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Procurement Commission Recommendations on Competitively Awarding Government Contracts

The Commission on Government Procurement was created in November 1969 to study and to recommend to the Congress methods "to promote the economy, efficiency, and effectiveness" of procurement by the executive branch of the Federal Government. The Commission's study was completed and its four-volume report was submitted to the Congress in December 1972.

This article summarizes and explains the rationale behind some of the Commission's recommendations on competitive methods of awarding contracts and proposes certain modifications to the recommendations. It is based on a speech by the author before the American Bar Association's National Institute on the Report of the Commission on Government Procurement, Washington, D.C., May 31, 1973.

This exposition has three simple purposes—to suggest the practical applications of some of the recommendations concerning the competitive award of contracts, to point out in other cases what the recommendations do not cover, and to offer for general consideration some modifications of the recommendations.

Formal Advertising

The Commission recommends that agencies be required to use formal advertising for contracts over $10,000 when procurement circumstances justify its use and that, when advertising is not used, the contracting officer, or in a few sole-source procurements

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someone superior to him, must document why it was not used.[1]

Herb Roback[2] has written that Congressmen prefer formally advertised procurement to negotiated procurement. He writes that the rules of the game are fairly well known, automatically applied, and publicly verifiable. The rules may be automatically applied to responsible bidders, and the winner readily chosen by reference to the lowest price, because the specification employed in formal advertising dictates that the competing products be essentially identical, regardless of which competitor wins the contract. This is an important point to be discussed later under competitive negotiation for fixed-price contracts.

The recommendation on formal advertising proposes two substantive changes in current law, one more apparent than real. That is, current law purports to set forth with considerable specificity the circumstances which justify not using formal advertising. In point of fact, the circumstances are broadly stated in the present statute and their recommended elimination does little, in my judgment, to change the practical effects of the law. In short, the agencies always have exercised broad latitude in deciding whether to use formal advertising and, under the Commission recommendation, they shall continue to enjoy that latitude.

The second substantive change is that when the contracting officer decides to use competitive negotiation instead of formal advertising, his judgment will not be required by statute to be reviewed and approved by a superior. While this is a real change in the law, I question whether it will result in significant changes in practice. Under the proposed change, regulations may be issued that require the same degree of review as is prescribed by the original procurement statutes of 1947 and 1949.

What the recommendation does not say is whether the General Accounting Office should have the authority to review the reasonableness of the decision to use negotiation instead of formal advertising. The current law is that GAO has the authority to review only those determinations to negotiate that are not required by the statute to be made by the head of the agency and may not review any of the factual findings required by the statute to be in writing and supportive of the determinations.[3]

In years past, controversy accompanied the question whether GAO should be empowered, in practical effect, to reverse a decision to use negotiation. Now, however, the Commission recommends the law authorize competitive negotiation as an acceptable and efficient procurement method

[1] Recommendations 3(a), (c), (d), p. 20, and recommendation 7, p. 26, vol. 1, Report of the Commission on Government Procurement. Further citations to recommendations are to the same volume of the cited report.

[2] Staff Director, Committee on Government Operations; Staff Director, Subcommittee on Legislation and Military Operations, U.S. House of Representatives.

[3] See 51 Comp. Gen. 658 (B-174809, Apr. 20, 1972) and B-174791, Oct. 20, 1972; cf. 10 U.S.C. 2310.

when the use of formal advertising is not justified.[4]

Well, "so what?"—one could ask. Current law already requires the use of formal advertising in some circumstances and authorizes competitive negotiation, and sole-source negotiation for that matter, when formal advertising is not used. Whether negotiation is "acceptable and efficient," in the words of the Commission recommendation, is a matter of conjecture which will not be resolved by cluttering the statute with charitable characterizations of its consequences.

Still, the *tone* of this apparently oblique recommendation is markedly different from current statutory language and therein lies its significant departure from existing written law.

Under the recommendation, one would have to "justify" his decision to use formal advertising. Under current law, he is required to use it "whenever feasible." Competitive negotiation is proposed as an "alternative," and clearly, if one takes into account the narrative of the Commission report backing up the recommendation, the negotiation alternative must be considered at least as acceptable as formal advertising. Moreover, the Commission recommends eliminating the statutory roadblocks to competitively negotiating a procurement after an unsuccessful attempt to formally advertise it. This means that in fixed-price procurements using a specification of doubtful adequacy for formal advertising, the contracting officer has fewer constraints against trying the more nearly automatic, publicly verifiable method of procurement—less concern that, if formal advertising does not work out, he will be unalterably stuck with the lowest bidder who offers at best a marginal product.

Competition

Another practical consequence of this recommendation may prove rather curious, and I do not refer to the suggestion of some that adoption of the recommendation will cause formal advertising to atrophy. The assumption of such a suggestion is that formal advertising deserves its reputation of ubiquity in Government procurement. It does not. Advertising has accounted for less than 15 percent of the annual procurement dollars since World War II. The hard fact is that the Government does not use formal advertising very much, and that, when it does, it is often for relatively insignificant procurements of under $10,000. If the Commission recommendation to increase the small purchase limitation from $2,500 to $10,000 is accepted, that recommendation,[5] not the one endorsing competitive negotiation, would itself permit the abandonment of formal advertising in 98 percent of all military procurement actions.

Others suggest the Commission treatment of formal advertising and competitive negotiation emphasizes the distinction between competitive procurements and sole-source procurements. It may be so perceived, but the perception is unlikely to have much to

[4] Recommendation 3(b), p. 20.

[5] Recommendation 7, p. 26.

do with changing the fact that almost 60 percent of military procurement dollars are spent on sole-source procurements.

The curious practical effect of this Commission recommendation that endorses "competitive procurement,"—don't we all—is that we shall begin to deal with our disagreements about what we mean by "competitive." The procurement laws have not defined "competition," and the term is used in very different ways.

The narrative of the Commission report does define competition—as the effort of sellers, acting independently of each other and offering products or services that are *reasonably close substitutes* for those offered by other sellers, to secure the business of the buyer by proposing the most attractive contract terms.[6]

The Commission recommendation that most nearly reflects the Commission definition of competition, in my judgment, is the one which proposes to amend the only generally applicable provision on the law books today dealing with competitive negotiation—that is, the statute that requires oral or written discussions with all responsible offerors who submit proposals within a competitive range.[7]

Competitive Negotiation

First, the Commission would extend this military statute to civilian agencies.[8] It would require that proposals be solicited from a "competitive" rather than a "maximum" feasible number of firms.[9] While the concept of "competitive number" is vague, it should convey the intent that the desirable number of sources depends on the economic conditions which prevail in the market at the time the purchase is made. The "competitive" number in fixed-price competitions, for example, usually might be taken as that number necessary to generate the rivalry among sellers to which the Commission definition alludes.

R&D procurements of innovative ideas ordinarily are not purchased with fixed-price contracts. Essentially, they are not price competitive. Therefore, participation of a "maximum" number of firms feasible in an R&D procurement does not insure minimum costs, a primary purpose of the statute requiring solicitation of the "maximum" number. Thus, the desirable number of firms for the economic conditions which ordinarily prevail in an R&D market could be less than the maximum feasible.

Fixed-Price Contracts

The next element of this Commission recommendation on competitive negotiation is quite significant. The current statute on competitive discussions says one need not conduct such discussions if he believes an initial proposal offers a "fair and reasonable" price. Commission studies suggested that proposers do tend to pad their initial fixed-price offers;[10] often,

[6] P. 19, vol. 1. Emphasis supplied.

[7] 10 U.S.C. 2304(g).

[8] Recommendation 4(a), p. 22.

[9] Recommendation 4(b), p. 22.

[10] P. 23, vol. 1.

the Commission speculated, because the specification was too imprecise to communicate to sellers a common understanding of the Government's actual needs. It felt discussions could and do clear up misunderstandings about what the Government wants. It believed the Government probably would end up getting lower offers if it used discussions to make sure everyone had the same understanding of what the Government expected to get out of the bargain.[11]

In view of this, the Commission proposed that the statute be amended to require the issuance of regulations concerning *fixed-price* competitions; which regulations must, in turn, facilitate the use of discussions when necessary for *a common understanding* of the product specifications.[12] This "common understanding" harks back to the Commission definition of competition as a phenomenon involving products or services that are "reasonably close substitutes" one for the other. The necessity in these *negotiated* procurements for a common understanding of the specifications is also related, in my opinion, to the Commission's analysis of formal advertising. The Commission concluded that the unique feature of formal advertising is the demand for essential identity between, not merely a common understanding of, competing products or services.[13]

The Commission appears to have decided that competitive discussions ordinarily should take place in a fixed-price procurement that must be negotiated because the specification is not sufficiently precise to demand at least functional identity between competing products or services. Such discussions would strive to establish that competing products be reasonably close substitutes for each other, perhaps even functionally identical insofar as the Government's needs are concerned. Of course, the statute should not dictate that the Government bargain endlessly.[14] It is within reasonable limits that, in the Commission's judgment, such discussions should aim at establishing that common understanding that may permit a fixed-price contract to be awarded on the basis of the lowest price finally offered.[15]

If this is a sound idea, then the implementation of the idea should be *required* by the statute, not simply set forth in the statute, with directions that the regulations ought to require its implementation.

Cost-Type Contracts

After addressing fixed-price negotiated competitions, the recommendation turns to competitions that are not expected to be awarded primarily on the basis of the lowest price. Here the extent of the competition in many cases will be limited largely to technical rivalry between firms, and the degree to which their products or services represent reasonably close substitutes may be considerably less

[11] Pp. 23–24, vol. 1.

[12] Recommendation 4(c), p. 22. Emphasis supplied.

[13] P. 19, vol. 1.

[14] P. 24, vol. 1.

[15] P. 24, vol. 1.

than the degree exhibited in fixed-price competitions. Indeed, the Commission report points out that such commonality often is the antithesis of a good R&D procurement, thus precluding the full use of competitive techniques.[16]

The Commission, taking into account the practical absence of competition that centers on price in these procurements, attempted to provide for at least as common a baseline as feasible to evaluate cost-type proposals and for assurance that the contractors would know the baseline of evaluation. Therefore, it recommended a new statutory requirement that the Government solicitation of offers set forth both the evaluation criteria and their relative importance.[17] The Commission believed nothing could be more basic to sellers than knowing what the buyer really wants. It believed that such information might not be uniformly dispensed without publishing in the solicitation the relative importance of the Government's evaluation criteria. This recommendation is in accord with numerous GAO decisions.

You will observe that the Commission recommendations and the narrative of its report recognize substantial differences between a contest for a fixed-price contract and one for a cost-type contract. It would be desirable to alter the scheme of the Commission recommendation by dividing "competitive negotiation" into two separate categories of recognized procurement methods. While this might have the appearance of being an unduly complicated departure from the current and simple dichotomy of "advertising" and "negotiation," it more accurately reflects, in a still general way, the procurement methods we actually use.

Dividing negotiation into its components—competitive fixed-price, competitive cost-type, and sole-source—would facilitate devising procedures for each, by way of regulations, of immeasurably greater clarity. For example, it might facilitate coming up with one set of rules on competitive discussions for fixed-price contracts—their length, scope, and frequency—to seek a common understanding of the specifications and the lowest price and another set for cost-type contracts in R&D procurements to deal with such problems as those characterized by the jargon "technical transfusion."

[16] P. 43, vol. 2.

[17] Recommendation 4(d), p. 22.