

**SUGGESTED GUIDELINES FOR STRENGTHENING
BIDDING AND CONTRACT PROCEDURES**



Published by the American Association of State Highway
and Transportation Officials. General Offices located at

444 North Capitol Street, N.W., Suite 225
Washington, D.C. 20001

FOREWARD

These suggested guidelines result from the efforts of a special Task Force on Bidding and Estimating, created by the *AASHTO* Standing Committee on Highways in 1981. The Task Force members reviewed the bidding and estimating practices utilized by several member departments, and problems that have been encountered with existing procedures. . On the basis of that review these guidelines were prepared and later accepted by the Standing Committee on Highways. Subsequently, the *PASHTO* Executive Committee approved publication and distribution of the suggested guidelines in October, 1981, as an informational report to member departments and others interested in the subject.

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The following guidelines are not intended to establish an absolute set of mandates that must be adopted by the States. Their purpose is to collate into one document suggestions, based upon experience, which will provide a state with a basis upon which it may build or add to its own antitrust overview program. Each state should carefully review these suggestions and apply, modify or reject each suggestion according to its own individual assessment of the suggestions balanced against the state's law, regulations, procedure, policy and requirements.

I. PRE-BID STAGE

A. Prequalification of Bidders and Subcontractors - A prequalification system is encouraged as a means of not only pre-determining job experience and work capacity but also to serve as a means of identifying individuals and organizations from whom the agency may be accepting a bid. Such system could cover the following as well as other areas:

1. Detailed Financial Statement - The financial statement is a means of establishing financial responsibility as well as providing a valuable "window" through which the agency may view the business association of individuals and organizations who wish to bid.

In addition to a balance sheet of assets, liabilities and net worth, the financial statement should also require detailed information such as the name and location of depositories, accounts receivable, investments, etc.

Include an affidavit in the financial statement which attests to the fact that the statements are true and which also authorizes any depository, vendor or other agency named in the application to supply information necessary to verify statements made.

2. Resident Agent - The out-of-state organization or individual proposing to bid should be required to have a resident Agent who is identified by name and address in the prequalification assembly. This will minimize the difficulty which could arise in serving a subpoena, etc. upon an out-of-state contractor.
3. Capacity and Classification (Type Work) for Which the Contractor Requests and is Subsequently Deemed Prequalified - Major classifications include
 - a. General Highway Construction
 - b. Grading and Minor Structure
 - c. Paving
 - d.. Miscellaneous (Signing, Fencing, Guardrail, etc.)

Suggested Guidelines for Strengthening Bidding and Contract Procedures

Note: Data of this nature serves to identify the type of work for which a contractor is qualified, thus deterring the submission of a complementary bid by a firm for work in which it has no genuine capability.

4. Experience and Performance - The applicant for prequalification should be required to list his classification and bidding capacity in other states as well as the number of years of experience his organization has had in each of the types of work he wishes to bid upon. The experience record should include both public and private work.

Principal individuals in the organization should be listed along with their position, type work in which they are most experienced and the number of years of such experience.

The contractor should be required to include in his application information regarding his failure to complete contracted work. He/she should also be required to give a full account of any instance in which prequalification was denied or in which the organization was removed from the bidding list in this or another state.

5. Ownership or Control

- a. The prequalification assembly should provide for a list of individuals, companies or corporations owning 10% or more of the applicant's firm.
- b. The applicant should be required to identify owners, officers, partners or individuals holding an office in his/her organization who have financial interest in and/or serve as an officer or partner in another firm prequalified to bid in this or another state.
- c. Affiliates, such as joint ventures, and/or subsidiary companies should be identified in the application.
- d. In addition to the aforementioned, the applicant should be required to identify any other individual or organization who, in any way, and to any extent, controls or influences the bidding effort in his/her firm or other firm qualified to bid on highway construction.

Note: This information could reveal possible monetary motive for collusive bidding where such is suspected.

6. Equipment - The applicant should be required to list the plants and equipment he owns or which are otherwise available through rental arrangements.

Note: This should deter the submission of a complementary bid by a firm which lacks the necessary equipment and access to same.

Suggested Guidelines for Strengthening Bidding and Contract Procedures

7. False Statements in Questionnaire or at Hearing - Include language in the prequalification assembly which prohibits the making of false, deceptive or fraudulent statements on the application or at the hearing under penalty of temporary or permanent debarment.

Note: This is an opportunity to forewarn the applicant of the seriousness of furnishing incomplete or inaccurate information. The providing of prior notice of the consequence of a prohibited act is a desirable element in supporting an action to revoke qualification.

8. Revocation of Certificate of Qualification - Provide for revocation of qualification if:
 - a. The contractor is declared in default in accordance with applicable provisions of the contract; or
 - b. It is determined that the contractor has made false, deceptive or fraudulent statement on his application or in the course of any hearing associated with his application for prequalification; or
 - c. It is determined that the contractor has participated in antitrust violations; or
 - d. It is determined that the contractor has employed agency personnel or offered or given gifts or gratuities to such agency personnel; or
 - e. The contractor has been debarred from performing work on Federal-aid projects; or
 - f. Any other action or inaction on the part of the contractor which the appropriate committee or agency representative deems to warrant revocation.
9. Appeals Procedure - There should be a well defined appeals procedure for a prospective bidder who may be dissatisfied with some decision affecting his/her classification, performance rating, and limits of prequalification. It is essential that the procedure include a reasonable opportunity for the prospective bidder to present his **case**. An appeals procedure strengthens the process by which the agency reaches its ultimate conclusion and helps insulate its action from a collateral judicial attack based upon an alleged lack of due process.
10. Up-Dating Prequalification Assembly - In addition to the required annual or other periodic renewal of qualification, the contractor should also be required to update his/her assembly within ten (10) days when there is a corporate or affiliate change and/or a reduction or more than 10 percent of stated assets.

Suggested Guidelines for Strengthening Bidding and Contract Procedures

- B. Specifications. - Include language in the agency's book of standard or general specifications which prohibits antitrust activities and the restraint of free competitive bidding. For example:
1. Under the section which sets forth various requirements for preparation of the proposal, the following or similar wording could be used to reinforce the required execution of a sworn statement

"A sworn statement shall be executed by the bidder or an agent hereof, on behalf of each person, firm, association or corporation submitting a proposal, certifying that such person, firm, association or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with such contract. The sworn statement shall be in the form of an affidavit, furnished by the Department and sworn to before a person who is authorized by the laws of the State to administer oaths. The original of such sworn statement shall be filed with the Department when the proposal is submitted."
 2. Under the section which lists various deficiencies which may result in a proposal being rejected, the following or similar wording could be used to lend additional support to the sworn statement

"If the bidder fails to submit a sworn statement concerning collusion or restraint of free competitive bidding."
 3. Under the section relating to the disqualification of a bidder, the following or similar wording could be used to reinforce the agency's authority to not only reject proposals by reason of antitrust violation on the project at hand but also to debar such contractor in so far as future projects are concerned:

"Evidence of collusion or restraint of free competition among the bidders. The contractor participating in such antitrust activity will not be permitted to bid upon future projects until reinstatement to the approved bidder's list."
- Note: This same subject is referred to in Section I I A.
- C. Estimate - In the interest of creating the best possible environment for open competition in the bidding process for public contracts, it is recommended that the detailed engineer's estimate be kept secret. Under such system, it is prudent to limit access to the estimate and to maintain a responsible level of security for files in which they are stored.
- D. Competition - Seek ways and means of improving competition on a continuing basis. For example:

Suggested Guidelines for Strengthening Bidding and Contract Procedures

1. Prebid meetings with contractors to discuss plans and specifications, especially- complex projects, are encouraged. Personal contacts after the taking of bids could prove helpful in determining why certain contractors did not bid. Could such work be divided or combined differently to attract additional bidders on future projects?
 2. Seek both agency and industry input on a continuing basis that will identify and eliminate superfluous, redundant or otherwise unnecessary requirements which encumber the entry of competent contractors.
 3. Make possible the bidding of basic improvement type projects by small contractors by tailoring prequalification requirements, specifications and acceptance criteria to such- projects.
 4. A list of those contractors who have picked up a **bid package** should not be made available to other contractors before the bid opening. A public disclosure will allow those contractors who would violate the antitrust laws to find out whether they will have competition on any particular contract. If they do not know who picked up the bid package, although they still are not prevented by this nondisclosure from colluding, they **will be uncomfortable** because they must worry that someone else, outside their circle and unknown to them, may take the bid by underbidding them. If they *know* that *no* one outside their circle picked up a bid package then they can be comfortable that their collusive plot will be successful.
- E. Debarment - Adopt policy for debarment of contractor and affiliate who commit a "bidding crime", defined as any act prohibited by state or federal law and committed in any jurisdiction, involving fraud, conspiracy, collusion, lying or material misrepresentation with respect to bidding on any contract, public or private.
1. Debarment should occur for any of the following reasons:
 - (a) Conviction of a bidding crime resulting from a jury or bench trial, any plea of guilty or nolo contendere, any public admission of any contractor, any presentation of an unindicted co-conspirator.
 - (b) Conviction of any offense indicating a lack of moral and ethical integrity as may reasonably be perceived to relate to or reflect upon the business practices of the company;
 - (c) Any other cause of a serious and compelling nature affecting responsibility as a contractor.
 - (d) Debarment by some other state or federal agency for substantially any of the reasons listed above.

Suggested Guidelines for Strengthening Bidding and Contract Procedures

Note: For a debarment process to be effective, states must adopt a reciprocating debarment process. This will be necessary to shut off the opportunity for a contractor who is debarred in one state from simply making a corresponding and offsetting increase in his bidding activity elsewhere. It should be noted that several states now have a policy whereby contractors who have been indicted are automatically suspended from bidding on projects. The AASHTO headquarters office will assume responsibility for notifying all member states of any reported debarment action.

2. The debarment policy should contain the following provisions:
 - a. Opportunity for hearing before or after debarment.
 - b. A uniform period of debarment - 36 months is suggested.
 - c. Authority on the part of the commission or agency head to lift or suspend debarment at any time if it is in the public interest to do so. The following mitigating circumstances may influence this decision:
 1. Degree of culpability
 2. Restitution of damages to state
 3. Cooperation in the investigation of other bidding crimes.
 4. Disassociation with those involved in bidding crimes.
 5. Whether lengthy debarment is required for protection of the state.
 - d. Authority on the part of the commission or agency head to hold a hearing no later than 15 days prior to the last day of the term of debarment and require the contractor to show cause why the debarment should not continue. Note: The passage of time may not necessarily cure a contractor's lack of responsibility in terms of business practices, associations or factors which contributed to the bidding crime.
3. Additional rules applicable to debarment:
 - a. Illegal or improper conduct of any individual may be fully imputed to the business firm with which he/she is or was associated or by whom he/she was employed where that conduct was engaged in within the course of his/her employment or with knowledge or approval of the business firm or thereafter ratified by it.
 - b. Debarment in no way affects the obligation of a contractor to the agency to complete services already under contract.
 - c. The commission or agency head may, in the public's best interest, suspend or otherwise delay inquiry into or review of any debarment in the event such action may impede, hinder or delay federal or state investigations into a bidding crime. Such decision will be made only after notice and as opportunity to be heard is afforded the affected contractor.

Suggested Guidelines for Strengthening Bidding and Contract Procedures

- d. Any-contractor currently qualified to bid upon agency contracts shall have a duty to notify the commission or agency head if it is convicted of any bidding crime within 30 days thereafter. Failure to furnish such notification is a serious and compelling offense sufficient to result in debarment in and of itself.
4. Notice to contractors

A copy of any policy and procedure for debarment should be mailed to each prequalified contractor and to each contractor previously debarred or suspended.

II. BIDDING STAGE

- A. Proposal Documents - Include an affidavit on a form furnished by the agency in bid document which contains the following elements:
 1. Appropriate references to applicable state -and federal law which deals with bidding crimes.
 2. An introductory statement which requires the execution of the affidavit as a prerequisite for consideration of the bid.
 3. A statement which in effect certifies that the contractor has not committed a bidding crime in connection with the project.
 4. A Notary Public statement witnessing the principal's signature.

Note: This same subject is referred to in Section I B 3.

23 U.S.C. Subsection 112(c) requires that before the Federal Highway Administration may approve a federal-aid highway contract, a noncollusion sworn statement must be submitted with the state's request for approval. In addition 23 CFR Subsection 635.107(i) requires that such statement must be on file with the state highway agency. Finally, under 18 U.S.C. Subsection 1020 filing a false statement can subject the affiant to a criminal penalty of \$10,000 or not more than five years in prison.

- B. Estimate - A statistical estimating system should be checked and monitored by the use of a rational estimating technique. Statistically based systems could be highly influenced by unit prices taken from bids which may not have been developed in a competitive environment.
- C. Submission of Proposal - Require proposals to be submitted in envelopes furnished by the agency and that they be sealed. This requirement provides for the ready recognition of bids versus other mail thus assisting in their prompt delivery to the contract office and assurance that the bid will not be casually opened.

Suggested Guidelines for Strengthening Bidding and Contract Procedures

- D. Location of Bid Depository - Proposals should be received at one location and address - the contract office. Avoid having a bid deposit or drop point at a location where bidders assemble for securing of subcontractor and vendor prices. Agency employees should avoid contacts of a personal nature with contractors during the preparation of bids - contacts of such nature create an image of impropriety.
- E. Opening and Reading of Bids - Provide for the public opening and reading of bids in order to maintain the highest level of credibility among bidders as well as the general public.
- F. Analysis of Bids - Bid prices should be reviewed and compared with the agency estimate for each of the items. Estimators and bid analysts should be trained in the identification of irregular bids, abnormal bidding patterns, etc.

Utilize information obtained from antitrust investigators and economists who specialize in the detection of such activities in the writing of specific guidelines for bid analysts. Such guidelines should include a charting of the contractors' bids and awards geographically for possible territorial arrangements. Look also for bidding patterns which indicate possible alternating of contracts. Attempt to detect bidding irregularities which suggest token or complementary bidding.

- G. Reporting of Suspected Antitrust Activities - Promptly report any indication of antitrust violations to the appropriate investigative authority for their review.
- H. Award - Adopt a policy in which a contract may be awarded when only one bid is received, assuming that the estimating procedure is reliable. **A policy** of not awarding a contract unless a single bid is received encourages the submission of complementary bids.

III. POST AWARD STAGE

- A. Internal Agency Audits - Include spot or periodic reviews of bids and bid analysis in the agency's internal audit process. Report results of these audits to management.
- B. State Antitrust Investigation Unit - Provide for spot or periodic review of bids and bid analysis by the state's antitrust unit.
- C. Increasing Competition - Inasmuch as the tendency to restrain free competitive bidding bears an inverse relationship to the number of bidders, a continuing effort should be made to determine the size and scope of various types of projects which are attracting the greatest number of bidders and to use such information in the establishment of future projects.
- A. Exchange of Information Among States Which Have Experienced Antitrust Activities - Participate in the collection and dissemination of information among states in connection with the detection of antitrust violations.

ANALYSIS OF BIDS

I. Identifying Bidding Patterns

- A. Division of the Work: A certain group of contractors bidding the same or many of the same contracts with a different low bidder on each.

Contract #1

Contractor "C" (low)
• "D" (second)
• "F" (third)
• "E" (fourth)

Contract #2

Contractor "F" (low)
" "E" (second)
" "R" (third)
" "C" (fourth)

Contract #3

Contractor "E" (low)
" "C" (second)
" "F" (third)
• "T" (fourth)

Contract #4

Contractor "D" (low)
" "W" (second)
" "C" (third)
" "E" (fourth)

Note: Contractors C, E and F bid 3 of the 4 contracts; Contractors C and E bid all 4 of the contracts; however, the 4 contractors in the group are low on at least one of the contracts.

- B. Territorial Arrangement: A certain group of contractors bidding the same or many of the same contracts within a given area and with a different low bidder on each.

County "V" is the territory in which Contractors Q, T and U have their headquarters or stationary plants.

Contract #1

Contractor "Q" (low)
• "T" (second)
• "U" (third)

Contract #2

Contractor "T" (low)
" "U" (second)
" "V" (third)
(fourth)

Contract #3

Contractor "U" (low)
• "Q" (second)

Note: Contractors Q and U bid 2 of the 3 contracts; however, the 3 contractors in the group are low on at least one of the contracts.

- C. Alternating Arrangement: A certain group of contractors bidding the same contracts in a given area and alternating the low bid.

Cite "P" is the territory in which Contractors D and G have their headquarters or stationary plants.

¹⁹⁷⁹ Contractor "D" (low) " " "G" (second) " " "R" (third)	¹⁹⁸⁰ Contractor "G" (low) <input type="checkbox"/> " " "D" (second)	¹⁹⁸¹ Contractor "D" (low) " " "T" (second) " " "G" (third)
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II. Identifying Bidding Irregularities

A. Order of bidders decided on the basis of one or two items : Similar unit prices are submitted by the several bidders with one or two notable (unexplainable) exceptions:

	<u>Item</u>	<u>Unit Price</u>	<u>Est.</u>
Contractor "B" (low)	1	\$ 3.00	\$ 2.85
	2	5.00	5.15
	3	6.00	5.10
	4	3.00	3.05
	5	7.00	6.90
• Contractor "A" (second)			
	1	3.00	2.85
	2	(10.00)	5.15
	3	6.00	6.10
	4	3.00	3.05
	5	7.00	6.90
• Contractor "C"			
	1	3.00	2.85
	2	5.00	5.15
	3	(15.00)	6.10
	4	3.00	3.05
	5	7.00	6.90

B. Bidder(s) deviate from their usual unit pricing on Project #3 without apparent justification:

	<u>Project #1</u>	<u>Project#2</u>	<u>Project #3</u>
Contractor "B" Class A-4 Conc. (low)	\$210.00	\$220.00	\$195.00
• Contractor "A" Class A-4 Conc. (second)	\$200.00	\$214.00	(\$300.00)
• Contractor "C" Class A-3 Conc. (third)	\$175.00	\$180.00	(\$310.00)

• Possibly Complementary Bids

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