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1.Does the Federal Government have specific procedures for the award of contracts by contracting authorities?

The U.S. Congress enacted the Competition in Contracting Act and the Federal Procurement Policy Act that set forth the procedures used at the Federal level for the award of public contracts. The executive branch of the Federal Government created the Federal Acquisition Regulatory Council to assist in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government via the Federal Acquisition Regulations (FAR). The prominent member of the Council is the Administrator of the Office of Federal Procurement Policy that provides overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies and to promote economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the Federal Government. Finally, other public contracts may be awarded based on the discretion of an executive agency.

Federal procedures are only used for public projects involving Federal

spending or Federal Laws and Treaties. These procedures differ depending on whether a public contract involves a State or not. When a public contract involving the Federal Government occurs in a State, that State's procedures must also be recognized and followed. The majority of States share general guidelines for the award of public contracts, however, each of the 50 States also utilize unique procedures that must be learned and adhered to.

2. Do Federal procedures for the award of public contracts depend on the kind of goods or services that are to be procured?

Federal procedures may depend on the amount of the public contract or whether the public contract is for goods or services. The majority of public contracts are subject to procedures allowing for full and open competitive bidding. However, public service contracts are not obligated to be awarded via competition. There are several exceptions to the competitive bidding process. For instance, an executive agency may justify using a non-competitive process in awarding a public contract up to \$50,000,000 if the justification is approved by a general or flag officer. Finally, Federal procurement procedures for specific classes of public contracts may be expressly authorized by statute.

3. Do Federal procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods or services that are to be procured and if so, what are the thresholds?

Generally, purchases and contracts for supplies or services for the Federal Government may be made or entered into only after advertising for competitive bids, except (1) when the amount involved in any one case does not exceed \$25,000, (2) when the public exigencies require the immediate delivery of the articles or performance of the service (such as in a time of war), (3) when only one source of supply is available and the Government purchasing or contracting officer shall so certify, or (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis (however, the competitive bid process may still be implemented). See 41 U.S.C.A. §§ 5, 253.

4. In what way does the Federal Government have to inform the market about the intended procurement?

Public contracts that are subject to the competitive bidding process must advertise for solicitation of sealed bids or competitive proposals. This is done to insure that all persons have the 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 to secure for the Government the benefits which arise from competition. The manner of advertising is left by the law to the discretion of the department advertising, no particular form being prescribed. Advertisements, notices, or proposals for an executive department of the Government, or for a bureau or office connected with it, may not be published in a newspaper except under written authority from the head of the department. Normally, an Invitation for Bids is published in the Federal Register, now posted at www.Regulations.gov. Other Federal Government procurement opportunities over \$25,000 are accessed through the single government point-of-entry (POE) at FedBizOpps.gov.

Solicitations for bids may include specifications that depend on the nature of the needs of the executive agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of function, performance, or design requirements.

In addition to bid specifications, each solicitation for sealed bids or competitive proposals shall at a minimum include a statement of all significant factors which the executive agency reasonably

expects to consider in evaluating the bids, the relative importance assigned to each of those factors and the time and place for the opening of the sealed bids.

Defects in the notice calling for bids or in the publication of the notice will require the re-publication of the notice in conformity with the applicable statutory requirements. Once it is determined that defects exist in the advertisement of the call for bids, prudence dictates re-publication rather than proceeding with the bidding process. If, notwithstanding any defects in advertising the call for bids, the bidding process continues, defects in the notice and publication requirements could become the basis for a disappointed bidder to attack the award of a contract to a competitor.

5. Does a potential bidder need to have a specific legal form, e.g., corporation, to submit a tender?

It is not necessary that a bidder conform to a specific legal form. A "prime contractor" is defined as "a person who has entered into a prime contract with the United States." This definition is to be used in conjunction with the definitions of "prime contract" and "person". A "person" is defined as "a corporation, partnership, business association of any kind, trust, joint-stock company, or individual." The definition is meant to cover any individual or business entity. See 41 U.S.C.A. § 52.

6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?

Often, a successful bidder is a licensed prime contractor that uses listed subcontractors. A joint bidding arrangement made up of a prime contractor and subcontractor is unusual but not unknown. See *Alcatel, Space SA v. Loral Space & Communications Ltd.* 154 F.Supp.2d 570 (2001). By definition, a consortium is a joint venture of affiliates, which is not prohibited from procuring and performing public contracts. See 41 U.S.C.A. § 15. In fact, joint ventures and contractor/subcontractor partnerships are both sanctioned as "construction team arrangements." F.A.R. § 9.601. However, the prime contractor remains fully responsible for contract performance, regardless of any team arrangement between the prime contractor and its subcontractors. F.A.R. § 9.604. Further, in regard to consortiums, one entity must be named as principal contractor to lead the consortium in its performance of the contract and have the power to control the others in regards the performance of the contract. See F.A.R. § 19.101.

The Federal Government recognizes the advantage of joint bidding agreements in that they add potential bidders to the bidder pool and thus promote competition. F.A.R. § 3.303. Contractor team arrangements may be desirable from both a Government and industry standpoint in order to enable the companies involved to complement each other's unique capabilities and offer the Government the best combination of performance, cost, and delivery for the system or product being acquired. Such arrangements may be particularly appropriate in complex research and development acquisitions, but may be used in other appropriate acquisitions, including production. F.A.R. § 9.602.

However, joint bids must avoid the appearance of violating Federal antitrust laws. One of the practices that may evidence violation of antitrust laws is the filing of a joint bid by two or more competitors when at least one of the competitors has sufficient technical capability and productive capacity for contract performance. See F.A.R. § 3.303(c)(7).

A public contract with a joint venture may involve any combination of individuals, partnerships, or corporations. F.A.R. § 4.102. If a public contract involving the Federal Government occurs in a State, that State's laws regarding a joint venture must also be recognized and followed. For instance, in California a joint venture must be duly licensed to be engaged in construction activities requiring licensure. See *California Business & Professions Code § 7029.1*. Under the California License Law, a joint venture license is issued to "any combination of individuals, corporations, partnerships, or other joint ventures, each of which

holds a current, active license in good standing." See *California Business & Professions Code § 7029*. However, multinational entities may be prohibited from participating in the bidding process in certain public projects, i.e., those affecting national security.

7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?

There are no requirements that a bidder must have an office in the United States or any State for that matter. Federal and State laws tie a bidder to the Country or State via licensed contractor requirements.

8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?

There are no additional document requirements for foreign bidders and most States have minimum bid document requirements. For example, in California, although there is no legal requirement that bid documents include Instructions for Bidders ("IFB"), as a practical matter, the IFB is critical to the bidding process. By the terms of the IFB, the public agency is able to establish the "rules of the game" for the bidding process and for award of the contract. In the IFB, the public agency can consider and provide for the handling of many of the typical issues arising in competitive bidding.

A local bidder may be given preference over a nonresident bidder. The amount of preference is governed by each State's choice of law rules. In California, the reciprocal preference afforded a local contractor against a nonresident contractor is equal to the amount of preference applied by the state of the nonresident contractor. If that State has no contractor preference on construction contracts, then California does not apply any preference against the nonresident contractor. See Public Contract Code § 6107. Each State may have legislation addressing similar preferences for foreign bidders.

9. Is a multinational bidding consortium allowed to submit a bid?

Multinational consortiums are not prohibited from procuring and performing most public contracts. Public contracts are administered by two separate agencies: the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council. The councils follow different governing statutes and regulations including what entities may submit bids on contracts. Certain types of contracts impose limitations on bids by a "foreign entity." The term, "foreign entity" means a foreign person, a foreign company, or any other foreign entity. 10 U.S.C.A. § 2410i.

Some projects limit bidders to "concerns" (meaning any business entity organized for profit, even if its ownership is in the hands of a nonprofit entity) with a place of business located in the United States or its outlying areas and that makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, material and/or labor, etc. F.A.R. § 19.001.

In general, a Department of Defense contract or Department of Energy contract under a national security program may not be awarded to an entity controlled by a foreign government if it is necessary for that entity to be given access to information in a proscribed category of information in order to perform the contract. 10 U.S.C.A. § 2536. It is the policy of Congress that procurement regulations used in the conduct of trade in defense articles and defense services should be based on the principle of fair trade and reciprocity and reflect the goal of establishing an equitable trading relationship between the United States and its "foreign defense trade partners." 10 U.S.C.A. § 2531.

Bids made in response to a Department of Defense solicitation must disclose any significant interest in the bidder or its subsidiary (or, in the case of a subsidiary, in the firm that owns the subsidiary) that it is owned or controlled (whether directly or indirectly) by a foreign government or an agent or instrumentality of a foreign government, if such foreign government is the government of a country that the Secretary of State determines under section 6(j)(1)(A) of the Export Administration Act of 1979 has repeatedly provided support for acts of international terrorism. A bid made by a foreign entity that supports the secondary Arab boycott on Israel may not be awarded a contract for an amount in excess of the small purchase threshold (\$100,000).

The Indiana Toll Road is an example of not only a multinational consortium being allowed to bid, but ultimately being awarded the contract. The Indiana Toll Road was operated for twenty-five years by the Indiana Department of Transportation until April 12, 2006, when enabling legislation allowed a takeover by the ITR Concession Company LLC comprised of an even partnership between Cintra of Spain and Macquarie of Australia.

10. In which language do the bids have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?

Submission of bids in response to solicitations for bids for most public contracts must be in the English language. Bids and offers received in any other language will be rejected. F.A.R. §§ 14.201-6, 52.214-34.

Bids must be submitted in sealed envelopes or packages unless submitted by electronic means. F.A.R. § 52.214-5.

Bids must be submitted in a manner that will ensure that they will be received in the office designated in the invitation for bids not later than the exact time set for opening of bids. Normally, the invitation for bids would indicate the preferred method of bid submission as well as other accepted methods. The invitation may authorize telegram or mailgram bids, facsimile bids, electronic commerce bids (email) or regular mail bids. F.A.R. §§ 14.301, 14.302, 14.304, 14.202-7, 14.202-8, 52.214-13, 52.214-31, 52.215-5.

11. Are there any Federal legal regulations governing the time within which bids have to/can be submitted to the contracting authority?

There is no universal regulation that determines a specific amount of days in which a bid must be submitted. Federal procedures mandate that any solicitation for bids on a public contract must be designed to achieve full and open competition with due regard for the nature of property or services desired to be acquired. 41 U.S.C.A. § 253a; F.A.R. § 14.202-1. Each solicitation for bids must include a statement of the time and place for the submission of proposals. Id. In no case shall a bid be accepted after 4:30 p.m. on the last day the bids are due, unless otherwise specified in the solicitation for bids. F.A.R. § 14.304.

For proposed contract actions expected to exceed \$10,000, but not expected to exceed \$25,000, a contracting agency must display the notice of solicitation in a public place, or by any appropriate electronic means, an unclassified notice of the solicitation or a copy of the solicitation. The notice must include a statement that all responsible sources may submit a response which, if timely received, must be considered by the agency. The information must be posted not later than the date the solicitation is issued, and must remain posted for at least 10 days or until after quotations have been opened, whichever is later. F.A.R. § 5.101; 41 U.S.C.A. § 416.

For proposed contract actions expected to exceed \$25,000, a contracting agency must furnish the notice to the Secretary of Commerce for publication by electronic means that meets the accessibility requirement (FedBizOpps.org) or for publication in Commerce Business Daily. The solicitation may not issue less than 15 days after the date the notice was published. 41 U.S.C.A. § 416.

For proposed contract actions greater than \$100,000, in addition to the procedures set forth in the preceding paragraph, the deadline for submission of bids or proposals for a contract for property or services, including architect/engineer services, in response to the notice may not be earlier than 30 days after the date the solicitation was issued. In the case of a solicitation for a contract involving research and development, the deadline for submission of bids or proposals may not be earlier than 45 days after the date the solicitation was issued. 41 U.S.C.A. § 416/ F.A.R. § 5.203.

Some public contracts may qualify for a streamlined solicitation procedure that may reduce the notice and submission times. 41 U.S.C.A. § 413.

Further, each State may have different policies regarding the time limit for accepting bids on a public contract. The time limit for accepting bids would be an integral part of the publication of solicitation for bids.

Defects in the notice calling for bids or in the publication of the notice will require the re-publication of the notice in conformity with the applicable statutory requirements. Once it is determined that defects exist in the advertisement of the call for bids, prudence dictates re-publication rather than proceeding with the bidding process. If, notwithstanding any defects in advertising the call for bids, the bidding process continues, defects in the notice and publication requirements could become the basis for a disappointed bidder to attack the award of a contract to a competitor under the Administrative Procedure Act.

12.Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?

“Bid and proposal (B&P) costs” consist of the costs incurred in preparing, submitting, and supporting bids and proposals (whether or not solicited) on potential Government or non-Government contracts. The term does not include the costs of effort sponsored by a grant or cooperative agreement, or required in the performance of a contract. F.A.R. § 31.205-18. Bid and proposal costs are not among the allowable costs listed in 41 U.S.C.A. § 256. However, for contracts that are "fully covered" (over \$500,000) B&P costs may be allocated to final cost objectives if allowed in the solicitation for bids. 41 U.S.C.A. § 256(l); F.A.R. § 31.205-18.

The general rule for the letting of public contracts is that an unsuccessful bidder is not entitled to damages. *Telephone Assoc., Inc. v. St. Louis County Bd.* 364 N.W.2d 378 (Minn.1985). This is because the authority for letting public contracts is derived for the public benefit and is not intended as a direct benefit to the contractor. *Id.* However, a bidder who is wrongfully denied the contract is entitled to recovery of bid preparation costs but not lost profits. *Keco Industries, Inc. v. U. S.* 428 F.2d 1233 (1970). Further, the competitive bidding process employed by a public agency includes the right to reject all bids without the responsibility of having to reimburse bidders fees associated with bid preparation. This applies as well to solicitations that are cancelled before the contract is awarded. See *Coastal Corp. v. U.S.* 713 F.2d 728 (1973).

Most States have similar legal authority preventing the recovery of bid preparation costs. For instance, a California court refused recovery to a disappointed bidder saying it saw "no injustice in requiring the [bidder] to bear the expense of preparing its bid; it entered into the bidding procedure with full knowledge of [the public agency's] right to reject the bids if it should choose to do so. As an experienced business entity, [the bidder] must be deemed to have assumed the risk that [the public agency] might act in accordance with its legal right; such a risk is a cost of seeking to do business with a governmental body." *Universal By-Products, Inc. v. City of Modesto* (1974) 43 Cal.App.3d 145, 149, 156.

13.Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?

The Federal Government will only award public contracts to "responsible" contractors. (Federal Acquisition Regulation § 9.103) A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors. If the contractor is made up of "affiliates", i.e., a consortium or partnership, then each affiliate must meet the applicable standards for responsibility. F.A.R. § 9.104-3.

To be determined responsible, a prospective contractor must:

- (a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(a));
- (b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
- (c) Have a satisfactory performance record (see 9.104-3(b) and Subpart 42.15). A prospective contractor shall not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history, except as provided in 9.104-2;
- (d) Have a satisfactory record of integrity and business ethics;
- (e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors). (See 9.104-3(a));
- (f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(a)); and
- (g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

Subpart (g) imports any applicable State qualification requirements. Many public contracts call for a bidder to have a valid State Contractor's License as a requisite for a bid. For example, in California, the determination of the knowledge and experience requirements for the issuance of a contractor's license is necessarily based upon the qualifications of the individual sitting for the contractor's license examination. As entities such as partnerships and corporations cannot be examined, the License Law adopts the concepts of "responsible managing employee" ("RME") and "responsible managing officer" ("RMO") to allow for the issuance of a contractor's license to entities. An individual owner is licensed by virtue of the license held by the owner or an RME acting on behalf of the owner. Partnerships are licensed by virtue of the license of an RME on behalf of the partnership. Corporations and all other forms of entities are licensed by an RMO or RME. See *California Business & Professions Code* §§ 7065, 7068(b).

The "responsibility" of each individual bidder must be evaluated independently. That is, in determining the "lowest responsible bidder," there is no basis for the awarding authority to apply a concept of relative superiority of the bidders' responsibility. If the awarding agency makes a finding that the low bidder is responsible, the contract cannot be awarded to another bidder on the basis of that other bidder's superior responsibility. Essentially, once a finding is made of the bidders' responsibility, all such bidders are deemed equally responsible. See *City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court* (1972) 7 Cal.3d 861. There, the court held that to permit a public agency to reject the bid of the lowest responsible bidder and to award the contract to a "more" responsible bidder operates to frustrate the very purposes of the competitive bidding process and could promote favoritism in the award of public contracts. However, other State laws mandating that public works projects be awarded to the lowest responsible bidder would not be precluded from implementing affirmative action requirement as part of contract specifications. See *Thomas P. Carney, Inc. v. School Dist. of Philadelphia* 633 F.Supp. 1273 (1986).

14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?

Protests against the proposed award of contracts are permitted under Federal regulations at various stages of the procurement process. Most Federal bid protests are filed with the Government Accountability Office (GAO), although certain protests may be filed with the Court of Federal Claims or the United States District Court in the district where the project is located. Protests regarding the form of the government's solicitation itself must be filed prior to the bid opening. Protests regarding a bid submitted by a competitor must be filed within 10 days from the time when the basis for the protest should have been known.

15.If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?

Assuming that the procurement meets the minimum amount necessary to trigger competitive bidding, then no other pre-conditions exist to the filing of a protest.

16.If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?

The Administrative Procedure Act confers to bidders the right to challenge agency actions. However, only injunctions or declaratory judgments were available to protesters under this jurisdiction. The passage of the Administrative Dispute Resolution Act of 1996 expanded available remedies under this forum to include monetary relief.

17. Can your office:

- Give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- Represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- Please name a contact person within your office for questions of public procurement law!**

Our firm is competent to assist foreign clients navigate domestic procurement procedures. Our firm may represent foreign clients in Federal Court as well as State Courts in California, New Mexico, New York and elsewhere. Peter Lindborg and Irina Drill are contact persons in this office in regard public procurement procedures. Contact them at (818) 637-8325 of plindborg@ldllp.com and idrill@ldllp.com