would agree. The problem is probably more political than legal. It's also important to remember that the ten-day requirement of notice is just the minimum required by law. We are at liberty to provide an earlier notice, and many potential bidders need more time to bid.

Tim: Richard is right about that.

Gary: so the board has ethical obligations. One of the board's commitments might be to provide for a fair bidding process. That might require going a mile or two beyond the state legal requirements.

Richard: In fact, the statutes are so full of loopholes, the only hope is that our boards will see

and live by their ethical obligations. You can obey the law and still be unfair to people.

Tim: One thing I think boards can forget is that they can go over and above the requirement of the state law. **It's often appropriate to go over and above what's legally required.** Of course there are limits. Bidding isn't free; it has associated costs to the college. That's why not everything has to be bid. There's the cost of preparing the request for bids, the publication costs, and the evaluation of the bids. All of those elements increase the cost of an education for our students, and it's the board's job to keep costs down.

Richard: Frankly, one of the problems that small organizations have in preparing bids is the lack of expertise on our staffs. We are small operations and we don't have experts in every field. If, for example, we wanted to provide sound amplification in a gymnasium, we probably wouldn't have an acoustics or sound engineer on staff. So deciding what we need to solve our problems isn't as easy as one might think.

Tim: The board needs to talk and decide who works for whom and who is advising whom. That's what governance is all about -- sorting out roles and responsibilities. If the board wants to open up the bidding process and make it more competitive, the board attorney can help the president make that happen.

Gary: Maybe that problem could be addressed through some conversation between the board and the president. As the chief executive officer, the president needs to know that the board experts prudent decisions. If I were a president and my board had told me that it expected prudent decisions, I would tend to seek outside help when my staff lacked the expertise to get a job done.

Richard: We also need to be certain that we are not making decisions that pay off in the short term but are very costly in the long term. We might, for example, be able to use a local manufacturer's milling machine to train our students on. But if the manufacturer isn't using the industry standard, we have trained our students for obsolescence.

Gary: Does Illinois Communit College Board review take the local board off the hook on any of this? What if the board is told that if a curriculum or a program is good enough for the state, it's good enough for us?

Richard: I don't think that holds. State review may catch a few problems with local education offerings, but **we can't depend on the State to save us from poor judgment.**

Gary: Let's get back to the laws governing purchasing and bidding. **Tim, is it legal for a college to call up a favorite vendor to give them a heads-up that the college will soon issue a request for bids?**

Tim: Under the Illinois criminal statutes there are some specific provisions that deal with interference with the bidding process. **Given certain vendors special treatment is a violation of Illinois law.**

Richard: What about the vendor who has a regular relationship with the college? He might be more likely to know what the college is planning to purchase just because he has frequent contact with the college.

Tim: **If the vendor were to call the college and say "It just so happen we got an XYZ machine sitting in our show room floor for \$30 thousand dollars. And do you want it?" If the college president says "yes" and then publishes a request for bids for XYZ machines (after he made the side deal with the vendor), the president is guilty of a bid rigging violation. That's a felony under Illinois law.**

Richard: **But not if the college then went out for bids for such a machine and the college's request for bids simply described what the machine will be used to do. Then it's not locking into a given vendor's product. And then you wouldn't be guilty of rigging a bid.**

Gary: Can colleges escape the rigors of bidding law by classifying products as "services?"

Tim: The service contract is exempt also under the bidding requirements, but not everything a college buys is a service. Ask your lawyer, "is this a 'service' that we are buying?" If revenue sharing is involved, it may well be a "service."

Richard: I have another concern.

Gary: Let's hear it.

Richard: I have the feeling that sometimes particularly aggressive bidders generate animosity on the staff. It's only natural for the staff to want to retaliate and by using technicalities like overly specific bid requirements they can do so. For example, if the aggressive bidder was from another state, the staff could write in a requirement that the vendor be located within 20 miles of the campus in order to assure prompt service.

And, of course, the board attorney (who is also the college attorney) may feel compelled to defend whatever tactics the staff is using. I don't blame them for that, Tim, because I know that's their job. But it would be very frustrating to me if I saw that going on. I'm afraid that trustees who are less comfortable with the intricacies of bidding might miss these shenanigans.

Tim: Well, at the board retreat the technically savvy trustee could take the rest of the board through what you have just explained, Richard. I am confident that if he is a good teacher, they'll eventually grasp his point. And when they do, they'll be as concerned as he is.

The board needs to talk and at the end of the discussion decide who works for whom and who is advising whom. That's what governance is all about -- sorting out roles and responsibilities. If the board wants to open up the bidding process and make it more fair, the board attorney can help the president make sure that happens.

Richard: What if the administration objects to the board's discussing whether the board attorney could help assure fair bidding practices? What if the president says, "Well, we haven't ever been sued for unfair bidding, and the firm is the biggest and the best of its kind, so let's leave well enough alone."

Tim: The board could thank the president for his or her advice and then instruct the president on the will of the board.

It will be important for the concerned trustee to bring the rest of the board along. Sometimes we make the mistake of thinking that lay board members are incapable of learning from one another and benefiting from one another's experience. But, of course, that's selling the board short. One of the responsibilities of a good board is to "lead as a thoughtful, educated team." I read that in the "effective governance" section of the ACCT website, www.acct.org.

Richard: Tim makes a good point here. It's vital that the more experienced trustee not hang the college out to dry by shooting off his or her mouth in a public session. That would only make the college look bad. It would unnecessarily lose some community support. There's a right and wrong place for these discussions.

Gary: So the trustee's due diligence doesn't have to come at the expense of the college's reputation.

Richard: That's exactly right.

Gary: Richard is paying attention to what is going on, but he knows what to say about it and when and where.

Richard: Well, I try to do my best. And I don't believe, as some of my friends have told me,

that a trustee is elected to either fire the president or endorse everything the president does.

Gary: The phrase I have heard is "Let's decide whether we are going to keep the president. If we are, then we have to decide how we can make him or her more successful."

Richard: I could live with that. I think the trustees' job is to help the president do a better job. Unfortunately when you do that she or he may think you're stepping on presidential toes.

Tim: Yes, and it's probably a good idea for the trustee to keep records. Document the points you made with the board and when you made them in case the issue at hand ever finds its way into the courts.

Gary: Doesn't closed session allow discussion of pending litigation?

Tim: Sure, "pending" in the sense of "probable."

Richard: I'll tell you from my corporate training, if this were a potential litigation issue, I wouldn't send a letter to the board. Rather I would make my point orally with the president and the board chair. Why? Because if a lawsuit is filed, the letter could be used by those attacking the college. **The president has the responsibility to assure the board that the bid process is fair.**

Gary: Yes, that's good advice, Richard.

Thanks, Tim. Thanks, Richard. We'll share this with trustees throughout the state and ask for their reactions to our discussion. We'll do this in the hope that boards will be more confident in their bidding processes. I appreciate the time you took to help ICCTA put this discussion together.

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