

## The Requirement for Competition in Federal Contracting

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Ms. Curran has experience in Federal procurement as in-house counsel for over a decade with the General Services Administration, and in the private sector where she has practiced law since 2006. She advises on all aspects of Government contracts and Federal procurement law, with an emphasis on construction and leasing issues. She counsels clients engaged in Government contracting from the bidding stage through contract administration and claims issues.

When competing for Government contracts, offerors need to understand and take advantage of the mandate that any Federal agency acquiring services in construction, or other needed services for that matter, must seek to maximize the opportunities for a fully competitive field of qualified offerors. The Competition in Contracting Act (CICA) of 1984<sup>i</sup> set the standard as “full and open competition” and instituted the use of competition as a critical tool for achieving the best return on the government's investment. While Federal agencies are generally required to award contracts on the basis of full and open competition, they are permitted to award noncompetitive contracts in certain limited situations. For example, the Government is permitted to solicit from a limited pool of contractors when promoting disadvantaged business goals, such as contracting opportunities for 8(a) minority owned businesses.

Effective competition in Government procurement, when following CICA, promotes competition by, among other things, requiring that procuring agencies give the public advance notice of impending solicitations and barring agencies from using restrictive specifications.<sup>ii</sup>

**Procurement Notices.** Agencies are generally required to publish “procurement notices” announcing upcoming solicitations or needs for contracts exceeding \$25,000.<sup>iii</sup> Timing is also dictated by CICA, as agencies may not issue solicitations earlier than fifteen (15) days after the

notice is published, or establish a deadline for submission of bids or offers earlier than thirty (30) days after the solicitation is issued.<sup>iv</sup> The Government utilizes technology to get the word out, and the website at FedBizOpps ([www.fbo.gov](http://www.fbo.gov)) allows potential offers to search for available opportunities by soliciting agency, location or place of performance, type of service or product desired using [North American Industry Classification System \(NAICS\)](#) code(s), and date of the notice or solicitation. Once a vendor identifies an interesting opportunity on FedBizOpps, the vendor can elect to be added to a list of potential bidders, or request receipt of electronic updates about the procurement effort as it progresses. This allows potential vendors to both know about, and easily track, opportunities that fit its capabilities.

**Planning and Solicitation Requirements.** Under CICA, agencies must prepare specifications geared toward obtaining full and open competition by using thoughtful procurement planning and current market research. The Government is charged with knowing the market it is soliciting. Specifications may be stated in terms of function, performance, or design requirements, but may include restrictive provisions or conditions only to the extent necessary to satisfy agency needs.<sup>v</sup> This requirement is intended to avoid a procuring agency from crafting requirements, called specifications or a solicitation, so narrowly that contractors are effectively excluded from the pool of potential offerors.<sup>vi</sup>

### ***Application to a Real and Recent Procurement.***

The General Services Administration recently issued invitations for interest on FedBizOpps for a solicitation for a Federal requirement for construction and lease of a complex office building of over 350,000 rentable square feet and 1,700 secured parking spaces to be housed on a 45 acre parcel of land in Fort Worth, Texas.<sup>vii</sup> The past performance minimum standards required for consideration by the Government were set high in this solicitation, perhaps too high to meet the mandates of CICA. A minimum number of three (3) office developments exceeding 300,000 square feet having at least five (5) stories and constructed in the last five (5) years was initially required in an offeror's

portfolio before being allowed to compete for this award. The market for large office buildings has been depressed since 2008 and few projects of this size were recently completed within these exacting parameters. The high hurdles set by the Government to show capability to perform this requirement do not reflect the goal of inclusion of offerors. In addition, these starkly restrictive parameters seem out-of-sync with the realities of the recent office construction market, which has not supported sufficient construction starts of the size required by the Government. If this solicitation's pre-qualifications allow only a very small number of competitors to compete, then the overly restrictive solicitation requirements may well be a CICA violation if they effectively prevent vigorous competition.

CICA dictates that the Government must seek to maximize opportunities for competition, and this basic principal can help bidders when reading a solicitation and considering opportunities. What can be done if an offeror encounters solicitation requirements that are unduly restrictive on competition? In my next article, I will address remedies available to a potential offeror excluded or barred from the competition by restrictive agency requirements. Seek legal help if you encounter a great opportunity, but fear that the Government has set the bar too high to allow capable offerors to compete.

If you have any questions, please contact me through [www.CurranLegal.com](http://www.CurranLegal.com) or phone me at 404-556-7341.

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<sup>i</sup> 41 U.S.C. §253.

<sup>ii</sup> Kate M. Manuel, Legislative Attorney for Congressional Research Service, Competition in Federal Contracting: An Overview of the Legal Requirements (June 30, 2011).

<sup>iii</sup> 41 U.S.C. § 416.

<sup>iv</sup> *Id.*

<sup>v</sup> 10 U.S.C. § 2305(a)(1)(B)(i)-(ii) & 41 U.S.C.

§ 253a(a)(2)(B) & (3)(A)-(C).

<sup>vi</sup> William S. Cohen, The Competition in Contracting Act, 14 *Pub. Cont. L.J.* at 19 (1983/1984) (describing specifications as the "cornerstone of competitive procurement" because they "serve initially as the fundamental expression of the agency's need and, in the contract award, as the baseline for the evaluation of offers.").

<sup>vii</sup> GSA issued SFO 9TX2395b (2011).