AMERICAN BAR ASSOCIATION
SECTION OF PUBLIC CONTRACT LAW
SECTION OF STATE AND LOCAL GOVERNMENT LAW

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association urges that any public acquisition at the federal, state, territorial, and local levels adhere to the following principles of competition in obtaining supplies, services, and construction:

PRINCIPLES OF COMPETITION IN PUBLIC PROCUREMENTS

1. Use full and open competition to the maximum extent practicable.
2. Permit acquisitions without competition only when authorized by law.
3. Restrict competition only when necessary to satisfy a reasonable public requirement.
4. Provide clear, adequate, and sufficiently definite information about public needs to allow offerors to enter the public acquisition on an equal basis.
5. Use reasonable methods to publicize requirements and timely provide solicitation documents (including amendments, clarifications and changes in requirements).
6. State in solicitations the bases to be used for evaluating bids and proposals and for making award.
7. Evaluate bids and proposals and make award based solely on the criteria in the solicitation and applicable law.
8. Grant maximum public access to procurement information consistent with the protection of trade secrets, proprietary or confidential source selection information, and personal privacy rights.
9. Ensure that all parties involved in the acquisition process participate fairly, honestly, and in good faith.
10. Recognize that adherence to these principles of competition is essential to maintenance of the integrity of the acquisition system.

Adopted by the American Bar Association House of Delegates in August 1998.

AMERICAN BAR ASSOCIATION
SECTION OF PUBLIC CONTRACT LAW

REPORT TO ACCOMPANY PRINCIPLES OF COMPETITION IN PUBLIC PROCUREMENTS

A. Introduction

As the Supreme Court recently recognized, there is a long history of legislative and regulatory bodies in all 50 states, many local government agencies, and the Federal Government requiring competition in public contracting. Board of County Comm'rs, Wabaunsee County v. Umbehr, 116 S. Ct. 2342, 2351 (1996). As stated in United States v. Brookridge Farm, Inc., 111 F.2d 461, 463 (10th Cir. 1940):

> The purpose of these statutes and regulations [requiring competition] is to give all persons equal right to compete for Government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition.

Other courts have described the purposes of competition in public procurement in a similar manner B including putting potential contractors on an equal footing, establishing open and honest procedures for public contracting, and treating all persons equally. See, e.g., Cataldo Ambulance Serv., Inc. v. City of Chelsea, 680 N.E.2d 937, 940 (Mass. App. Ct. 1997), aff'd, 688 N.E.2d 959 (1998); National Waste Recycling, Inc. v. Middlesex County Improvement Auth., 695 A.2d 1381, 1387 (N.J. 1997) (the purpose of the public bidding requirements is to secure for the public the benefits of unfettered competition and to guard against favoritism, improvidence, extravagance, and corruption).

At the federal level, principles of competition in public contracting have been developed in decisions by the courts and the Comptroller General of the United States in procurement protest cases over many decades. This law was developed in adversarial proceedings in actual cases involving competition requirements. Decisions by the Comptroller General typically have been accorded deference by the courts. See, e.g., M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1304-05 (D.C. Cir. 1971); John Reiner & Co. v. United States, 325 F.2d 438, 442-43, (Ct.Cl. 1963), cert. denied, 377 U.S. 931 (1964). These decisions express fundamental concepts of competition in public contracting (including the importance of providing a level playing field for all qualified suppliers) and are cited in this report to explain the competition principles in this recommendation. Fundamental principles of competition can be achieved by innovative purchasing techniques, such as those which take advantage of ongoing active competition in the commercial marketplace.

B. Competition Principles

1. Full and Open Competition. As early as the Revolutionary War, government purchasing was characterized by sharp practices, profiteering, and kickbacks, and competition and sealed bidding gradually were adopted to combat fraud and abuse. 1 Report of the Commission on Government Procurement 163-64 (Dec. 31, 1972). Early competition statutes required "advertising," which suggested unlimited competition inasmuch as anyone seeing the advertisement could compete. Prior to 1984, the Comptroller General variously referred to the scope of competition required by advertising as "full and free" competition, 10 Comp. Gen. 294, 301 (1931), and "full and open" competition, 20 Comp. Gen. 903, 907 (1941). In 1984, Congress adopted full and open competition as the standard when it enacted the Competition in Contracting Act of 1984, Pub. L. No. 98-369 (1984) ("CICA").

Recently, Congress reconsidered the full and open competition standard. Although it had the opportunity to do so, Congress expressly elected not to change the full and open standard when it enacted the Federal Acquisition Reform Act of 1996 ("FARA") and the Information Technology Management Reform Act of 1996, Pub. L. No. 104-106, 110 Stat. 679 (1996) (the "Clinger-Cohen Act"). Congress stated that the "Federal Acquisition Regulation shall insure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements." Id. at sec. 4101. The legislative history specified that the provision "makes no change to the requirement for full and open competition or to the definition of full and open competition." H.R. Conf. Rep. No. 104-450, at 965 (1996), reprinted in 1996 U.S.C.C.A.N. 238, 450-51.

The full and open standard of competition was established because of the strong belief that the procurement process should be open to all capable contractors who want to do business with public entities. H.R. Rep. No. 98-861, at 1422, 1429 (1984); see also, James LaMantia, B-245287, Dec. 23, 1991, 91-2 CPD & 574; Dan's Moving & Storage, Inc., B-222431, May 28, 1986, 86-1 CPD & 496. Another purpose of the full and open standard is to provide public entities with the opportunity to obtain fair and reasonable prices. Ervin & Assocs., Inc., B-278849, Mar. 23, 1998, 1998 WL 129879 (C.G. Mar. 23, 1998); Wind Gap Knitwear, Inc., B-276669, July 10, 1997, 97-2 CPD & 14; Gourmet Distributors, B-259083, Mar. 6, 1995, 95-1 CPD & 130. The basic competition principle, therefore, is that competition for public contracts should be full and open to the maximum extent practicable, subject only to exceptions that are authorized by law and restricted only to the extent necessary to satisfy a reasonable public requirement.

2. Exceptions to Competition. In some circumstances, full and open competition may be impossible or impracticable. At the federal, state, and local levels, a public exigency may create such an unusual and compelling circumstance that it may be necessary to limit the number of sources from which bids or proposals are solicited. Such circumstances could include major accidents or natural disasters, such as earthquakes, tornadoes, or floods. Full and open competition also may not be practical in certain high technology and other areas where compatibility, human safety, and performance requirements are critical. In fact, there may be

only a sole source that can meet the public needs within the required time. It also may not be practical to make small purchases of spare parts, office supplies, etc., utilizing full and open competition. The nature and limits of the exceptions to competition requirements, however, should be policy decisions made by the legislature (or other policy-making authority) and the discretion of purchasing officials should be exercised only within the limits of such exceptions. These policy decisions should be set forth in the law governing public acquisitions.

3. Restrictions on Competition. Where a solicitation includes requirements that reduce competition by limiting the ability of offerors to compete, there should be a reasonable basis for imposing the restrictive requirement. Navajo Nation Oil & Gas Co., B-261329, Sept. 14, 1995, 95-2 CPD & 133; Harbor Branch Oceanographic Inst., Inc., B-243417, July 17, 1991, 91-2 CPD & 67; Norfolk Shipbuilding and Drydock Corp., 60 Comp. Gen. 192 (1981), 81-1 CPD & 46. For example, it may be reasonable to impose a performance bond requirement even though the requirement may restrict competition and possibly even exclude firms with inadequate financial responsibility. Northern Management Servs., Inc., B-261424, June 26, 1995, 95-1 CPD & 291. Similarly, where a solicitation requirement relates to safety concerns, it may reasonably require the highest possible reliability and effectiveness even though the number of competitors may thereby be reduced. See Harry Feuerberg & Steven Steinbaum, B-261333, Sept. 12, 1995, 95-2 CPD & 109. In addition, it may not be practical to solicit all known sources individually, in which case rotating mailing lists may be reasonable. Any provision that restricts competition, however, should be utilized only if necessary to satisfy a reasonable public requirement. United States v. Brookridge Farm, Inc., supra (conditions or limitations should have reasonable relation to the public need); see Marlen C. Robb & Son Boatyard & Marina, Inc., B-256316, June 6, 1994, 94-1 CPD & 351.

4. Description of Requirements. It is a basic principle of public contracting that specifications must be sufficiently definite and free from ambiguity so as to permit competition on a common basis. Science Pump Corp., B-255803, Apr. 4, 1994, 94-1 CPD & 227. The basic rule for solicitation requirements is that they be unambiguous, state the Government's needs accurately, and provide for equal competition. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD & 325. In fact, inadequate or ambiguous specifications constitute a "compelling reason" to cancel the solicitation. Neals Janitorial Serv., B-276625, July 3, 1997, 97-2 CPD & 6; LB&B Assocs., Inc., B-254708, Dec. 30, 1993, 93-2 CPD & 346. The reasoning underlying these conclusions is that, for there to be meaningful competition, competitors must know "what they are bidding for or against." 39 Comp. Gen. 570 (1960). Another concept basic to competitive acquisitions is that all offerors compete on an equal basis by proposing to the same terms, conditions, and specifications. Cylink Corp., B-242304, Apr. 18, 1991, 91-1 CPD & 384; JG Eng'g Research Assocs., B-224892.2, Mar. 3, 1987, 87-1 CPD & 239; Macro Sys., Inc., B-208540.2, Jan. 24, 1983, 83-1 CPD & 79; see also, Canberra Indust., Inc., B-271016, June 5, 1996, 96-1 CPD & 269 (it is a fundamental rule of competitive procurement that all offerors be provided a common basis for submission of proposals); Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD & 555 (bidders have a right to assume that the essential requirements of a solicitation are the same for all competitors). Thus, it is a fundamental principle of competition that solicitations contain sufficient information to allow offerors to

compete intelligently and on an equal basis. Braswell Servs. Group, Inc., B-276694, July 15, 1997, 97-2 CPD & 18; Continental Servs. Co., B-258807.2, Apr. 11, 1995, 95-1 CPD & 190; W.D.C. Realty Corp., B-225468, Mar. 4, 1987, 87-1 CPD & 248. As the Federal Circuit noted, the bastion of federal procurement policy is that all offerors must possess equal knowledge of the same information in order to have a valid procurement. LaBarge Products, Inc. v. West, 46 F.3d 1547, 1555 (Fed. Cir. 1995); see also, Holmes and Narver Servs., Inc., Morrison-Knudson Services, Inc., Pan Am World Services, Inc., B-235906 et al., Oct. 26, 1989, 89-2 CPD & 379. Likewise, the public interest in competition requires that offerors in state procurements compete on an equal basis. See, e.g., McBirney & Assocs. v. State, 753 P.2d 1132 (Alaska 1988); Platt Elec. Supply, Inc. v. City of Seattle, 555 P.2d 421 (Wash. App. 1976), review denied, 89 Wash.2d 1004 (1977).

5. Publicizing Requirements. There cannot be full and open competition if prospective suppliers are not made aware of potential public acquisitions. The oldest (and, possibly the most common) method of notifying possible competitors of public acquisitions is by "advertising" the requirement. This can be done in newspapers, trade journals, or governmental publications. Another method of publicizing public requirements is by using solicitation mailing lists and even rotating any mailing lists that become excessively lengthy. Modern technology has created new methods of notification, including email and the World Wide Web. To achieve meaningful competition, there is an affirmative obligation to publicize procurement needs and to disseminate solicitation documents to those entitled to receive them. Ervin & Assocs., Inc., supra; Wind Gap Knitwear, Inc., supra; Laboratory Syst. Servs., Inc., B-258883, Feb. 15, 1995, 95-1 CPD & 90; Lewis Jamison Inc. & Assocs., B-252198, June 4, 1993, 93-1 CPD & 433. Offerors should be advised of changed requirements that are material or prejudicial. Container Products Corp., B-255883, Apr. 13, 1994, 94-1 CPD & 255. Information provided to one offeror must be furnished to all other offerors if the information is important in submitting an offer or if lack of such information would be prejudicial to other offerors. National Am. Indian Hous. Council, B-218298, May 23, 1985, 85-1 CPD & 595. Full and open competition requires that diligent, good faith efforts be made to communicate the purchase requirements to prospective competitors in a timely manner.

6. Basis for Evaluation. It is elementary that all types of competition require that the rules to be used for determining the winner be disclosed to all competitors. Thus, it is fundamental that competitors be advised of the basis on which their offers will be evaluated. Amtec Corp., B-261487, Sept. 28, 1995, 95-2 CPD & 164; Talon Mfg. Co., Inc., B-257536, Oct. 14, 1994, 94-2 CPD & 140. Intelligent competition assumes the disclosure of the evaluation factors to be used in evaluating offers and the relative importance of those factors. Richard S. Cohen, B-256017.4 et al., June 27, 1994, 94-1 CPD & 382; North-East Imaging, Inc., B-256281, June 1, 1994, 94-1 CPD & 332. As recently stated, the purchasing entity must provide guidance about the selection criteria so that vendors can compete intelligently and must indicate the basis upon which the selection will be made. COMARK Fed. Syst., B-278343.2, Jan. 20, 1998, 98-1 CPD & 34; For Your Info., Inc., B-278352, Dec. 15, 1997, 97-2 CPD & 164. Full disclosure of the evaluation method will enable competitors to structure their offers and prices in a manner that will result in contracts providing the most public benefits.

7. Evaluation and Award. After disclosing the evaluation method and evaluation factors to competitors, the purchasing entity must adhere to those criteria in making its award decision in order to have meaningful competition. PharmChem Labs., Inc., B-244385, Oct. 8, 1991, 91-2 CPD & 317. Thus, evaluation and contract award must be made in accordance with the terms and conditions set forth in the solicitation. Lykes Bros. Steamship Co., B-236834.4, July 23, 1990, 90-2 CPD & 62; American President Lines, Ltd., B-236834.3, July 20, 1990, 90-2 CPD & 53. It is a fundamental principle of competitive procurements that the contract awarded must be the one for which the offerors have competed. St. Mary's Hosp. and Medical Ctr. of San Francisco, California, B-243061, June 24, 1991, 91-1 CPD & 597; Corbetta Constr. Co., 55 Comp. Gen. 201 (1975), 75-2 CPD & 144. Any offer that ultimately fails to conform with the material terms of the solicitation should be considered unacceptable and should not form the basis for award. 4th Dimension Software, Inc., Computer Assocs. Int'l, Inc., B-251936 et al., May 13, 1993, 93-1 CPD & 420; Arthur Young & Co., B-216643, May 24, 1985, 85-1 CPD & 598. Thus, the essential requirements for evaluation of offers and contract award are that they be fair, reasonable, and consistent with the evaluation criteria in the solicitation. See IGIT, Inc., B-275299.2, June 23, 1997, 97-2 CPD & 7; Modern Technologies Corp., B-278695 et al., 1998 WL 115587 (C.G. Mar. 4, 1998).

8. Public Information. Section 1-401 of the Model Procurement Code for State and Local Governments, approved by the American Bar Association in 1979, provides for public access to procurement information. The commentary states that the purpose of this provision is to achieve maximum public access to procurement information consistent with appropriate consideration of safeguards for contractors and employees. Procurement information includes purchasing regulations, policies, procedures, and directives as well as the results of evaluation of competitors' bids and proposals. Public access to procurement information demonstrates the integrity of the competitive system, and public confidence in the fairness of the procurement system increases the quantity and quality of the competition. The need for maximum public access to procurement information, however, must be balanced against the rights of competitors not to have their trade secrets and confidential financial information disclosed. Improper disclosure of such information will discourage competition and, therefore, is inconsistent with the public interest.

9. Standards of Conduct. When offers are submitted in response to a competitive solicitation, there is an implied contract that the offers will be considered honestly, fairly, in good faith, and in accordance with the terms of the solicitation. See United States v. John C. Grimberg, 702 F.2d 1362 (Fed. Cir. 1983); Heyer Products Co. v. United States, 140 F. Supp. 409 (Ct.Cl. 1956); United Indus., Inc., B-212996.2, Aug. 1, 1984, 84-2 CPD & 139; Lear Siegler, Inc. - Recon., B-217231.2, May 30, 1985, 85-1 CPD & 613. Thus, when a public entity elects to hold a competition, it must ensure that the competition is conducted fairly and equitably. See Marvin J. Perry & Assocs., B-277684 et al., Nov. 4, 1997, 97-2 CPD & 128. The Government must deal fairly and honestly with all offerors. Keco Indust., Inc. v. United States, 492 F.2d 1200 (Ct.Cl. 1974). Competitors also have a duty to compete honestly and fairly. Offerors that obtain an improper and unfair competitive advantage (such as improperly obtaining

source selection information, collusive bidding, bait and switch practices, etc.) should be excluded from the competition. Similarly, if an offeror makes an intentional material misrepresentation, the bid or proposal should be disqualified, and any resulting award should be canceled. International Data Products, Inc., Commax Techs., B-275480.2 et al., Apr. 3, 1997, 97-1 CPD & 179; Mantech Advanced Sys. Int'l, Inc., B-255719.2, May 11, 1994, 94-1 CD & 326. Fairness, honesty, and good faith are required of all participants to maintain the integrity of the competitive system, without which the public benefits the system is intended to achieve cannot be obtained.

10. Integrity of System. The quality of competition can be affected by both the number and quality of competitors, and both will be reduced if prospective vendors lose confidence in the integrity of the competitive system. This means that the rules of the competition for public contracts must be fair, disclosed, and enforced. Preparation of bids and proposals can be an expensive process, and prospective vendors may be unwilling to incur such costs unless there is reasonable assurance that the purchaser will abide by the rules it establishes for the competition. For these reasons, the maintenance of confidence in the integrity of the procurement system outweighs the possible monetary advantage to be gained by violating the rules of the competition in any particular procurement. See SWR, Inc., B-278415, Dec. 17, 1997, 97-2 CPD & 166; Rocky Mountain Trading Co., B-221060, Jan. 24, 1986, 86-1 CPD & 88; Palmar, Inc., B-207321, May 27, 1982, 82-1 CPD & 503. Thus, for example, a nonresponsive bid must be rejected even though it might result in a monetary savings since acceptance would compromise the integrity of the system. Trail Equip. Co., B-241004.2, Feb. 1, 1991, 91-1 CPD & 102; Recyc Sys., Inc., B-216772, Aug. 23, 1985, 85-2 CPD & 216. Maintaining the integrit0y of the competitive system ensures that public contracts are awarded on the basis of merit and are not based on favoritism, collusion, or fraud.

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