

## Bidding Basics

RFPs, Outsourcing, and Avoiding Conflicts

BY DARCEY GERSTEIN 2020 FEBRUARY

BOARD OPERATIONS



Co-op, condo, and HOA boards across the country are made up of volunteers who are committed to the governance of their community. Among their most important duties is selecting vendors to provide goods or services—everything from lawn care to roof repair; surveillance to extermination. Often these volunteers have little to no direct expertise in the industries and occupations related to their properties, so the task of even finding qualified vendors—let alone evaluating and choosing the best one for the job—can be daunting. By understanding the process and keeping a few caveats in mind, however, boards can make solid choices for their communities while steering clear of conflicts.

### Let Your Manager Manage

Your first and likely best resource in navigating the bidding process is, of course, your property manager, says Steven R. Wagner, principal at law firm Wagner Berkow in New York and also president of his own Manhattan co-op. “You need somebody who’s familiar with building systems to be able to help you cover what needs to be done,” he advises. A competent manager is a professional who knows the ins and outs of the industry, has contacts and relationships with a broad range of companies, and is experienced in contract negotiations and procurement. He or she also acts as an intermediary between the board and the third parties they engage. Ideally, your manager will be involved with all selections of third-party suppliers from the very beginning of the process.

### The Process

And just what is that process? First comes a needs assessment. Whether the gym needs new equipment, or the boiler needs repair, or the windows need replacing, the first step is for the board and its relevant advisors to determine the

parameters or expectations of the deliverable; do they want to totally overhaul and upgrade the gym, or just install a couple of new stationary bikes? Do they want to purchase the equipment, or lease it? Have residents who use the gym been requesting specific features or items? All of this might go into what's called a statement/scope of work, or SOW. Using this as a guide, the manager will produce a request for proposal (RFP) and distribute it to a list of qualified bidders.

How many bidders get the RFP depends on the nature of the work. For some jobs, there might be only a couple of vendors who provide a particular service, while for other categories like painters or insurance providers, there could be hundreds. Either way, it's a good idea to solicit more bids than might seem necessary, because some vendors may turn out to not meet requirements, some may not be available in the time-frame needed, and others may not respond to the RFP at all.

## Avoid Conflict

Regardless of the type of job, one of the most important things to get right in the bidding process is avoiding conflicts of interest—in both fact and appearance. Because as Claudine Gruen, Vice President Director of Operations for Garthchester Realty in Queens, notes, "Perception is reality, especially in this business."

That means that while having a board member who happens to be a plumber definitely helps when deciding what to do about a recurring leak, hiring that same board member to fix it would be a definite conflict. Not only would it raise questions about self-dealing on the board, such a move would also need to be disclosed to every association member or shareholder (at least in New York as of January 1, 2018, when Business Corporation Law [BCL] 727 went into effect), and would require the board member-plumber to recuse him- or herself from any discussion or votes involving that contract. According to the pros, the benefit of having a seasoned professional on the board's side to advise on a project without the burden of recusal far outweighs whatever savings they might get from hiring an 'inside' contractor to carry it out.

## Seal the Deal

To ensure fairness and impartiality, an RFP should stipulate a deadline for submissions, after which no other bids will be considered. Once all the responses are collected, they're delivered back to the board/manager in a sealed format, and all opened at the same time. (Opening bids as they come in could give an early bidder an advantage – or allow other bidders to adjust their proposals to undercut the known bid.)

Some boards elect to unseal bids at a regularly scheduled board meeting. Others, like those managed by Gruen, limit it to the manager and the board president (and the engineer or other professional if involved), who coordinate the unsealing together according to their schedules and then share with the rest of the board online. Regardless, at least two people should be charged with unsealing the bids together, for the benefit of transparency and accountability.

## Stay on the Level

Once the bids are open, a process of evaluation and elimination begins – which is another area where the manager's expertise comes into play. He or she, along with any relevant professional advisers, will create what is called a bid leveling sheet. If the initial RFP was thorough and well-composed, and the responses adhered to the requested formats and inclusions, the leveling process is pretty straightforward. But often there are variables that the RFP might not have considered, or idiosyncracies among vendors that cannot be captured within the format specified. In those circumstances, bid leveling is even more important in order to help a board make a fully-informed, prudent decision.

If a project is especially complex or beyond the expertise of the property manager, Wagner advises investing in an owner's rep. An owner's rep is a dedicated manager with particular knowledge of a specific project, who can distill the proposals and align the variables so that they are easier to capture and compare. There may still be discrepancies that preclude direct one-to-one comparison between bidders, but the basic elements for weighing each proposal evenly are there. Any remaining questions can be addressed in the next step, which is inviting select bidders for an interview with the board.

Before and after the bid leveling, the manager or owner's rep might go back to each bidder and ask them to "sharpen their pencils"—a common euphemism for adjusting their proposals to a more favorable price or offering. This is also a good time to leverage future projects, or suggest bulk purchasing or other efficiencies. Gruen, for example, manages multiple properties and can negotiate favorable prices when buying large quantities of necessities like snow melt that can be shared among the properties. Tread carefully here, though: if this cost-cutting measure is not adequately communicated to the boards in question, they might be concerned that some sort of skimming or kickback were occurring when they see the purchase order that exceeds their needs.

## Don't Forget the Past

This brings us to an important caveat. It may seem like a distant memory to most of us (if it was on our radar at all), but today's New York property professionals are still feeling the sting from a double wave of corruption-related indictments brought by Manhattan District Attorney Robert M. Morgenthau back in the 1990s. That ended in charges for more than 80 New York real estate managers and management companies. Five years later, 30 more individuals and 10 corporations were charged with stealing \$4 million through kickback and bid-rigging schemes in another residential real estate industry scandal.

According to a Department of Investigation's press release about the latter indictments, "Bid-rigging and kickbacks have obviously been a way of life for many years in the residential real estate industry. But...today's coordinated response by local law enforcement will go a long way toward ending this cycle of greed."

By all accounts, it has. While there are undoubtedly still unscrupulous administrators continuing to pocket money under the table from vendors, there is a common understanding that those schemes and tactics are part of an unsavory past. Gruen herself is happy that bygone crackdowns have cleaned up the industry, to the point that she almost wishes there were more to come, because it would make reputable businesses like hers smoother to operate.

Intensified scrutiny from law enforcement—and from boards and management firms themselves—has led to a more ethical and accountable industry all around, but a savvy board should still keep its eyes open, and not hesitate look closer if something seems off. "There are no stupid questions," Wagner reminds us. "Ask the question. Challenge authority. I've seen some crazy things that were picked up by board members who just didn't understand and asked the question."

## When You're On Your Own

So far we've focused on the bidding process when professional managers are involved. But where do self-managed communities turn to find qualified bidders, write an RFP, level bids, and interface with potential vendors?

Given enough time, forethought, and planning, a self-managed board can definitely get the job done. First, you already have a great resource: The Cooperator! Our online Directory of Co-op and Condo Services ([www.directory.cooperator.com](http://www.directory.cooperator.com)) includes an exhaustive list of relevant professionals covering everything from legal services to HVAC repair.

But if your board simply doesn't have the time, or doubts its ability to navigate the process itself, there are other options. One such option is The Bid Lab, a New York-based consulting firm that focuses exclusively on the RFP process on behalf of small and medium-sized nonprofit boards. Maurice Harary started the company with his business partner in 2017, drawing from a background in business and procurement to put together a team of experts to help boards in the quest for new vendors, contracts, and services.

## Bids, Adieu

All of this may beg the question: does every contract or project need to be bid out? According to Richard Brooks, a partner at the law firm of Marcus, Errico, Emmer, & Brooks in Braintree, Massachusetts, the short answer is no – at least not legally speaking. He says it's really more an exercise in common sense. Small jobs don't merit taking the time and effort to solicit multiple bids, and in an emergency situation, obtaining bids just isn't practical. Brooks adds that when it comes to longer-term contractual relationships like with a manager or an attorney, "There's no reason to go out to bid unless things aren't going well." In fact, those relationships benefit from their longevity, where institutional knowledge, personal comfort, and familiarity with the property have value that likely outweighs saving a few bucks by switching to a different provider.

Governing documents are also pretty much silent on bidding, says Brooks, and he and other attorneys advise against adding provisions for obtaining bids that are not simply "at the discretion of the board." While an organization might be tempted to add language around the bidding process to its documents in an effort to avoid conflicts or the appearance of such, doing so could have the effect of gumming up the works, so to speak. For example, Brooks points out that requiring a competitive bid for projects or contracts over a certain monetary threshold is an unnecessary muzzle on the board's judgment, and assumes prior cost estimation. Even more constraining, a clause that triggers a shareholder or unit owner vote on projects over a certain dollar amount would stymie the board's decision-making process and could complicate confidentiality.

Ultimately, the process of bidding out projects on behalf of a community is just another part of a board's duties to their constituents. Understanding the basics, maintaining checks and balances, and knowing when to ask questions will go a long way toward keeping the process fair and legal.

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