WHY COMPETITIVE BIDDING PROHIBITS SOLE-SOURCING AND MUST ALLOW OR-EQUAL SUBMITTALS

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Public Contract Code §§ 3400 and 10129 (and similar federal regulations) prohibit public agencies from "sole-sourcing," that is, specifying materials, products or services that only one firm can provide. They also compel public agencies to accept substitutes for specified materials, products and services when the substitutes can equally perform the required functions of the specified items.

Those "or-equal" statutes (and regulations) codify fundamental principles underlying competitive bidding laws. Long before there were any such statutes or regulations, a prohibition against sole-sourcing was inferred from the very nature of the competitive bidding process. Obviously, if only one firm can satisfy contract specifications, there can be no competition for the materials, product or services sought. The taxpayers lose the benefits of competition; a firm that knows it has a lock on a contract will submit an inflated price.

Besides, sole-sourcing is often a manifestation of the favoritism, fraud and corruption that competitive bidding seeks to prevent.

The federal act of July 31, 1894 (28 Statutes of the United States 208) allowed a disbursing officer, or the head of a federal executive department, to direct questions about payments under a federal contract to the Comptroller of the Treasury. In 1921, this function was assumed by the Comptroller General of the United States. The responses to these questions – coming before any statutes or regulations prohibited sole-sourcing or mandated acceptance of

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equally-performing substitutes – explain why sole-sourcing is fundamentally incompatible with competitive bidding.

In 22 Comptroller Decision 302 (Jan. 13, 1916), payment for two Buick trucks was refused, despite the War Department's insistence that the trucks be sole-sourced because they had the best hill-climbing ability and best costs of maintenance and operation. The Comptroller of the Treasury said:

> [T]he desire for a particular make of truck can not be used to avoid the statutory requirement as to advertising. Such a theory is wrong and can not be countenanced. Its application generally would furnish a basis for evasion of the requirements of the law at pleasure.

In 22 Comptroller Decision 421 (Feb. 26, 1916), payment for typewriters procured without competitive bidding was questioned, and the Comptroller of the Treasury held:

> Demands for a certain make of machine arise from preference of individual operators rather than from any special merit in the particular make favored. Such preference is not in itself a sufficient justification for purchase of the favored make to the exclusion of others equally adapted to the use to which the machine is to be put. The Government is entitled to any benefit which competition may bring, and no machine should be purchased for the Government without competition and only from the lowest responsible bidder.

In 27 Comptroller Decision 640 (Jan. 22, 1921), purchase of one manufacturer's precise transits by the Department of Interior was condemned. The transits contained parts that were patented; so, they could only be sold by that company. The Comptroller of the Treasury pointed to the applicable competitive bidding statute, and concluded :

> [T]he Government is entitled to any benefit which competition may bring and no purchases should be made for the Government without competition and only from the lowest responsible bidder. There are many makes of transits on the market and it is understood that the general features and adaptability of the standard makes are practically the same. The demand for a particular make is not, in itself, a sufficient justification for the purchase of such a make to the exclusion of others if the others are equally adapted for the needs of the service.

In 27 Comptroller Decision 896 (Apr. 15, 1921) the Governor of the Panama

Canal sought to justify sole-sourcing the tractor lawn mowers he was already using, because adding more of the same would save money by limiting the kinds and amount of repair parts he had to keep on hand. The Comptroller of the Treasury rejected this argument (a) because "[t]hese reasons might be equally advanced for limiting almost any purchase to a particular make," (b) because the explanation was "theoretical, and particularly so with reference to the possibilities of economies greater than savings in price though competition obtained by advertising," and (c) because "if the reasoning should be carried to its logical conclusion, every activity would have to be limited to a particular make or kind because of the necessity to carry repair parts."

When the Panama Canal administration wanted a particular brand of truck, it advertised for trucks that had a sleeve valve in the engine – a feature appearing only in the preferred manufacturer's trucks. In 5 Comptroller General 712, 1926 U.S. Comp. Gen. LEXIS 125 (Mar. 9, 1926), the Comptroller General of the United States first explained the purposes of competitive bidding:

> It has been held in numerous decisions by this office and the courts that the provisions of [the statute requiring competitive bidding] are designed to give all manufacturers, etc., equal right to compete for Government business; secure to the Government the benefits which flow from competition; to prevent unjust favoritism by an officer of the Government in making purchases on public account, and to raise a bar against collusion and fraud in procuring supplies and letting contracts. The provisions of the statute are mandatory and its requirements are to be strictly enforced and no procedure amounting to noncompliance with its terms is authorized.

Public Contract Code § 100 echoes this 1926 justification for competitive bidding: "a means of protecting the public from misuse of public funds. . . . provide all qualified bidders with a fair opportunity . . . stimulating competition in a manner conducive to sound fiscal practices. . . . eliminate favoritism, fraud, and corruption in the awarding of public contracts."

The Comptroller General then condemned the subterfuge used to limit bidding to just one truck company:

> [T]he attaching to and making a part of the advertisement for bids the specifications of a particular make of truck practically excludes other makes and prevents competition. Specifying minor details has nothing to do with the need for a truck . . . If such a procedure is permitted, it would practically nullify the law requiring advertising as a condition precedent. Not only is such a procedure unauthorized as being in direct conflict with [the statute requiring competitive bidding], but it leads to dissatisfaction among bidders and should be discontinued.

The United States Coast Guard tried to justify sole-sourcing of the engine for its standard lifeboats on the fact that the boats had been designed for the particular engine. For any other engine, the lifeboats would have to be redesigned, and the lack of standardization among them would increase maintenance expenses. In 5 Comptroller General 963, 1926 U. S. Comp. Gen. LEXIS 254 (Jun. 7, 1926), these arguments were rejected. The Comptroller General explained:

> The facts of record do not disclose . . . that the particular engines . . . are the only engines that will in fact answer the purposes for which they are required. . . . [E]xperience with a particular engine does not justify excluding bidders offering other makes of engines. Such a course would result in establishing permanently but one make of machinery or equipment without giving trial to possible improvements through other makes. . . . [W]hat is needed is not an engine of a particular make but an engine that will meet certain performance requirements of the United States Coast Guard Service. . . . [I]n the purchase of such equipment, bids should be requested on specifications drawn not by designation of a particular make, nor to cover mechanical construction of the engine, but to show the dimensions of the boat, the space available for installation, the conditions under which it is to be operated, and the performance requirements necessary to meet the needs of the Government, etc. . . .

In 16 Comptroller General 171, 1936 U.S. Comp. Gen. LEXIS 346 (Aug. 21, 1936) the Comptroller General refused to allow payment for a sole-sourced product, explaining:

> [U]nder existing law governing the purchase of equipment, supplies, materials, etc., for the Government the controlling element is the job to be done, the work necessary to be accomplished. The request for bids should fairly reflect the actual need through specifications or otherwise, and the lowest priced article

> that will answer the needs is that authorized to be purchased at public expense.
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> In the advertisement on which bids were asked in this case, the prospective bidders were not advised as to the actual needs of the United States with respect to pipe protection materials. . . . [T]he specifications instead of describing the job to be done merely specified by name a certain patented or proprietary product . . .

In 32 Comptroller General 384, 1953 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 1953), one power sweeper manufacturer protested the Postmaster General's invitation for bids that described only another manufacturer's sweeper. In sustaining the protest, the Comptroller General explained:

> [T]he advertised matter of each of the companies claims superiority of its type of sweeper and undoubtedly each type does have certain individual advantages over the other types. Appropriate officials of the General Services Administration . . . are not aware of any reason why the sweepers offered by the other bidders would not adequately and satisfactorily meet the actual needs of your Department. . . .
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> The Government advertising statutes consistently have been held to require that every effort should be made by the procurement agencies of the Government to state advertised specifications in terms that will permit the broadest field of competition within the minimum needs required, not the maximum desired. [citations]

In 33 Comptroller General 524, 1954 U.S. Comp. Gen. LEXIS 108 (Apr. 23, 1954), the Comptroller General sustained a protest against a Post Office invitation for bids that sole-sourced a stool, reiterating that competitive bidding requires "specifications in terms that will permit the broadest field of competition within the minimum needs required." The Comptroller General also pointed out:

> It can hardly be doubted, however, that any limitation placed upon full and free competition in bidding tends to increase the cost of the procurement and under the law must be avoided if it is at all possible to do so.

The conclusion that competitive bidding and sole-sourcing are incompatible is continued today in statutes and regulations, and cases interpreting and applying those statutes

and regulations. So, what guidance can agencies, engineers, architects, specifiers and product salesmen glean from these early federal analyses?

Several rules jump out:

(1) Competitive bidding requires specifications that describe the "job to be done, the work necessary to be accomplished," not the materials, products or services that can do the job.

(2) Competitive bidding requires specifications that "permit the broadest field of competition within the minimum needs required by the agency, not the maximum desired."

(3) Specifying "details" that have "nothing to do with the need for" a product or service is an illegal subterfuge that violates competitive bidding.

(4) Specifications that can only be met by one firm's product or services "to the exclusion of others of equal quality" violate competitive bidding.

(5) "Equal quality" criteria must arise from "the need for" the materials, products or services, not the particular features of any firm's offering.

Agencies ignore these rules at their peril, risking litigation over sole-sourcing that violates not only or-equal statutes, but also the principles of competitive bidding that these statutes codify.