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Rural Development

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TO: State Directors
Rural Development

ATTN: Community Programs Directors
State Engineers

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SUBJECT: Open and Free Competition on Water and Waste Projects

This memorandum provides guidance to Rural Development State Office staff regarding requirements for maximum open and free competition contained in 7 CFR 1780.70(b) and (d); Departmental Regulations 3015.182, 3016.36(c) and 3019.43, and OMB Circulars A 102 and A 110. It does not apply to guaranteed loans. This document supersedes the unnumbered letter of the same title dated March 18, 2002, and should be filed with RUS Instruction 1780.

Agency responsibilities described in this memorandum are consistent with the duties of the State Engineer. Therefore, unless stated otherwise, wherever this memorandum states that the Agency will make a determination or perform an action, this means that the State Engineer will do so. State Directors are responsible for ensuring these requirements are met through oversight of State Engineer activities and responsibilities. State Directors are strongly encouraged to provide written delegations of authority for State Engineers to perform these duties.

Procurement Procedures

In accordance with the above regulations owner procurement procedures shall not restrict or eliminate competition. All procurement transactions, whether by sealed bids or negotiation and without regards to dollar value, shall be conducted in a manner that provides maximum open and free competition. Some of the situations considered to be restrictive of competition include, but are not limited to:

1. placing unreasonable requirements on firms in order for them to qualify to do business, such as requiring bidders to provide excessive documentation about an equipment item proposed as an equal product;
2. requiring unnecessary experience and excessive bonding, such as requiring manufacturers to have an unnecessary number of years doing business before their equipment may be evaluated by the consulting engineer to determine if it is an equal product;

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3. noncompetitive pricing practices between firms or between affiliated companies, such as accepting a bid from a bidder that the owner knows used unethical practices in development of their bid;
4. organizational conflicts of interest, such as accepting a bid from a bidder when there is a financial relationship between the consulting engineer and the bidder;
5. specifying only a brand name product instead of allowing an equal product to be offered and describing the performance of other relevant requirements of the procurement, and
6. any arbitrary action in the procurement process.

All procurement transactions will be conducted in a manner that prohibits statutorily or administratively imposed in-State or local geographic preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this requirement preempts State licensing laws.

Specifications

Owners procurement procedures will ensure that all solicitations:

1. Incorporate a clear and accurate description of the technical requirements for the competitive procurement of construction services, equipment, and materials. Such descriptions shall not contain features which unduly restrict competition. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements of a procurement, a "brand name or equal" description may be used as a means to define the performance or other salient requirements. The specific features of the named brand that must be met by bidders or offerors shall be clearly stated.
2. Identify all requirements which bidders or offerors must fulfill including the factors that will be used in evaluating bids or proposals, and the basis upon which the contract will be awarded.

In specifying materials, the owner and its consulting engineer will consider all materials normally suitable for the project commensurate with sound engineering practices and project requirements. The Agency shall consider any owner recommendations concerning the technical design and choice of materials to be used for a facility. If the Agency determines that other acceptable designs or materials should be considered in the procurement process, the Agency shall provide the owner with a comprehensive written justification for such a determination.

7 CFR 1780.70(d) only requires a single brand name and the words "or equal" be included in every specification listing a brand name product. As stated above, it also requires that the specific features of the named brand that must be met by bidders or offerors shall be clearly stated.

In addition, specifications, bidding, and contract documents must not prevent bidders or contractors from proposing an equal product at any time up to 5 days prior to bid opening or at any time after award of a contract. Consulting engineers must evaluate proposed equals submitted by bidders and contractors, but are not required to consider equals proposed directly by any subcontractors, suppliers, or other third parties. Prior to bid opening the results of this evaluation would be provided to plan holders as a bid addendum. After contract award the results would be provided to the contractor as part of the shop drawing submittal process.

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Equals and substitutes

Bidders and contractors may propose either equals or substitutes. To qualify as an equal product the consulting engineer must determine that a product:

1. is equal in materials of construction, quality, durability, appearance, strength, and design characteristics;
2. will reliably perform and function at least equally well as the brand named product and achieve the results imposed by the design concept of the completed project as a functioning whole; and
3. has a proven record of performance and responsive service.

In addition, the bidder or contractor must certify in writing at the time of shop drawing submittals that, if approved, there will be no increase to the owner in cost or contract times and that the proposed equal will conform substantially to the requirements of the item named in the contract documents.

As designer of record, the consulting engineer has sole discretion to determine whether the proposed item meets the requirements to be an equal. Approval of an equal will be indicated by: (1) the consulting engineer issuing a bid addendum approving the item before bid opening and/or (2) if after contract award, approval of a shop drawing submitted by the contractor.

Substitutes are items of materials or equipment proposed by a contractor and determined by the consulting engineer not to qualify as an equal. Typically they require some level of redesign on the part of the consulting engineer to incorporate into a project. Owners are not required under open and free competition requirements to consider substitutes, but they are required to consider proposed equals.

Bid Schedule

The front end bidding documents must be developed by the consulting engineer in a manner that does not restrict or eliminate competition. To accomplish this, there must not be any statements restricting competition. However, note that Buy American restrictions under Section 1605 of the American Recovery and Reinvestment Act apply if the criteria are applicable and the project includes any funding under this Act.

In addition, the bid schedule must not name any specific brand name products or material types unless a competitive pre-selection was accomplished or less than normal competition has been approved in writing by the Agency. Unless one of these criteria is met, the bid schedule must name the item and include a blank for a unit price or lump sum without reference to any material type or brand name.

Bid schedules set up around a given brand name product with additive or deductive alternatives for other brands are unacceptable. Also, note it is unacceptable to require bidders to list brands in the bidding documents that they intend to use if awarded the contract. A contractor may submit any proposed equals after award in accordance with the requirements of the General Conditions of the contract.

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Less Than Normal Competition

Although the regulations require compliance with a standard of maximum open and free competition, there are cases where less than normal competition is acceptable for specific projects. The following examples list those situations. Where an owner's written request or justification is required, the consulting engineer may provide the request or justification as the owner's representative.

Bid schedules and specifications may list only one material type or brand name of equipment if the Agency concurs in writing:

(1) with an owner's written request that project requirements are unique;

(2) that selection of a given material or brand name product is necessary for interchangeability of parts or equipment in an existing system;

(3) that a process is only available from a single source and the need for the process was demonstrated in the Preliminary Engineering Report through either technical justification or a life cycle cost analysis;

(4) that only one type of material will meet technical requirements;

(5) that an equipment item required to meet technical requirements of the project is available from only one source; or

(6) that regulatory authorities require the use of a proprietary item in a permit.

In such cases the owner shall submit written justification to support their assertion that a given material or brand name is required. The Agency then evaluates the submitted documentation and provides a written concurrence or non-concurrence.

For example, a small town may wish to continue use of the same brand of water meters they already use when considering expansion of a water system. The Agency would evaluate the request to standardize on a given brand for a given project and should reject it unless there is a special need for standardization. Standardization may be appropriate if needed for interchangeability of parts or equipment, especially for a smaller system where resources are limited, but not for the convenience for the owner alone.

In addition, for loan-only projects the RUS Administrator may use the exception authority at 7 CFR 1780.25 to approve a written request for a waiver of the requirement for maximum open and free competition if requested by the owner and concurred in by the State Director. Such a waiver may be limited to a given material or brand name of equipment or may be issued for an entire project. Exception authority may never be used to waive the requirement for maximum open and free competition if there is any Agency grant funding in a project. If grant funds are added to a project after award, the requirement for maximum open and free competition must be added to the entire project, but would only apply to procurement transactions taking place after the grant was added.

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Attached are exhibits addressing several topics related to the issue of maximum open and free competition.

If there are any questions, please contact Ben Shuman, PE at 202-720-1784 or ben.shuman@wdc.usda.gov or Jon Melhus, PE at 202-720-7817 or jon.melhus@wdc.usda.gov.
Attachments

Exhibit One: Selection of Materials

The owner and its consulting engineer will consider all materials normally suitable for the project commensurate with sound engineering practices and project requirements (7 CFR 1780.70(b)). This does not mean that the consulting engineer as the designer of record has no control over the selection of materials for a project.

The Agency must consider the preference of the owner and consulting engineer in selecting materials (such as pipe materials). If there is a legitimate technical reason for limiting design to a specific material or materials, written justification must be provided by the owner or consulting engineer and submitted to the Agency for concurrence. Written agency concurrence must be obtained prior to the submittal and concurrence in plans, specifications, and bidding documents and the issuance of the advertisement for bids (see Less Than Normal Competition above). If the Agency determines that the owner or consulting engineer's selection of materials is arbitrary or otherwise does not have legitimate technical merit, then the Agency will provide a letter to the owner and consulting engineer requiring alternate materials to be considered in the procurement process.

If there is no Agency approved justification for limiting design to a particular material or materials, then the choice of material to use for the project must be left to the construction contractor. In such a case, material specifications must be open. This may mean that more than one specifications section (e.g. one for each type of pipe) will be required for a particular item.

An example would be in the case where High Density Polyethylene (HDPE), Ductile Iron (DI) or Polyvinyl chloride (PVC) pipe are all technically feasible for a proposed water system. Even if the owner preferred DI, if there is no Agency approved justification to limit design to DI, the bidding documents, specifications, and drawings must allow all three pipe materials. If a portion of the system had to be DI due to an approved technical justification, then the bid schedule and plans and specifications would include such requirements.

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Exhibit Two: Selection of a Design Approach

Often the owner and consulting engineer will want to select a specific design or technology for a given project that is proprietary or otherwise precludes the use of other technologies that may be able to meet the technical requirements of a project.

The Preliminary Engineering Report (PER) should be used to evaluate design or technology alternatives and exclude them from further consideration based on life cycle cost or technical merit analyses. § 1780.57(n) requires that a facility design provide the most economical service practicable, therefore designs and technologies excluded through life cycle cost analysis in the PER do not need to be considered later in plans, specifications, and bidding documents.

When reviewing the PER, the Agency should ensure that appropriate and technically feasible alternatives have been considered and should not concur if the applicant tries to exclude appropriate technologies. Alternative technologies or designs do not have to be considered further if they are excluded by sufficient technical or life cycle economic analysis.

In the case of proprietary equipment where only one manufacturer exists for a given technology, the selection of that technology may result in the default selection of a brand name. This is acceptable only if the use of that technology was adequately justified in the PER, but the Agency should document prior to concurring in plans and specifications that the requirement for maximum open and free competition has been met even though an item required to meet technical requirements of the project is available from only one source.

When more than one technology is acceptable for a given project, the consulting engineer and owner should leave the bidding documents open to allow as broad a variety of technologies as practicable. For example, in the case of procurement of water storage tanks, a bid schedule should call for a tank of a certain capacity rather than of a specific type (e.g. single pedestal versus multi-legged tank), unless a certain type of tank was shown in the PER not to be economical or technically feasible for a given project in which case it would not have to be considered in the procurement. Infeasible options do not need to be included in procurements, but factors excluding their use must be documented in writing by the owner or their consulting engineer and concurred in by the Agency in writing.

It is acceptable to use a base bid with alternates if the following conditions are met:

1. The base bid and alternates must not be different brand names, but rather different designs or technologies. If a base bid lists one proprietary brand name product for a given technology or design with additive or deductive alternates, this is unacceptable and should not be used.
2. The bidding documents must clearly explain which bid schedule item is potentially being replaced by the bid alternate item(s).
3. Selection of the design or technology must be made on the basis of low price and the bidding documents must clarify that the selection will be made in this manner. Owners are not allowed to use additional funds to make up the difference in cost to enable use of a more expensive design or technology.

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Exhibit Three: Procurement of Equipment Prior to Selection of a Contractor

Sometimes the selection of a major equipment item can significantly impact the remainder of the project. It is important to maintain an environment of open and free competition in these circumstances. In cases like this, it may be best to conduct a "pre-selection" process. One of two approaches may be used based on whether a procurement contract is assigned upon award of a construction contract to the General Contractor or not.

For procurement contracts to be assigned to the General Contractor, a two phase process is allowed for pre-selection wherein materials or equipment may be selected prior to the selection of a construction contractor. This process enables the owner and consulting engineer to meet the requirements of maximum open and free competition and still complete the design around a specific type of material or equipment.

The first phase involves the competitive selection of the materials or equipment using competitive negotiation procedures (7 CFR 1780.72(c)). A Request for Proposals (RFP) is developed by the consulting engineer and publicly advertised by the owner. Manufacturers or suppliers reply to the RFP and submittals are ranked in accordance with the terms and conditions of the RFP. The RFP should include cost and other factors as determined by the owner and consulting engineer and concurred in by the Agency.

Negotiations on price and potentially other factors may then be completed with one or more of the manufacturers or suppliers submitting proposals. These negotiations may result in changes in the ranking of proposals. Then an award is made based on the best value to the owner in accordance with the ranking factors in the RFP.

A critical factor in using this approach is that the price of the materials or equipment must be locked in by the award based on a hold period established in the RFP. At this point a contract exists between the owner and the manufacturer or supplier. Contract documents for this purpose may be developed by the consulting engineer or standard forms of agreement between the manufacturer and the owner developed by industry groups may be used, such as the Engineers Joint Contract Documents Committee (EJCDC) procurement "P-series" forms. In either case, forms of agreement will require adaptation for use on Agency funded projects unless National Office approves a standard form of agreement for this purpose. Any form of agreement used must be approved by the Agency for individual projects with the assistance of the OGC Regional Attorney if required.

Next, the consulting engineer completes the design process. Note that the consulting engineer now has the advantage of knowing which materials or brand name equipment will be used in the final design, enabling them to complete the design with fewer unknowns.

The second phase is for selecting a contractor. The bid documents will look like bidding documents normally used, except for the following differences:

1. The bid schedule must list specific line items that were contracted for in phase one, including brand names and locked-in prices based on the first phase procurement. A base bid with additive or deductive alternates is still not allowed.
2. The specifications for the line items that were bid in phase one will not include a requirement for consideration of equals because competition requirements were met in phase one for these items.

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3. Article 23 of the Instructions to Bidders (Attachment F of RUS Bulletin 1780-26) will need to be modified by the consulting engineer to clarify that the contract between the owner and manufacturer or supplier will be assigned to the construction contractor upon award to the General Contractor.

Upon award of the construction contract, the procurement contract for equipment purchases transfers from the owner to the contractor without any variation in the price or terms of the contract.

For Procurement Contracts where the owner turns over the equipment to be installed by the General Contractor without assigning the procurement contract to the General Contractor, the equipment would not be included in the bid schedule, but would be listed as owner supplied equipment in the contract. In addition, the Owner must maintain insurance and store the equipment in such a manner as to protect it until it is turned over to the General Contractor.

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