

3. Pre-Bid Considerations

Contractor Prequalification

In general, contractor prequalification is used to help determine the quantity and type of work a firm is capable of undertaking. Normally the firm's resources, work experience, and its staffing capability must all be identified for it to become prequalified.

Prequalification is necessary to collect information via a financial statement or some other process. Do not specify the type of work or limit the size of project a firm may bid upon because overly restrictive prequalification may restrict competition unduly. Some agencies do not overly prequalify, but instead rely on the contractor's ability to provide a performance bond. Prequalification procedures must not unduly restrict competition.

Prequalification has been identified by some agencies as a useful tool for gathering pertinent information on the intricate management details of a contractor's firm. In the event of a conviction of a crime such as bid rigging, such information proves useful as an aid in determining the appropriate sanctions for the firm and/or the individuals involved. Another possible use would be to determine the relationship of firms bidding on any projects.

Specific information that should be collected from a firm includes the following: principal individuals in the firm (anyone having a 10 percent or more interest in the firm), all affiliates or subsidiary companies including material sources, available equipment, work experience, individuals and organizations that have control or influence over the firm's bidding procedures, and whether the firm has ever been suspended or debarred from bidding and the related circumstances.

The instructions for completing the work experience section (of the pre-qualification form) should require that the firm identify all projects for which it was the prime contractor and those on which it worked as a subcontractor during in the past as well as the contracting agency for those projects. Also, the contracting agency should describe the penalties for making false statements in the pre-qualification process.

Anti-collusion Statement

A sworn anti-collusion statement should be included as part of the bid proposal package. The Department of Justice has concluded that non-collusion statement may be either an un-sworn declaration made under penalty of perjury under the laws of the U.S., or a sworn affidavit executed and sworn before a person who is authorized to administer oaths by laws of the State. All non-collusion certifications shall be retained by the in accordance with the retention policy of 49 CFR 18.42. These certifications could serve as important evidence in the event that collusion or bid rigging is discovered at a later date. If any bidder submits a false statement, sanctions could then be taken against the firm.

Standard Specifications

All agencies should have standard specifications that address the issue of evidence of collusion among bidders. Those State specifications that currently address this item generally specify that may determine that the bidder is not responsible and reject his/her proposal based on evidence of collusion. In addition to rejection of a firm's proposal, the specification should advise that collusive bidding is a violation of the

law and could result in criminal prosecution, civil damage actions, and State and Federal administrative sanctions.

Bidders List

Confidentiality of the bidders' list (those firms that have taken out plans and a bid proposal document) has both advantages and possible disadvantages.

- a. With the availability of bid tabulation information and bidders lists on the Internet, the potential for bid collusion is higher than in previous years when such information was not readily available. In an effort to create the most competitive environment for potential bidders, a firm should not be aware of the identity of the other potential bidders. An advantage of keeping the bidders' list confidential is that bidders will submit what is believed to be a realistic competitive bid based upon the company's own individual circumstances. This is especially important for projects where there would be limited competition.

- b. A possible disadvantage of keeping the bidders' list confidential would be that potential material suppliers and subcontractors would not be informed of what firms to contact for upcoming projects. Therefore, a material supplier may fail to inform a potential bidder of its current prices. However, by the very nature of competitive bidding and the last-minute quotes traditionally provided contractors, it is felt both contractors and suppliers will continue to have adequate communication. Further, since the bidder must perform the contract work with his/her own firm and/or subcontract it, the burden actually lies with the bidder to determine what other firm he/she wants to work with on a project. Unless the project has new or unusual material or construction requirements, it is believed most contractors are aware of the available subcontractors and potential material suppliers. Therefore, it is believed the bidder is generally the one seeking potential subcontractors, especially if Disadvantaged Business Enterprise (DBE) goals are included in the proposal. During court testimony, defendants have stated the bidders' list was used to identify other potential prime contractors to be contacted to rig the project bids. Although there are other ways to find out who plans on bidding, i.e., from material suppliers, bonding companies, etc., at least the contracting agency is not providing this information when it keeps the bidders list confidential. It is recognized that State freedom of information or similar statutes may, however, preclude keeping the bidders' list confidential.

Competition

Competition for projects by bidders is an integral part of a successful construction program. An effort should be made by the contracting agency to maximize the competition by a number of methods.

- a. Advertisement should be widespread enough to advise those potential bidders interested in the type of work and size of project involved. Based on the complexity of the project, extended advertisement periods are encouraged.
- b. Consideration should be given to the project's estimated cost/size to maximize the number of bidders. The size normally varies in each State depending on the makeup of the construction industry. In some situations, it may be desirable to divide the project into several smaller contracts to foster competition.
- c. Jobs should be allowed to be bid individually or in combination.

Multiple Bid Requirements

If a State law or regulation exists which requires that more than one bid be submitted before award can be made, efforts should be made to revise or repeal it. There is evidence that in those cases where only one contractor was interested in a project and the multiple bid requirements existed, the firm actually contacted other contractors to submit a complementary bid so award could be made. If only one bid is submitted and it far exceeds the estimate, it should be rejected; but if it is at or below the estimate, it should be considered for award.

Escrow of Bid Documents

The agency should consider escrowing bid documents where it is administratively feasible to do so.