E-Procurement Policy Issues

NECCC
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National Electronic Commerce Coordinating Council

The National Electronic Commerce Coordinating Council (NECCC) is an alliance of national state government associations dedicated to the advancement of electronic government within the states. The Council is comprised of **NASIRE** (a group representing the chief information officers of the states), the National Association of State Purchasing Officials (**NASPO**), the National Association of State Auditors, Comptrollers and Treasurers (**NASACT**) and the National Association of Secretaries of State (**NASS**). In addition to these voting members, other governmental and private organizations participate in an advisory capacity. These associations include the National Governors Association (**NGA**), the National Association of State Chief Administrators (**NASCA**), the Information Technology Association of America (**ITAA**) and the National Automated Clearing House (**NACHA**). The ITAA and the NACHA specifically represent private information technology companies and the financial services and technology industries.

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Introduction

The E-Procurement Policy Workgroup of the E-Procurement and Funding Committee is pleased to present its initial draft of the following issues papers. These papers represent the group's findings on these issues to date, and are being presented at this time, and in their current form, in order to provide some initial input on these topics, as well as to solicit input from the broader community of the National Electronic Commerce Coordinating Council (NECCC).

It has been the purpose of this group to identify, investigate, and review the pertinent issues affecting public purchasing brought about by the technology revolution we are seeing in our business and professional environments. The group views these papers as living documents, therefore, they are not presented as definitive works that are necessarily all-inclusive of every consideration. These are initial presentations on issues which will be more fully developed and enhanced through input that is received during the Annual Conference, and through further discussion and interaction over the ensuing months.

We believe that the members of the NECCC can derive benefit from the level of information that is being provided at this time and look forward to being of even greater service through the enhancement of this information in the months ahead. In that these and other related issues are evolving as technology evolves, it is our recommendation that the NECCC continue this group in the coming year.

It has been our pleasure during the past year to chair the E-Procurement Policy Workgroup, which had a tremendous wealth of talent.

For the E-Procurement Policy Workgroup,

Co-chairs

David Gragan John Kennedy

Old Principles; New Paradigm

Applying Public Purchasing Principles in a New Business Paradigm

The evolution of the Internet has brought about a new way of conducting business. In fact, the capabilities presented by this technology represent nothing short of a complete paradigm shift; from a paper-based means of business interaction to an electronic one.

The challenge faced by those in the public purchasing environment is not unlike that faced by practitioners in other spheres: How does this significant technological change effect how we (as public purchasers) conduct our business?

This is, of course, too big a question to answer in a broad-brush manner. It must be broken into distinct parts in order to be treated with the proper precision, and this paper has been organized around six topics that have been identified as major issues. These topics represent the specific points at which new technological capabilities present specific challenges to public purchasing business practices. The major issues are:

1. What, if anything, should change about the manner and time over which we provide public notice of bidding opportunities?
2. Is the traditional sealed bid requirement still valid or necessary as we move to new technologies?
3. Buyer auctions, are they allowed by statute and administrative code? Are they likely to result in real savings over traditional bid methods?
4. Application Service Provider (ASP) policy implications (hosting applications on other than public networks, limitations of risk, funding...)
5. What constitutes competition (reasonable competition?) in public jurisdictions, and will this change over time?
6. How do we address local and/or small business impact issues of global visibility in procurement opportunities?

The scope of the group's initial efforts address the policy implications related to the first three of these issues: public notice, electronic bid submission, and online "auctions" as a means of obtaining pricing.

The presentation of the work group's findings regarding each of these issues will be presented in the following order:

A. Clarification of the Issue

B. The Principle Behind the Issue

C. Matters to Consider in Applying the Principle in the New Paradigm

Public Notice

Clarification of the Issue

The American Bar Association Model Procurement Code (final draft, revised, 2000) defines public notice, in part, as "the distribution or dissemination of information to interested parties using methods that are reasonably available."

The giving of public notice about bidding opportunities is practiced in many ways including: placing advertisements in newspapers with a significant readership in the jurisdiction, posting of bidding opportunities in a public place, distribution of solicitations to mailing lists, or, more recently, posting the notice on the jurisdiction's web site.

The focus of this discussion will center on a public entity's responsibility to notify the public about opportunities to provide goods or services to the jurisdiction.

The Principle Behind the Issue

The principle at work in this instance is one of competition. Public notice requirements are generally required by statute, and exist for the purpose of soliciting maximum competition from the competitive marketplace. The benefit to the taxpayer is that the lowest and best offer is uncovered, and the public money spent on the acquisition of the needed commodity or service is minimized.

When determining how to apply this principle in the paradigm of new technology, a jurisdiction should base its game plan on the understanding that, whatever means are used to give notice, they meet the intent as expressed in the applicable statute, usually one of "reasonable availability."

The use of electronic means to accomplish public notice may depend on the interested parties' ability to access the public notice. This capability can vary greatly from jurisdiction to jurisdiction (when viewed from the perspective of the general public's ability to access the notice), and from industry to industry (when viewed from the potential bidders' ability to access the notice).

Matters to Consider in Applying the Principle in the New Paradigm

Availability: A jurisdiction must ensure that, in using an electronic means of public notice, the interested parties have the means to access it. If a particular supplier community within a jurisdiction is not generally capable of receiving such notices via an electronic means, the jurisdiction should exercise caution when relying on an electronic means of notification.

Level of Access Capability: If the purpose of providing public notice is simply one of letting the public know what is going on, then a lower level of access capability on the part of the public can be assumed. If the purpose is of a more complex nature (i.e., the electronic distribution of a solicitation), the jurisdiction should ensure that the recipients have the capability to act on this notice in the manner required (e.g., the ability to download and print a specification from a web site).

Technological Infrastructure: The jurisdiction should also consider the technological capabilities within its boundaries for the public to make use of electronic means of providing public notice. This consideration should be a big picture view, encompassing such items as the general availability of Internet access within the jurisdiction, the infrastructure's ability to make electronic means practical (e.g., just because access to the Internet may be generally available does not necessarily mean that the infrastructure is capable of effectively handling more intensive means of electronic notice such as the electronic distribution of extensive solicitation documents), and a person's ability to access the notice through "public" means such as Internet access at a public office or library.

Business Considerations: The business implications of providing electronic notice via public means may entail a broad range of considerations, from the nature and level of staffing required, to a decision to have an entity outside of the public body be responsible for the task. When determining the right vehicle for public notice several questions may be asked: should web site visits versus circulation numbers for a newspaper be used as measures of effectiveness? Is there a likelihood that suppliers will be inundated with opportunities, and have to filter out certain buying entities? Is there a likelihood that an unmanageable number of responses will be received at the procurement office? Policy-making officials and the business community should be included in dialogue related to this issue.

International Considerations: The public purchaser is involved in a global economy just as much as purchasers in the private sector. Interested parties may reside anywhere in the world, if indeed, the jurisdiction views it as such. The advent of agreements through organizations such as the World Trade Organization means that giving public notice may take on a much fuller role and responsibility than it has in the past. In fact, this international responsibility could be a compelling reason for a jurisdiction's decision to have electronic means of public notice as at least a part of its game plan.

Statutory Considerations: Current statutory requirements for publication of bid notices should be reviewed. Full understanding of the statutory requirement for public notice and awareness of all agencies that may be involved in the process is preliminary to any determination regarding changes.

Sealed Bids

Clarification of the Issue

In the public sector, the predominant method of executing large one-time purchases, or establishing ongoing contracts for goods or services is a Request for Quote (RFQ)/Request for Proposal (RFP) and subsequent Sealed Bid process. This is sometimes prefaced by a Request for Information (RFI), and the process may vary significantly for the purchase of professional services (e.g., IT or Engineering).

The majority of states and an increasing number of local governments are including the Internet as a means to deliver that notice, as well as a mechanism to deliver detailed RFQ/RFP's, specifications, and bid submission forms, formats, and requirements. A few government agencies have also begun to accept and encourage response via the Internet as an alternative to the paper-based sealed bid. The specific issues surrounding the electronic submission of bids are the subject of this discussion.

The Principle Behind the Issue

There are two major considerations that come into play when delineating the principle of a jurisdiction's requiring the receipt of bids and proposals for a given procurement: "role" and "function."

The role most commonly played by a vendor's response can be expressed as one of commitment, i.e., the vendor's response to a solicitation represents the firm's committing itself to the price(s) and other information contained in its response.

The requirement of a bid or proposal is based on the jurisdiction's need to have it play two very important and necessary functions. The vendor's response fulfills the role of both a decision-making document (as viewed by the jurisdiction's evaluators prior to the award of a contract/purchase order), and as a contract document (where it represents the vendor's "half" of the agreement with the jurisdiction following the award of a contract/purchase order).

When a jurisdiction is considering receiving bids and proposals via an electronic means, it may want to consider the role and function that the vendor's response has in its procurement process. This may need to be done on a case-by-case basis, because some jurisdictions have a number of procurement methodologies at their disposal. For example, a jurisdiction may view the receipt of a bidder's response via electronic means differently in a competitive negotiation process than it does in a process that does not allow for negotiation because the role and function of the bidder's proposal is different in each of these instances.

Matters to Consider in Applying the Principle in the New Paradigm

Security: The foremost issue in the transaction of business over the public Internet is security. Fraud, confidentiality, authenticity of the signer and document, integrity of the message, and non-repudiation are typical starting points in discussions about the many possible Internet security issues. For a more detailed discussion of this issue, see: *"Electronic Commerce: A Blueprint for States"* at the NECCC web site (www.ec3.org).

Premature (or other improper) disclosure of "sealed" bid data: This could result in damage to a bidder, or at least invalidation of the bid cycle. The bid process is intended to promote competition and care should be taken in establishing clear operating guidelines, providing a secure transport mechanism for electronic bids, and avoiding any impropriety or appearance of impropriety, which would undermine public and business trust in the process.

Interoperability: The lack of fail-safe interoperability of all possible hardware, software, and internal/external data networks introduces the possibility of failed or delayed bid delivery or opening. Government should ensure the reliability of bid submission components by using commercially available, mature hardware and software in the design of the submission system. Government should also clearly specify and communicate the supported hardware and software required by bidding participants.

Sample Submission: In an electronic bidding environment, samples and bids cannot be delivered simultaneously or by the same means. Products might be pre-qualified or samples submitted after the fact. How will public jurisdictions handle the requirement to review and inspect samples prior to making an award?

Performance Bonds: A mechanism is needed to handle performance bonds which is reasonably priced, and readily available.

Experience: All businesses may not have the expertise to use software. Use of commercially available mature software will minimize the impact and enable the use of available local expertise. Outreach training may be needed.

Training: Government employees will have to be trained in the bid process and system as well.

Strategic Change: A process which directly links suppliers to the government, and which expends millions or billions of dollars of public money is tremendously visible. It deserves and receives a high level of scrutiny to ensure proper management and fairness. Public jurisdictions, in planning to investigate or institute such changes, should be aware that strategic planning is an essential first step, so that incremental change may contribute to a sensible whole.

Fragmentation within States (by agency, region, or district) or Decentralized Procurement: Agencies and governments do not necessarily follow a uniform set of procedures in their procurement processes. Electronic solutions will need to be coordinated so software, security, etc does not conflict.

Inertia: There is a reluctance to alter processes and procedures that are tried and true over generations.

Auctions

Clarification of the Issue

Auctions are commonly referred to in the government and technology world as buyer's or seller's auctions. Synonymous with these terms are reverse and forward auctions. In a *seller's (forward) auction*, the price increases with each new bid; at a *buyer's (reverse) auction* a purchasing agent is seeking competitive pricing, and the expectation is for prices to decrease with each new bid.

There is evidence from pilot projects in the Commonwealth of Pennsylvania, as well as other jurisdictions, that some cost savings may occur if public entities allow suppliers to compete during an auction cycle and (for a period of time) submit lower pricing in response to the bid prices of an unknown competitor.

Any public jurisdiction that is auctioning off surplus property is conducting those auctions now, and therefore policy issues in that arena are not seen as compelling. The purpose of this section is to provide a discussion on the relevant issues in buyer's auctions for the public procurement professional.

The Principle Behind the Issue

This issue has no direct, singular antecedent in terms of a specific public purchasing principle simply because it has arisen due to the emergence of a new technology which has provided the modern-day public purchasing officer with a capability that was not previously known.

One assumption behind the practice of public sealed bidding is that bidders will provide the "best" price possible if they know they only have one opportunity to do so. Jurisdictions should evaluate their view on this matter before embarking on their own application of the new technology.

The public procurement process has operated on the assumption that the public needs to know the identity of the participants, while at the same time, ensuring that an unfair advantage is not being afforded any participant by their being knowledgeable of the other entities and prices involved in the process. Anonymity of bidders helps prevent collusion between bidders while sealed bids prevent fraud and favoritism being exercised by bid officials. There is some question as to whether a dynamic, real-time bidding environment prevents these problems.

Matters to Consider in Applying the Principle in the New Paradigm

Saving Money: The opportunity to discover actual market value of a commodity or service is more readily provided by a dynamic bidding environment, where interested suppliers can react to the bid activity of their competitors. Traditional bidding, where a sealed bid (or quotation) is due at a specified time and place, requires interested suppliers to make risk versus gain assumptions with very little certainty. Prices received via this means could potentially be higher due to bidders' desire to mitigate risk in the pricing offered. However, the auction process is, in and of itself, more expensive than the more traditional sealed bid process, so the cost of operating the auction must be included in any meaningful value analysis. Care must be exercised to ensure the winning auction participant's price is compared to a realistic assessment of what price may have resulted from a sealed bid process. In addition to using forecasts of pricing trends, auction results can be benchmarked against the results of other similar entities that employed the sealed bid process for a comparable procurement.

Security: Fraud, confidentiality, authenticity of the signer and document, integrity of the message, and non-repudiation are typical starting points in discussions about the many possible Internet security issues. A more in-depth discussion can be found the in *"Electronic Commerce: A Blueprint for States"* at the NECCC web site www.ec3.org.

Spoofing: There may be more opportunities in an electronic environment for misrepresentations of identity. The impact in an auction environment is that artificial bidding might occur. Vendor registration, required by most jurisdictions currently, would likely remain a sound practice to minimize identity issues.

Collusion: Many government procurement laws require bidders to affirm that they have not colluded in an attempt to influence the outcome of a competitive bid process.

Regulatory Environment (Legality of Auctions, Policy): Each jurisdiction must determine whether they have the authority to conduct a buyer's auction. Other provisions such as statutory conditions limiting the ability to make changes to a bid after initial submission need also to be reviewed.

Disparate Impact on Suppliers: Auctions, whether physical or electronic, require access. The impact of access is a significant one in public purchasing, and often influences policies if not statutes, which regulate that function.

Fail-safe Technology: Government should ensure the reliability of bid submission components and clearly specify and communicate the supported hardware and software required.

Training: The advent of auctions as a procurement method may require new skills of public purchasing personnel.

Competition: Assessment must be undertaken to ensure that if auctions are implemented, no potential supplier is unreasonably expected to modify their business practices to be required to compete.

Auctionable Materials: Not all goods or services are candidates for auctions as the appropriate purchasing method. Guidelines are needed to ensure the procurement staff are familiar with the viability of auction in any circumstances.

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