

## **Sole-sourcing to Match Existing**

When there is a one line entry, deep in the project specifications, calling for a particular product from one, designated manufacturer "to match existing," can the contractor, nonetheless, accept or-equal bids from other manufacturers, and, more importantly, must the agency consider and accept another manufacturer's product if it is equal to what was specified?

Public Contract Code sections 3400 and 10129 allow such "sole-sourcing" on state and local agency projects, but (1) only in limited circumstances and (2) only if the awarding authority takes prescribed procedural steps and memorializes that action in the invitation for bids.

One limited circumstance under which such sole-sourcing is allowed is: To match existing products in use "on a particular public improvement." So, the first question is whether the project is an addition to an existing public improvement or is a completely new public improvement. The answer turns upon the details of the project and how it relates to other projects. For example, if the contract is for a new wing to an existing building, the agency probably can require the contractor to match existing products already in use in the building. On the other hand, if the contract is for a wholly new building, then there is probably no existing particular public improvement; so, the agency cannot require the contractor to match existing products in other buildings owned by the agency.

On the procedural side, merely stating in the specifications that sole-sourcing is being done "to match existing" fails to comply with the steps required under the statutes. The procedural steps require (1) "the awarding authority or its designee" - not the user or the user's architect - to make a "finding" that sole-sourcing is being done to match "other products in use on a particular public improvement" and (2) to describe that finding "in the invitation for bids or request for proposals . . ."

### **Reasons Why Sole-sourcing Is Strictly Limited**

The law restricts an agency's ability to sole-source to match existing products, because matching existing is, historically, the most common excuse for trying to limit competition. It is a regular manifestation of the favoritism, fraud and corruption that competitive bidding seeks to prevent (see Public Contract Code § 100: "[T]his code [is] to achieve the following objectives: . . . (d) To eliminate favoritism, fraud, and corruption in the awarding of public contracts."). Agency efforts to match existing have been the subject of continual administrative and court cases for almost 100 years. Some examples:

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."

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. . . . [¶] 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. . . . [¶] 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."

In *The Jack Stone Company, Inc. v. The United States* (1965) 170 Ct. Cl. 283, 344 F2d 370, 373-74, the contract for electrical work at the National Institutes of Health specified Sperti Faraday fire alarm equipment, and the court explained federal regulations prohibit such sole-sourcing: "It was designed to discourage the potentially monopolistic practice of demanding the use of brand-name or designated articles in government contract work. The framers of the clause obviously thought that it was in the national interest to widen the area of competition, and to bar local procurement officials from choosing a particular source either out of favoritism or because of an honest preference. This anti-restrictive purpose has a long history behind it." The court went on to explain (at 344 F2d 375): "[O]ne of the purposes of the general policy reflected in paragraph 1-19 is to prevent particular manufacturers from being unduly favored in government procurement; and the record does suggest strongly that the Sperti Faraday company was consulted and participated in the drafting of the specifications on the fire alarm system."

## **Reasons for the Notice in the Invitation for Bids**

When a product is sole-sourced, the manufacturer/supplier knows that there will be no competition, so its bid price is usually larded up with profit. The contractors who bid on public works projects generally do not care if an agency wants to pay a premium price for a particular product – so long as the contractor is able to include that premium price in its bid and pass that extra cost on to the agency.

Since contractors usually have very limited time to research projects and prepare bids, a sole-sourcing requirement that is buried in the specifications can easily be missed. The contractor will get bids from manufacturers/suppliers of equal products much lower than from the manufacturer/supplier of the sole-sourced product. Inevitably, the contractor will use one of the lower prices in its bid to the agency.

Then comes the dispute with the agency over whether the equal product must be accepted. If it is, the agency still gets the benefit of the lower price. If it is not, the contractor suffers financially. To prevent exactly this situation from developing, the legislature, in Public Contract Code sections 3400 and 10129, requires the "finding" by the awarding authority - not just the user or the user's architect - and requires a description of that finding to be in the invitation for bids where it should come to the attention of every bidder.

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