

## LIMITING COMPETITION IN SCHOOL ROOF BIDDING

Despite Public Contract Code provisions that require competitive bidding in publicly-funded construction, an investigation by the state Assembly Committee on Accountability and Administrative Review has found widespread efforts to limit competition in school roofing projects throughout the state. In both large and small school districts, community college districts and state universities, proprietary specifications are used in bidding documents to force contractors to use a specific roofing manufacturer's products, even though there are more than a dozen roofing manufacturers selling similar products in California.

Bidding documents examined by the Committee for school re-roofing projects throughout the state all limited roofing products to a specific manufacturer and created significant hurdles for any contractor attempting to substitute an alternative product that could be similar in quality but at less cost. Roofing industry officials, contractors and school district officials interviewed by the Committee all suggested this limited competition occurs routinely in numerous school districts, community college districts and universities, and leads to non-competitive bidding and higher prices.

School roofing projects are typically awarded to a contractor with the lowest bid through a procurement process set up by the purchaser. While the bidding processes that the Committee reviewed indicate that multiple contractors bid on these jobs, the contractors are often limited to the products they use by the specifications put forth by the school district. Some contractors also cannot bid on these jobs because they are not approved by the manufacturer that is being singled out for the project in the specifications. This can inflate the cost of a project by 25 percent or more. Industry officials indicate that at least three roofing manufacturers have specific business models aimed at subverting the competitive bidding process. Sales representatives from these roofing manufacturers provide free consultations for the district officials, design consultants or architects who do the construction planning and procurement for schools. The manufacturers' representatives also often provide bidding documents with specifications favoring their company. School district officials use these documents because districts often lack in-house roofing expertise.

Specifications that limit competition are referred to in the industry as "closed specs," or "lockout specs." The Committee found numerous bidding documents showing different ways in which competition for products is limited:

- ***Brand names are specified.*** Bidding documents from school districts in Northern, Central and Southern California for re-roofing jobs done within the last year specifically name a single manufacturer as the product supplier. In several cases, the documents include the name of the sales representative and his phone number. State Public Contracting Code Section 10129 prohibits specifications "in a manner that limits the bidding, directly or indirectly, to any one specific concern," and prohibits "calling for a designated material, product, thing, or service by specific brand or

trade name unless the specification is followed by the words 'or equal,' " which would allow contractors to substitute an alternate product. In some documents the Committee reviewed, there is no "or equal" clause, a clear violation of state law. In others, the "or equal" clause is included, but further descriptions of the product materials make it extremely difficult to provide an equal product, as described below. See Exhibit A for an example.

- ***Products are described in a way which singles out one manufacturer.*** Some of the bidding documents reviewed do include the "or equal," clause, but then contain detailed descriptions of desired products that only pertain to one company's product, making it impossible to find an equal product from a different manufacturer. For example, specifications require that roofing materials be made of a specific combination of ingredients that are only produced by one manufacturer.

Another common method used to limit competition for products centers around product ratings associated with ASTM International, originally known as the American Society for Testing and Materials. ASTM International creates standards for testing products to ensure their content and performance. Specifications reviewed by the Committee often required that a product meet a specific ASTM rating that only one manufacturer's product meets, without stating that the product could meet that rating or better. By singling out one specific ASTM rating, instead of suggesting that rating or a higher rating, only one product qualifies. Another way ASTM ratings are used to limit competition is to list an obscure and unimportant ASTM test that only one manufacturer's product has been tested for, thus requiring any contractor wishing to use a substitute product to pay for the specific test. Testing also requires time, and many manufacturers would not have time to conduct the test before the bid deadline. A manufacturer can add a teaspoon of one useless additive that can be tested for, creating a proprietary product that can be called out in bidding documents by using an ASTM test that no other manufacturer's product would have undergone.

Many of the "closed specs" reviewed by the Committee provide overly detailed descriptions of each piece of a roofing system, instead of simply calling for roofing materials that fit basic quality performance standards. These overly complicated specifications are unnecessary and allow for the elimination of competition, according to the industry officials and experts the Committee interviewed. See Exhibit B for an example.

- ***Hurdles are created to eliminate the ability of contractors to use substitute products that could be cheaper and of similar quality.*** In addition to creating detailed specifications that limit products, many bidding documents impose significant hurdles on any contractor seeking

to substitute a named product. For example, some bidding documents require substitute products to be approved as an equal to the named product by a licensed engineer or testing lab, which would require expenditures that would raise the bid price and take too much time to meet the bid deadline. Other bids require proposals for substitutes to be submitted days or weeks in advance of the closing date, leaving contractors with little or no time to prepare alternates. Other bids require the specified manufacturer to approve the use of a substitute. In other words, the pre-selected manufacturer would have the authority to decide if a competitor's product could be used. See Exhibit C for an example.

Contractors typically must submit a bid bond with each bid that is 10 percent of the total estimated cost of the project. This is generally used by public agencies to ensure that all contractors are properly licensed and qualified to perform the task and that should they win the bid, they will perform the work at the price they offered. Contractors can lose this bond if they win the job and then are discovered to be unqualified, or if they cannot do the job at the price they offered. Should a contractor submit a substitute product that is cheaper than the product singled out in the "closed spec," the agency awarding the bid can reject the substitute and require the contractor to use the products specified in the bidding documents, but at the less expensive price originally offered by the contractor. Thus, the contractor would pay more for the products needed for the job and lose money doing the work. He would lose the bid if he withdraws his offer. This is one more way in which "closed specs" discourage any contractor from attempting to use a substitute product.

## **OTHER STATES' EXPERIENCE WITH INEFFICIENT BIDS**

Investigations into public roofing projects in many states including California have one common theme:

The taxpayer is cheated through a skillful and complex scheme to limit competitive bidding and inflate prices.

### **NEW JERSEY**

The Commission on Investigation for the State of New Jersey issued a report in September 2000 entitled "Waste and Abuse: Public School Roofing Projects". The statewide probe involved a review of 115 separate roofing projects in 39 of New Jersey's school districts.

According to the report, the Commission found evidence of "widespread cost-gouging; unscrupulous bidding practices; contract manipulation; questionable design, installation and inspection procedures and other abuses." The Commission found instances where design consultants, working in secret partnership with suppliers and manufacturers of roofing materials, prepared proprietary specifications that favored a set of products that eliminated competition. Technical hurdles were placed throughout project specifications to "foreclose the possible substitution of less expensive materials of similar or equal quality."

In one instance the Commission found that a design consultant representing a school district received fraudulent payments (usually disguised as 'roof inspection fees') of more than \$361,000 from a leading supplier of premium-priced roofing materials.

Through the years, these problems and practices have been repeated and exposed in a number of states.

### **MASSACHUSETTS**

In 2003, the Office of the Inspector General for the Commonwealth of Massachusetts uncovered the same procedures and practices at work in the field of public school roofing in particular and public buildings in general.

"This Office has observed improper use of proprietary specifications for roofing projects in Massachusetts...

"...some governmental bodies have issued specifications that named a particular brand but purported to allow vendors to propose other products equal to the named brand. Simply adding the phrase "or equal" does not transform a brand-name, proprietary specification into a competitive specification. The specifications reviewed included technical requirements that effectively prohibited use of materials other than the named

brand, thereby nullifying the “or equal” provision...In another example, the municipality specified that the school building roof had to be a certain color that was available from only one manufacturer...By including technical requirements that only one manufacturer could meet, the specifications effectively eliminated competition; without written justification, the proprietary specifications were unlawful.”

### **MINNESOTA**

In 2009, the Minnesota Office of the State Auditor reported on roofing projects noting “the likelihood of proprietary specifications restricting the pool of contractors among other findings leading to improper bidding and contracting at higher prices.”

### **OTHER STATES AND CALIFORNIA**

Similar reports have come out of Indiana, New York, Pennsylvania, Arizona, Ohio, New Mexico, Maryland, and Virginia.

## **THE CALIFORNIA EXPERIENCE**

The Committee has found evidence that suggests California is a current victim of efforts to limit competition in bidding on public projects to replace roofs—even though such a scheme was uncovered in advance of in advance of the New Jersey investigation.

Previous investigations and lawsuits in California demonstrate that unfairly limiting competition among roofing manufacturers has occurred. In addition, a Committee review of the duties of various state entities involved in distributing state funds for school construction shows that there is limited oversight responsibility for ensuring competitive bidding practices.

In a lawsuit filed in 1997 in California, the State sued a company engaged in roofing public schools in California. The case was settled and an injunction applicable to all parties named, including any employees, representatives, agents, successors, etc. was issued “enjoining and restraining the parties from engaging in the following acts or practices in the State of California:”

Bid rigging, vertical price fixing, horizontal price fixing, unlawful, unfair or fraudulent business practices, or commercial bribery were all included. The company was directed to incorporate specific practices into its business model, agree to maintain specified records for a five-year period from the date of the settlement. The company was also required to pay specified monetary awards. (See Exhibit D)

It appears that the practices this judgment intended to end continue to be a problem in many public school districts today.

### **CALIFORNIA STATE AUDITOR**

In 2003, the California State Auditor investigated the complaint of a whistleblower at the University of California at San Francisco who alleged that the university had violated state contracting law and University of California Regents' policies by using bidding specifications for several roofing projects that unfairly restricted competition. The State Auditor hired a roofing expert who reviewed bidding documents for several campus roofing jobs. The consultant found that the documents unnecessarily forced contractors to use one manufacturer's products by detailing the exact ingredients required of a roofing membrane, which only were produced by one company. In addition, the consultant found that the bidding documents limited the ability of contractors to submit alternate products by requiring additional tests of a proposed alternative that would have added cost to the bid. (See Exhibit E)

### **STATE INVOLVEMENT**

Improvements on school construction projects funded by state budget revenues and state school bonds often appear to cost more than is necessary due to inefficiencies or the lack

of safeguards in the bidding procedures used. The Committee found repeated instances of bids that were proprietary in nature and locked out competition (discussed in additional detail under "Limiting Competition in School Roof Bidding").

The responsibility of various state agencies is self-described in the following sections.

### **STATE ALLOCATION BOARD**

"The State Allocation Board (SAB) is responsible for determining the allocation of state resources (proceeds from General Obligation Bond Issues and other designated State funds) used for the new construction and modernization of local public school facilities... The SAB is the policy level body for the programs administered by the Office of Public School Construction."

"As staff to the State Allocation Board, the Office of Public School Construction facilitates the processing of school applications and makes funding available to qualifying school districts..."The Office of Public School Construction (OPSC) is also charged with the responsibility of verifying that all applicant school districts meet specific criteria based on the type of funding which is being requested..."

"It is also incumbent on the OPSC staff to prepare regulations, policies and procedures which carry out the mandates of the SAB, and to work with school districts to assist them throughout the application process. The OPSC is responsible for ensuring that funds are disbursed properly and in accordance with the decisions made by the SAB.

All of this activity focuses on ensuring that funds are applied for and spent for the correct purposes. In essence, none of this ensures that a project is bid correctly or prevents unnecessary or deceptive proprietary bidding from occurring—or that the contractor most able to replace a roof at the least expensive price is awarded the job.

### **DEPARTMENT OF GENERAL SERVICES**

The Department of General Services establishes California Multiple Award Schedules (CMAS) as base contracts that can be used to purchase goods and services. These contracts also do not safeguard against these practices, nor guarantee the lowest cost. They represent the maximum cost if you use the CMAS contractors. In order to go through an easier process, state and other public entities can use the CMAS process and pay a percentage of 2.5% of the total contract cost to the Department of General Services (DGS) for establishing the CMAS or pursue an independent procurement process through an RFP and obtain bids—still paying DGS the same percentage of the total contract amount.

Historically, the State School Deferred Maintenance Program (including roofing) provided State matching funds on a dollar-for-dollar basis, to assist school districts with expenditures for major repair or replacement of existing school building components. Revisions to the 2008-09 fiscal year State Budget Act and the 2009-10 fiscal year State Budget Act grant school districts flexibility to use Deferred Maintenance funding for any

educational purpose with no required school district matching share. This flexibility is in effect until the 2012-13 fiscal year.

Funding for this program is generated from the State General Fund, and State General Obligation Bonds sold and loaned to the districts for that program, and from certain State School Site Utilization Funds.

### **LOCAL SCHOOL BOND OVERSIGHT COMMITTEES**

In a 2009 report, the Little Hoover Commission noted that a key mechanism for ensuring that school construction programs around the state were expending money in an efficient manner was weak and ineffective. Proposition 39, approved by voters in 2000, lowered the threshold to pass local school bonds to 55 percent but also required the creation of local school bond oversight committees to act as watchdogs over bond expenditures. In its report, the Little Hoover Commission found that these committees were sometimes not created and often performed little true oversight. The Commission recommended that the Legislature improve the mandate of these committees by more specifically describing their roles, allowing outside groups – not just school districts – to nominate committee members and ensuring that committee members received some training to understand their role and how to interpret audits of construction expenses. (See Exhibit F)

## COMPARISON OF COSTS USING

### PROPRIETARY SPECIFICATIONS VS OPEN SPECIFICATIONS

PROPRIETARY SPEC (PS)	BID AMOUNT WITH PS PRODUCT	BID AMOUNT WITH OTHER PRODUCTS	JOB SIZE	WINNING PRICE PER SQ	LOSING PRICE PER SQ
X	\$585,000	\$315K	400 SQ	\$ 14.62	\$7.87
X	\$367,760	\$230K	285 SQ	\$ 12.90	\$8.06
X	\$1,464,000	\$915K	1500 SQ	\$ 9.76	\$6.10

OPEN SPEC (OS)	BID AMOUNT WITH PS PRODUCT	BID AMOUNT WITH OPEN BID PRODUCTS	JOB SIZE	WINNING PRICE PER SQ	LOSING PRICE PER SQ
X		\$350K	450 SQ	\$ 7.77	
X		\$230K	350SQ	\$ 6.57	
X		\$317K	400 SQ	\$ 7.92	
X		\$600K	1000+SQ	\$ 6.00	

As the chart above illustrates, the use of proprietary specifications leads to higher costs in re-roofing California public schools.

This results from requiring a specific product which is then vastly overpriced in comparison to others on the market that may provide equal performance.

The three projects shown above that were bid with proprietary specifications are from 39% to 47% higher as opposed to another qualified bidder attempting to substitute an equal product.

The four projects shown that were bid using open, generic specifications all came in at between \$6 and \$7 per square (100 square feet equals a "square in roofing terms) as opposed to the proprietary specs which routinely come in at twice the open or generic bid cost.

These figures were obtained by committee staff in reviewing bids obtained throughout California.