

Suggested Best Practices - Bidding

A consulting firm recently conducted a study on behalf of the Association of National Advertisers (ANA)¹, regarding purported non-transparent agency practices in media purchases. As a result of that study – and the controversy it engendered, and the perspective of the serious concerns it uncovers – the AICP feels it is important to review and remind our members of the basics of best practices in our end of the business.

Our goal is to help ensure that in the fast-paced environment of this industry, members are able to provide services in a straightforward manner to agencies representing advertisers. These comments are designed for informational purposes to alert members to issues to consider and are intended to provide suggestions on best practices that should benefit all interests involved.

Agency Relationships

Typically, an agency works as agent for an advertiser-client and therefore acts on behalf of another party. This is helpful to bear in mind because it means there is likely another participant in the discussion: one who may not be “in the room” but who usually has the ultimate say.

As noted in the recent ANA report, agencies are typically required to have full transparency with their clients about dealings on their behalf. You, much like the client/advertiser, may benefit from transparency. Simply put, disclosure is helpful to all parties. It helps provide the most informative, efficient and effective process.

Questions to Ask at the Outset

Best practices help ensure that our members are well informed at the outset. Below are certain basic areas of information about which you should be knowledgeable from the start:

1. Has the proposed job or assignment been cleared by the client?
 - If the proposed job has not yet been approved to move forward, you may want to consider whether and how your company will spend its resources in preparing a proposal or bid.
2. Is the job proposed only to one bidder or to several?
 - There are two types of bidding scenarios: single bid or multi-bid (often triple bid).

¹ <https://www.ana.net/content/show/id/industry-initiative-media-transparency-report>



- There may be a number of reasons why an agency proposes a job to only one bidder. By way of examples, the production company/director may have worked for the advertiser in the past or a unique directorial style may be required.
 - By contrast, an agency may seek several – typically, triple – bids when an advertiser-client requires that it do so, or the creative team is looking for various stylistic approaches. By way of example, the request for several bids could elicit a variety of creative approaches to the job. Alternatively, the costs for the production may not be easily identifiable and an advertiser wants to consider the most competitive, or lowest price options.
 - An agency following best practices should be fair to all bidders by: a) supplying all with the same job-scope information and opportunity to bid, and b) safeguarding as confidential, each production company's creative ideas and bid details (including, but not limited, to costs and prices).
 - Similarly, a production company following best practices should not accede to any request or demand to share such job and bidding information with competitors, regardless of the source of the request or demand.
3. Is there full bidding transparency?
- There may be instances where the production company is aware that a competitor-bidder has a certain advantage. For example, a competitor may have already worked for the advertiser on prior campaigns, or you may feel that your production company's director is not, stylistically, a likely candidate for the job.
 - If an agency requests that a production company provide a bid merely as a cover or as a way to enable an agency to fulfill an advertiser's multiple-bid requirement, the production company may feel under pressure to accede. The U.S. Department of Justice, however, has issued legal warnings about such behavior. If, by way of example, the agency were to provide target numbers in order to better position other bids, the request may – by itself, and particularly if acted upon by the production company - raise legal questions about whether it has the potential to undermine competition in a bidding process that the advertiser may expect to be competitive.
 - The US Department of Justice has discussed the legal caveats presented by what is sometimes called “Complementary Bidding”:



Complementary bidding (also known as “cover” or “courtesy” bidding) occurs when some competitors agree to submit bids that are either too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer’s acceptance, but, are merely designed to give the appearance of genuine competitive bidding.

Complementary bidding schemes are the most frequently occurring forms of bid rigging, and they defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.²

- In short, such activity would not be considered best practices and, worse, might be deemed anti-competitive or in violation of the law. (*See e.g., Rattoballi v. United States*, 452 F.3d 127, 128-130 (2d Cir. 2006) (Conviction for conspiracy to rig bids and mail fraud: defendant, a sales representative for a print brokerage firm, (i) made cash payments and gifts to advertising agency purchasing agents and (ii) submitted exaggerated “cover” bids to advertising agency in order to help agency create the illusion of competition among potential suppliers to agency’s client.)
4. Are the payment terms guaranteed by the agency or are they hedged by a “sequential liability” or “sequential payment” clause?
- Sequential arrangements have become more common in the past decade. It basically means that the agency will only be responsible for payment once it has received payment from its client, the advertiser.
 - This term in the contract between the agency and the advertiser may take precedence over payment terms to which the production company is accustomed and which it may even have negotiated in the contract with the agency. For this reason, it is important to know, in advance, what payment terms apply and to have client contact information in case payments from the agency are not received in the expected, contractual timeframe.
 - Ultimately, if the production company contractually agrees that the advertiser’s payment to the agency will control the timeliness of payment to the production company then, consistent with best practices, the contract should require the agency to be fully transparent about the cash-flow and also require that the advertiser is made fully aware of its responsibility under the arrangement.

² *Antitrust Primer: Price Fixing, Bid Rigging and Market Allocation Schemes*: www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes



5. What guidelines or particulars govern the contract?
 - It is helpful for you to know if there are client-advertiser or agency guidelines or pre-existing bidding specifications or rules.
 - It is helpful for you to know if the proposed engagement involves a firm bid or cost-plus contract, or specific cost-plus items.
 - If cost-plus, find out the terms of “cost-plus”.
 - Different agencies or clients may have varying approaches.
 - It is helpful for you to know if the proposal involves a single or multi bid
 - If the proposal calls for a triple bid, for instance, a production company might ask if it is being considered with “peer” bidding directors or if it is operating within a like pool of union or non-union companies.
 - This knowledge may help you decide whether to engage in bidding on this project.

Pragmatic Considerations

Best practices call for common sense and pragmatic considerations so that you can plan and consider whether the proposal is a practical and suitable one.

Issues to Consider at the Outset:

1. It is worth trying to get an idea from the agency what the client-advertiser is looking to spend. When the agency gives a rough estimate, you should know if that is an “all-in budget” (thereby including: Production, Edit, Talent, VFX, Music and Finish) or whether the budget is just for Production?
 - Many times this isn’t clear, even to the agency. A term like “all-in” may mean different things to different agencies. It should therefore be a signal to get clarity.
 - It is best to double-check and ask how talent is being handled:
 - if union (e.g. SAG/AFTRA) and all-in is discussed in briefing, then Production budget dollars could be considerably less than the budget discussed.



- If non-union talent is discussed in the briefing, then Production budget dollars will likely need to include all principal On-Camera Talent Session fees, Buyout, Background Extra and Agents' Fees.
2. Read the scripts at the outset, even before roughing out numbers or engaging your director and team in a meeting or call. Based on experience and the director's style, you may well have an idea of the cost range and be able to compare it to the rough budget disclosed.
 3. If the project is not realistic based on the anticipated budget, you may not want to waste time on developing an approach that will most likely not be feasible.

Devil Is In the Details

If you are satisfied with all of these points and are awarded the job, you should follow best practices and pay attention to the details of the contract. You will not want to accept contractual obligations that you feel are unfair or not practical.

Be aware that this is a process and many on the buying end may not be as experienced as others in determining what is appropriate. It is helpful to articulate clearly the basis for your cost items and how they are tied to your production/creative approach. Similarly, it is helpful to articulate your concerns about taking on various obligations inherent in a contractual agreement.

****Please bear in mind that these Suggested Best Practices do not represent any Association policy or agreement, and each member must make its own independent business decisions about how to conduct its business. In addition, these Suggested Best Practices are not meant to be legal advice with respect to any particular set of circumstances, and members are advised to consult with legal counsel for advice in connection with any specific business context or transaction.****