

## Rural Utilities Service

# Open and Free Competition



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# Overview

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# What is Open and Free Competition?

- A combination of requirements for ensuring limits to competition are not allowed unless justified;
- Needed to ensure balance between:
  - The engineer's control of the project as designer of record;
  - The community's interests as the system owner;
  - The need for industries to offer suitable products that can meet community needs;
  - The need for the Agency to comply with statutory and regulatory requirements.

# Basis of Requirements

- Statute (7 U.S.C. 1926):
  - Section 306(a)(17) of the Consolidated Farm and Rural Development Act (CONACT) enables the Agency to provide input to technical design and material selection;
- Office of Management and Budget (OMB) Regulation (2 CFR 200.319):
  - OMB regulations prohibit unnecessary limits to competition in procurement; and
- Agency Program Regulations (7 CFR 1780.70(b) & (d)):
  - Implement these statutory and regulatory requirements.

# Reasons for 2012 Agency Policy

- Generally clarify requirements;
- Bring minimum number of brand names required for specifications in line with regulatory requirements;
- Address limitations to competition being seen where only one pipe material type was being allowed without consideration of others by the engineer;
- Clarify designs/technologies ruled out in PER don't need to be considered in procurement; and
- Clarify that it is okay for engineer to specify proprietary equipment as long as they allow an "equal".

# Highlights of the Policy

- Brand name or equal;
- What is an equal?
- Engineer's authority regarding equals;
- The bid schedule;
- Competitive pre-selection;
- Less than normal competition;
- Materials Selection.

# Brand Name or Equal

- OMB regulations at 2 CFR 200.319(a)(6) list examples of restrictions to competition:
  - “Specifying only a ‘brand name’ product instead of allowing “an equal” product to be offered”
  - “Any arbitrary action in the procurement process.”
- 7 CFR 1780.70(d):
  - “a ‘brand name or equal’ description may be used to define the performance or other salient requirements of a procurement.”

# What is an Equal?

- Engineer determines:
  - Equal in materials of construction, quality, etc.
  - Will reliably perform and function;
  - Proven record of performance/record of service;
- Plus bidder/contractor must certify in writing:
  - No increase cost/time;
  - Will conform substantially to item named.

# Consulting Engineer's Role

- As designer of record, engineer has sole discretion to determine equals;
- Issue bid addenda if equals are approved;
- Shop drawing approval;
- If it's not an equal then it's a substitute and does not have to be considered, but can be.

# Bid Schedule

- Generally can not name brands on bid schedule;
- Prices should be listed on bid schedule for pre-selected items only where approved by Agency;
- No tables allowed where bidders list manufacturers because they discourage bidders from offering equal products to named manufacturers.

# Materials Selection

- Owner/engineer “will consider all materials normally suitable for the project commensurate with sound engineering and project requirements” (7 CFR 1780.70(b));
- Plans and specifications should be open to alternative pipe materials that will work for the project unless there is a technical justification otherwise;
- Agency considers recommendations, but also requires consideration of alternatives.

# Options for selection of materials

- Allow market competition to select best option from among technically acceptable choices;
- Other options:
  - Design approach – Use the Life Cycle Cost Analysis in the PER;
  - Competitive pre-selection;
  - Justify less than normal competition;
  - Bid Alternates;
  - Life cycle bidding;

# Design Approach – Using the Life Cycle Cost Analysis in the PER

- The PER includes a life cycle cost analysis to determine the most economical service practicable as required by 7 CFR 1780.57(n);
- Alternative materials do not have to be considered further if they are excluded by analysis in the PER, but this must be concurred in by the Agency;
- PER approval must clarify that the material selection was approved or the limitation is not concurred in.

# What is Competitive Pre-Selection?

- Competitive negotiation process where manufacturers or technologies selected in advance of Advertisement for Bids;
  - Allowed under 7 CFR 1780.72(c);
- Process is fully competitive, but takes place early to enable the engineer to complete design around the specific material or technology.

# How to Use Competitive Pre-Selection

- RFP;
- Selection;
- Contract (owner and manufacturer);
- Assignment of contract to General Contractor.

# What is Less than Normal Competition?

- Described in the 2012 policy on competition;
- In limited cases, there may be circumstances where the selection of a brand name, design, or choice of materials should be more limited than in other cases;
- Less than normal competition may be called for in these cases, but is still considered maximum open and free competition for the specific project.

# Circumstances Justifying Less than Normal Competition

- Project requirements unique;
- Interchangeability for existing system;
- Available from single source and need demonstrated in Preliminary Engineering Report (PER):
  - Needs Technical justification or Life Cycle Cost justification in PER;
- Only one material type meets technical need;
- Item required to meet technical needs available from only one source;
- Regulatory authorities require use of proprietary item.

# Process for Less than Normal Competition

- Approval:
  - Written request from owner or engineer;
  - Written concurrence from Agency;
- Documents:
  - Named item listed in specifications and bid schedule;
  - If engineer obtained a firm price from manufacturer's rep, it may be listed in bid schedule.

# Bid Alternates

- Bid alternates can be used to compare options and determine which approach is most cost effective;
- This approach can not be used to encourage the selection of a preferred brand name on bidders;
  - May be used for different pipe materials where more than one material type will work for the intended purpose;
- Bidding documents must clearly establish process for evaluation of bids and award.

# Life Cycle Bidding

- The agency will allow life cycle bidding in accordance with 2 CFR 200.320(c)(2)(4);
- Life cycle bidding requires that the bids be adjusted to include consideration of life cycle cost factors for different selection of materials;
- The Agency would have to approve any life cycle factors or methodology to ensure it is based on technical issues and not preference.

# Conclusion

- There are many types of pipe materials that an engineer can consider.
- We do not verify that engineers consider every option, but rather that normally suitable choices are considered.
- If there is no Agency approved reason for limiting design, then the choice of materials must be left to the construction contractor.
- *The Agency does not favor and does not have a preference for any specific type of pipe material.*

# Questions?

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