

The Low-Bid Myth

Too many procurement and contracting procedures are fixated on price, at the expense of quality and open competition.

By Sherry J. Williams

Procurement departments in both the public and private sectors generally rely on the low-bid process to achieve their objective of obtaining the highest quality product at the best price. The assumption is that, of all the procuring methods, the low-bid process provides the most consistent, defensible results.

Yet, contrary to popular belief, the low-bid process may actually limit the ability of the purchaser to obtain the best deal by unnecessarily limiting competition, quality and the entity's ability to achieve other objectives, such as minority and female participation in purchasing opportunities.

Two factors drive the low-bid process. One is price. The other is the meeting of specifications. These factors become paramount when the procuring entity tries to ensure that its procedures are "objective."

The assumption that any procurement decision is objective, however, perpetuates the great myth about procurement systems—that is, that the decision-making process is truly objective. The criteria themselves may be, but any good procurement agent can manipulate them to exclude small and minority owned firms. Prequalification specifications, for example, can be written too

narrowly so that only a few contractors (the contractors of choice) can satisfy the objective criteria.

Furthermore, objectivity removes a critical factor of a business transaction—that is, relationship building. Smaller, newer firms in particular need the opportunity to create the relationship, in an open environment, where they have the chance to sell and convince.

Rather, the procuring entity needs to achieve transparency and accountability in its procedures to ensure that subjective decisions are made in a way that promotes fair and open competition. Making transparency and accountability central to procurement operations allows procuring agents to focus on "the deal" in which they are involved.

True competition revolves around more than just price. For instance, consider the competitive factors of both large and small firms. While large firms may be able to offer lower prices, in terms of putting lower-

paid, junior personnel on the project, or offering price breaks on supplies, smaller firms tend to provide more innovation and the direct involvement of the firm's most experienced staff (including the owner). The smaller firm's prices may be higher, but the quality of the product and the experience of the team may actually be much greater than that of its larger counterpart.

These competing factors often are not given the appropriate consideration in the low-bid system. Its focus on price de-emphasizes the importance of quality. Many entities are now struggling with the end result: poor craftsmanship, high-cost change orders after contract execution, and the like. This has led many agencies to consider alternative procuring methods, particularly in construction, such as design build, program management and construction management.

For example, compare the request for proposal (RFP) process to the sealed low bid. Under an RFP, selection criteria are established to determine the ability of the proposers to meet the outlined scope of work. Factors include the experience of the individuals involved (instead of simply the firm), previous work the firm has performed, minority and female subcontractor participation and price. Sometimes, price is not considered until the appropriate, qualified vendor is selected, and price is always negotiable.

In the low-bid process, the procuring agent first determines whether the proposers have met the specifications, which tend to be more rigid than the RFP process; then, whichever of the proposers that submitted the lowest price wins. In many ways, the low-bid process reduces the deal to simply paperwork.

This comparison is important in light of case law regarding affirmative action programs. Since the Supreme Court's 1977 *Bakke* ruling, organizations have been able to use race as a factor in the selection process as long as it is not *the* factor. In the procurement arena, on the other hand, case law focuses on the low-bid system to determine whether minority and women contracting goals are flexible and aspirational (that is, in "good faith").

A deeper appreciation, though, by the judiciary of the procurement selection process might place as much emphasis on the operation of the purchasing system as on the contracting goals themselves.

How does the purchasing method affect the operation of minority and women contracting goals? Essentially, the more the procurement method fosters open and fair competition (or considers all competitive factors), the more the goal functions as aspirational. For instance, compare again the low bid and RFP processes. Since the determining factor is price, low bid forces minority and female participation objectives to function more as a set aside than an aspirational goal, as dictated by the Supreme Court. Any other factor that obtains as equal a consideration as price diverts from the principal functioning of the low-bid process.

On the other hand, the RFP process allows the entity to use many factors in selection, without any one factor overwhelming the final decision. For example, in a situation where qualifications, experience, minority and female participation and price are given equal weight, a vendor could have high minority and female participation, and still lose the award based on other factors. This type of procurement process should decrease the entity's legal

liabilities when establishing aspirational goals. Theoretically, if only majority contractors bid on a certain contract and all decide not to use minority and women subcontractors, then all simply lose the opportunity to gain selection points based on this factor. It becomes completely the choice of the vendor as to whether it will attempt to gain a competitive advantage over another vendor by including minorities and women on its team.

Like low bid, these alternative procurement methods are not without risk for small, minority and women owned businesses. If procuring agencies do not operate in an environment of absolute transparency and accountability, then the subjective nature of these methods can be severely abused and can easily undermine established contracting goals. Capacity, capability and qualifications become the mode by which the purchasers can favor large firms or discriminate against small firms.

Additionally, if the procuring agencies do not have a firm commitment to small business participation, then majority firms, through the old boy network or other exclusionary efforts, can simply decide among themselves to exclude these firms from participation. This is too often the case in the private sector, where procurement systems are not open to public scrutiny, are less regulated and place less emphasis on inclusionary policies.

By focusing on the deal, whereby price is just one element in the overall bid evaluation, and transparency and accountability are priorities, the procuring entity will enhance open and fair competition, while small, minority and women owned firms can focus on selling the best-quality products and services at the best price. ♦