

LIMITING COMPETITION IN PUBLIC ROOFING PROJECTS

A nearly year-long investigation by the Assembly Committee on Accountability and Administrative Review has found a statewide, widespread pattern in publicly-funded roofing projects that unnecessarily limits competition among roofing manufacturers and drives up the costs of roofs.

The Committee has reviewed dozens of bidding documents for roofing projects for school districts, universities, community colleges, municipal buildings and state buildings that force contractors to use a specific roofing manufacturer's products, even though there are numerous roofing manufacturers selling similar products in California. Interviews with roofing professionals indicate this practice of stifling competition can double the cost of a roof.

State Public Contract Code Section 3400 prohibits public agencies from drafting specifications that limit competition. Agencies that call for a designated material or product in bidding documents must allow for bidders to provide an alternate product by including the phrase "or equal" whenever a brand or trade name is listed in the documents. Public agencies are allowed to bypass this prohibition if they are testing a new product, if the material is available from only one source, if there is an emergency, or if they are matching a product to one already in use.

The Committee has discovered numerous examples that appear to violate the spirit of this statute. While the bidding processes that the Committee reviewed indicate that multiple contractors bid on these jobs, the products contractors can use are often limited by the specifications in bidding documents. Thus, contractors are not able to find the best product at the cheapest price – they are all required to use the same product, limiting their ability to shop around and provide the best value to the public agency.

In some cases, sales representatives from roofing manufacturers provide free consultations for public agency officials, design consultants or architects who do the construction planning and procurement for public building projects. The manufacturers' representatives also often provide bidding documents with specifications favoring their company. Government officials use these documents because most agencies lack roofing expertise.

Specifications that limit competition are referred to in the roofing industry as "closed specs," "lockout specs," or "proprietary specs." Virtually everyone in the roofing industry that the Committee spoke to is familiar with this practice. Among the ways that competition is limited are:

- ***Brand names are specified.*** Bidding documents from public agencies in Northern, Central and Southern California for re-roofing jobs done within the last three years specifically name a single manufacturer as the product supplier. In several cases, documents include the name of the sales representative and his phone number. In some documents the Committee reviewed, a brand name is specified without an "or equal" clause, a clear violation of state law. In others, the "or equal" clause is included, but further

description of the product materials make it extremely difficult to provide an equal product, as described below.

- ***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 pertain only 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 produced by only one manufacturer. In other cases, descriptions of products' attributes, such as tensile strength, are written so narrowly that only one product can be used, even if there are other products with a higher tensile strength that may be cheaper.

Another common method used to limit competition 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 has. (A specification that would encourage competition would suggest an ASTM rating that could be met, but include the phrase, "or better," to allow multiple products.) 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. 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.

- ***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 product by a licensed engineer or testing lab, which requires expenditures that would raise the bid price. Other bids require proposals for substitutes to be submitted days or weeks in advance of the closing date, leaving contractors very little 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 was used or not.

Contractors typically must submit a bid bond with each bid that is 10 percent of the total estimated cost of the project. Contractors could lose that bond if their substitute is rejected, leaving most contractors unwilling to risk submitting a substitute.

The Committee has included six examples in this binder to illustrate specifications that appear to unfairly limit competition. The Committee has chosen to black out the names of the manufacturers and public agencies in these documents to allow for a more open discussion of the issue and to not single out any one company or agency.

2010 legislation did "not go far enough." Based on the Committee's first hearing on this topic, in June 2010, the Committee sponsored AB 635 last year. The measure was signed by Gov. Arnold Schwarzenegger on Sept. 29, 2010. AB 635 added Sections 3000 - 3010 to the state Public Contract Code and requires architects, roofing consultants, roofing manufacturers and other roofing professionals to disclose financial relationships. The law also directs anyone with knowledge of bid rigging in public roofing projects to notify the Attorney General or Bureau of State Audits.

In a signing message, Schwarzenegger called the legislation a "good first step" but said it did not go far enough in addressing the problem. "I encourage the Legislature to continue working on the issue to ensure additional school funds are being spent prudently," he wrote.

The Committee believes the problem first addressed in 2010 is continuing in 2011, based on interviews with roofing professionals around the state and reviews of recent construction projects.

Attachments:

Six examples of "closed specs."

Bureau of State Audits, Investigations of Improper Activities by state Employees, February 2003 – June 2003. September 2003. "University of California, San Francisco: Improper Contracting Practices."

San Francisco Chronicle, July 23, 2010. "Schools paying millions too much for new roofs."

EXPERIENCES IN CALIFORNIA AND OTHER STATES REGARDING PROPRIETARY SPECIFICATIONS

Previous investigations in California and other states have shown that limiting competition among manufacturers for publicly-funded roofing projects adds unnecessary costs to projects and violates the spirit of public contracting codes that encourage competition.

California. In California, the Bureau of State Audits investigated a complaint lodged by a whistleblower in 2003 that bidding documents for roofing projects at the University of California San Francisco were written to unfairly limit the ability of all but one manufacturer to provide products for several roofing projects. Auditors concluded the university violated state contracting laws and University of California Regents' policies by using bidding specifications that unnecessarily restricted competition. The written explanation of the audit is included in this binder. A representative from the Bureau of State Audits will testify at the hearing regarding this investigation.

New Jersey. In New Jersey, the State of New Jersey Commission on Investigation, an independent government organization that investigates organized crime, public corruption and government waste, released a report on school roofing projects in 2000 that found evidence of "widespread cost-gouging; unscrupulous bidding practices; contract manipulation; questionable design, installation and inspection procedures and other abuses." The Commission reviewed 115 roofing projects in 39 school districts and found numerous examples of architects and other consultants working in secret financial relationships with manufacturers to prepare proprietary specifications that limited competition for school roofing projects.

Massachusetts. In 2003, the Massachusetts Office of the Inspector General also reviewed public roofing projects and found unnecessary proprietary specifications, such as specifications that required products to be a certain color manufactured by only one manufacturer.

Minnesota. A 2009 investigation by the Office of the State Auditor in Minnesota found that a large school district in that state used specifications written by a manufacturer that favored that manufacturer's products. The specifications presented multiple insurmountable hurdles to contractors who wished to provide a substitute product, such as requiring expensive testing to show that the substitute product met the exact same qualities as the specified product, and requiring contractors to submit bids with substitute products two weeks in advance of other contractors.