Pre-qualification
Rights and wrongs


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AT TIMES, PUBLIC SECTOR organizations pre-qualify suppliers who may bid for contracts. Whether for a specific instance or for a broad category, such as all city engineering contracts or those up to a given amount, the motivations for pre-qualification may be:

- to reduce the number of prospective bids to a manageable number. Bidding for a public contract can be time consuming and expensive. Where there are numerous potential bidders, thus reducing the chance of securing the contract, good suppliers may refuse to bid. Paradoxically, reducing the number of bidders may increase the quality of competition;
- to ensure that the only bids received are from organizations that have the technical, staff, and financial resources, as well as the experience required to perform the contract. Under the current law of tender, normally a tendered contract must be awarded to the lowest qualified bid. Pre-qualification can ensure that all participants in a competition are able to do the work; and/or
- to evaluate market interest in a proposed contract, before proceeding to a full-blown tender.

Nevertheless, pre-qualification is fraught with difficulty and prone to controversy. It is inherently exclusionary, thus contrary to the principle that government contracting should be open. Where the criteria for selection are obscure, the principle of transparency is also violated. Perhaps most important, pre-qualification limits the amount of competition and may lead to higher costs.

The legal implications of pre-qualification are not yet settled. Because pre-qualification is remote from the contract award, it is doubtful whether the *Ron Engineering* line of case law applies. However, in recent years, courts have imposed wide-ranging duties of fairness on public authorities in relation to their contracting process – particularly where the selection (or disqualification) of a supplier involves the exercise of a statutory power of decision or the exercise of legislative authority. Although it is unlikely that a general duty of fairness applies to every preliminary and integral step in the award of a contract by way of a competitive bidding process, a blatantly unfair approach could be problematic.

Irrespective of legal implications, most public authorities have no desire to behave unfairly. Most have bylaws or legislation and policies in place which specifically direct staff to act in a fair and open manner when selecting suppliers. To the extent that such requirements apply, the first problem is to find a method of conducting pre-qualification that is reasonably fair. Unfair methods can raise problems under international trade arrangements. Fortunately, some guidance on structuring a suitable system may be found in Article 7 of the *UNCITRAL Model Law on Procurement of Goods, Construction and Services, 1994,* (©United Nations). Whether or not this particular precedent is followed, the scheme of pre-qualification employed should be clear in its terms, consistent in its application and offer all applicants fair guidance as to all applicable experience and other requirements, and the selection that will be used to identify acceptable suppliers.

UNICTRAL Article 7 is aimed primarily at achieving procedural fairness in the selection of suppliers. It is more difficult to achieve substantive fairness. Problems can occur such as:

- using overly precise or demanding pre-qualification criteria. Perhaps the worst possible outcome to a fairly run pre-qualification scheme is that not a single supplier meets the tests. One could go back to the market with less demanding criteria, but there is a serious risk that some suppliers may not bother to apply the second time around.
- using overly subjective criteria. The use of highly subjective criteria lends itself to the criticism that it is being used as a covert method of preferring specific suppliers.
- using non-standard, supplier or product specific criteria. Just as specifications can be rigged to favor a particular supplier (*Summit*, June 2004), so too can pre-qualification criteria. For instance, pre-qualification criteria such as "…must have experience in servicing computers in an all 'Widget PC' office," may exclude any supplier other than a Widget PC supplier.
- excessive use of pre-qualification. An example is using it in contracting for simple, non-critical items, which will invariably be carried out in accordance with standard industry practice or government regulatory standards.
- setting higher pre-qualification criteria than justified by the contract.
- political problems resulting from complaints by small suppliers who may not be geared for dealing with the additional formal requirements of pre-qualification.
- and, stale pre-qualification. The longer the time interval between pre-qualification and the final award of the contract, the greater the chance that the bidder(s) selected will no longer have all the resources and the experience required to perform the contract. People leave and resources dwindle.

None of the above means that the pre-qualification process should not be used. However, when it is used, it should be employed carefully; all aspects of the process should be defensible. The criteria of selection should be demonstrably relevant and should be applied in a way that is seen to be fair. Failsafe mechanisms need to be in place to deal with unexpected or unusual situations, such as the possibility that a suitable (perhaps even ideal supplier) may fail to pre-qualify.

Pre-qualification is a time-consuming process and imposes additional cost on the procurement effort. If a purchasing department has barely sufficient resources to administer its existing competitive award program, it should be reluctant to adopt pre-qualification as a widespread practice.

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