

The Perils of Non-Competitive Contract Awards

Preface

This article was first published in the NIGP Technical Bulletin of February, 1995. The response was most surprising, especially considering that my articles are usually so dull that there are rarely any responses to them at all. A number of readers thought it was pure comedy. Others thought it was an instructional allegory. Yet others saw it as a treatise based upon several particularly annoying experiences which morphed into a list of dos and don'ts for the education of a would-be public purchaser. Many of the latter requested copies of the complete lists of corollaries, axioms, postulates, admonishments and maxims. Many of these readers were noticeably disappointed when I explained that such lists only existed in my imagination.

The comments receded after a few weeks, the usual life of responses to periodicals, and the article wandered into oblivion without even a whimper.

Some years later, a few stalwart readers with remarkable memories asked if the article could be republished and, of course, I, constantly in need of recognition and, more importantly, the \$500 in cold cash it would bring, heartily agreed ⁽¹⁾.

Thus, in May of 2001, the article was slightly revised and published in a now defunct periodical entitled Purchasing Pulse, an instrument of a start-up software company now consumed by the conglomerate, Sci-Quest. Same response. Kudos, compliments and questions on lists — and, of course, the money which came from a writing contract for which I wrote an article on a purchasing topic once a month (2000 through 2008).

I revived the article again in 2006 when I began teaching a course in Governmental Procurement at Portland State University; the article became a reading assignment in the area of ethics, competitive source selection and other topics underlying the award process. All the students appear to have enjoyed it and had asked me to read it in class. I declined, as I am a better writer than a performer.

So, here it is, again slightly revised, this time for whatever posterity is offered by a posting on my web page, hopefully a few years at least (what with my having turned seventy just last year).

Lloyd Rain, March, 2009

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By Lloyd Rain, March, 2009

Has this ever happened to you?

You have a complex need that is so special, so extraordinary, and so complex, that you cannot imagine how it will ever be accomplished. You ponder and contemplate, you

stew and you fret, you fuss and you worry, and you just can't find a way to get that exceptional project executed.

Suddenly the procurement fairy waves her sparkling wand over your office and lo, it is as if the waters have opened up before you. All your problems are solved. A magic contractor appears in a blinding flash of light, dressed no doubt in shining armor, glistening Nikes and an airline captain's hat, saying, "I can do it all." — and you know deep in your heart that this contractor is the answer to your most impassioned prayers.

Sometimes, you already know a magic contractor who not only dresses in shining armor daily, but is uniquely qualified to perform the work. She's done it before. She knows the process. She knows the people. She knows the systems. And heavens, you're just so positive that no one else in the whole world can get the job done like your magic contractor that you'd bet a month's salary on it.

So you whip up a requisition, fire on down to Purchasing and, just a-beaming all over, you wax eloquent that your magic contractor is the only contractor in the whole world capable of doing the work just the way you want it done.

And then, to your horror, the Purchasing people not only don't jump for joy along with you, they unenthusiastically reveal that they've heard it all before and that there are thousands of people out there who do the same kind of thing and that a competitive solicitation is in order. After considerable gnashing of teeth and, perhaps, some choice invectives, you leave the purchasing offices, disillusioned and distressed. You storm into your boss's office with a tale of woe about how Purchasing is gumming up the works and creating more work for everyone.

By day's end, you're at your favorite watering hole with a case of **PID** (Purchasing Induced Distemper) which is commonly characterized by a high-pitched fervor and low exasperation threshold.

We in Purchasing, are invariably on the receiving end of the whining, the chest beating, the pulling of hair and the renting of clothing. Yes, even the gnashing of teeth. We purchasing people actually **have** seen it all before. It has to do with retaining architects, engineers, computer programmers and trainers; with the purchase of specialty equipment ranging from aircraft engine analyzers to automated firing mechanisms, from laboratory animals to gene splicing materials, from leasing automobiles to leasing copiers, from ship-building to chip-building. (It also has to do with laziness, poor planning, an insistence on expedience over wisdom and, most of all, failure to recognize the perils of non-competitive procurement.)

And you, our client, may wonder what we, your purchasing people, are thinking about when we admonish you to team up with us for a public, competitive selection process.

Well, here it is.

From our point of view, every time you select a contractor without competition you are denying yourself, your institution and your taxpaying public the right of due process in the expenditure of funds. And, unless you have a boundless knowledge of the industry, and **can prove** that you have an absolute and incontrovertible solution, there is only one option — the marketplace.

A marketplace is a bubbling cauldron of activity, teeming with creativity and shrewdness, each privateer jockeying for position to further his or her own buoyancy in the brew. The closer each competitor is to the top, the more air he or she gets to breathe.

The marketplace is where you go to find the best deal that your money can buy. You want to locate the top-breathers who are fighting to stay there. They are there for two reasons: one, they do good work and, two, they want more work. You don't really know if your magic contractor is a top breather or a bottom feeder that just happens to have been through a car wash. You may have the best deal in hand, **but you don't know that** until you've sallied forth into the marketplace and offered all comers a chance to respond. Only after you've done that can you say with any confidence, "I have tested the waters. I have cast forth my needs to the general public and all who wish to respond have had that opportunity." Only then can you say with any confidence, that there is a reasonable chance of your having selected the best opportunity for your agency or institution.

Think of all that you don't know, all the missed opportunities and chances that you frivolously fling aside when you make a non-competitive selection.

The first thing you don't know, of course, is the true market value of the products or services you want to buy. Even though your magic contractor may be offering what you perceive to be reasonable pricing, until you've gone to the marketplace and drawn upon a competitive market, compared all the offerings and analyzed their relative merits, you really don't know the true value of the materials or services in today's environment. No matter how reasonably priced you think your magic contractor may be, and no matter how many market studies and pricing analyses you've done, **Rain's Axiom Number Two** says, "**One firm bid is worth a thousand hypothetical studies.**" All your theoretical machinations do not even begin to approach the value of one solid proposal through which the proposer binds itself to perform a task for a firm price.

The only way to know is to go to that marketplace and survey, not only the available skills, and the available technology, but the price at which they are offered under competitive pressures. That's how you ascertain **fair market value** — the value that a informed seller and informed buyer arrive at, neither being under duress and both being knowledgeable of the market. Not being under duress means that either party can walk away from the transaction at any time without fear of loss and with other options to pursue. That's competition. The moment you select a source on a non-competitive basis, you have eliminated the pressures of free market pricing and chances are you're going to pay more than you need to have paid for the same product or service.

Another thing you don't know is how determined your magic contractor is upon, not only getting the work, but upon performing it. The only measurement of your contractor's commitment to obtaining and accomplishing the work is by his or her response to a competitive opportunity. The quality of the response is invariably an indicator of how well the contractor will perform the work; with how much dedication, thoroughness, clarity of thought and organization. **Rain's Postulate Number Seven: "Shoddy response, shoddy work — guaranteed."**

It never ceases to amaze me how many magic contractors who, upon realizing that the work is not going to be handed to them on a platter and that they will actually have to

(choke...choke...) **compete** for it by presenting a clear, well-thought-out and finely-priced proposal, will simply fade into the background never to be heard from again. This dance is called the back-door, quick-trot, now-you-see-me-but-soon-you-won't minuet. Translation, real contractors aren't afraid of competition. In fact, they relish it. The proposal process is something akin to a vetting process — it separates those who **want the work enough to work for it**, from those who will only perform when begged to do so. Begging to have work done is somewhat like begging to be served at a restaurant — if you have to plead for service, go somewhere else. When you're a paying customer, they should be lined up ten-deep with offers — and as purchasing professionals, it's up to us to convene the line-up for you.

When competitive proposals are submitted in response to even the flimsiest of invitations, the rich variety of solutions and options is certainly no less than a king's ransom. Only an arrogant fool would sacrifice such a trove of treasures for unqualified dependence upon his own limited knowledge and experience.

Yet another consideration. When you have entered into a sole source contract, you have no backup. No secondary position, no standby. When your magic contractor descends into the abyss of non-performance, due to, perhaps bankruptcy, or perhaps, being hit by a truck, you have no other proposals on which to base continuity, no "second-low's", so to speak. You have nothing. You may not even have the work you paid for because, chances are, you used the contractor's contract, rather than your own contract (sole sourcing usually means that nobody took the trouble to write specifications and that, for the sake of expedience, the contractor's work statement and contract were hastily slapped onto the purchase order before the ink dried). So when you're faced with non-performance, you're not only starting from scratch, you're usually about a mile behind the starting line — with nothing to show for your efforts. ***(Rain's Admonishment Number Five: "If you're paying the bill, use your own contract — and take the time to draft it.")***

There's yet another issue; that of ethics. As much as budget authorities in public agencies would like to lay claim to their funds, the money they spend, is not their own. It does not belong to any department, institution or agency.

The money is given to us in trust by our taxpayers, our students, our fee payers, and our service users. As public agencies, we are only the trustees. The public expects us to spend these monies wisely and solely in the ultimate support of our mission. Thus, we do our tax-paying community a disservice when we make less than every effort to spend their moneys wisely. ***(Rain's Corollary Number Three: "It is clearly unethical to spend public monies with any less diligence than that of a diamond cutter reshaping the Hope Diamond.")***

Moreover, we must also furnish an opportunity for those who provided the money to partake of the contracts resulting from the pursuit of our mission. Translation, "It's the public's money, and members of the public must, therefore, have a fair and equal opportunity to participate in any contracts which utilize those funds." That opportunity is effectively quashed by any attempt to predetermine the selection of a contractor, let alone make a selection without an honest and broad approach to the marketplace.

You ought not to be thinking of a non-competitive selection unless you can answer, with great assurance, the following questions:

- Is your magic contractor the only provider available, and if so, how do you know that? Can you prove it?
- How sure are you of your magic contractor's ability to leap tall buildings in full regalia of shining armor; i.e., to flawlessly perform the work? How do you know?
- Is your magic contractor offering you the most competitive price available? If so, how do you know that? Can you prove it?
- Have all interested providers of the product or service been given a reasonable opportunity to participate in the requirement?, i.e., to offer their wares in free and open competition?
- Has the selection process been unbiased, without preconditions, without predeterminations and without preferences?
- If you proceed with a sole source award and, after the work has begun, you are faced with non-performance, what will you do? And what steps will you have taken to protect the funds which are obligated or encumbered?

If you can't answer with clear affirmation to all these questions, you shouldn't be thinking about a non-competitive selection. What you should be thinking about is a thorough approach to the marketplace with a clear and professional solicitation which not only addresses your needs, but is designed to provide solid and incontestable answers to all the questions posed above. And, yes, you ought to be thinking about it well in advance. In spite of the far-reaching benefits of a public solicitation, the process is considerably complex, sometimes very time-consuming and occasionally fraught with hazards ranging from specification shortcomings and boilerplate bafflements to legal protests that can take you all the way to your state supreme court. Lots of lead time is the key — and poor planning is not an excuse for circumventing the process. If the real answers are to be found and the taxpayer well-served, the questions must be answered by the marketplace.

Finally, we must recognize that we function in an arena of very diverse perceptions and personal (sometimes covert) agendas. Nothing, no matter how technically correct or ethically appealing, nothing from a staffer should appear in a public forum which could be embarrassing or unsettling to a board member or an agency officer without due consideration and prior approval of the public officials involved. Non-competitive awards are one of the most enigmatic issues facing public officials today (most astute public officials give these awards a wide berth). By recommending a sole source award to your public officials, you may well be, with the best of intentions, jeopardizing a political career and inviting public scrutiny and even ridicule of your institution.

Consider this sentence from a US News & World Report article on an overdue federal Agriculture Committee report. **“Sources say a contract for the report was awarded without competitive bidding to an outside consulting firm...”** ^{2}. Simply the mention that the contract was awarded without a competitive process is an implication of wrongdoing — and in this case the Agriculture Committee is charged, judged and

convicted in the press without even a perfunctory attempt to explain why it may have been important, necessary, or even crucial to award the contract directly to the firm in question.

So, when you're considering a non-competitive contract award and you think you have all the necessary substantiation — forbear. Stand down. You can rarely prove it by any other means than pointing to responses from the marketplace. ***Rain's First Axiom*** states, **“Unless there are compelling reasons for sole sourcing, anything less than a full and open competitive selection process is not only an abandonment of your responsibility as custodian of public funds, but may result in surprisingly harsh scrutiny and criticism of you, your institution, your officers and your board.”**

End

{1} At that time I was under contract to E&I Cooperative to produce one article a month for the National Association of Educational Buyers newsletter, *Purchasing Link*.

{2} US News & World Report, August 14, 1995, page 16, “The Elusive Study”

Note: This article was originally published in the **National Institute for Governmental Purchasing *Technical Bulletin***, November, 1995. It was edited and rewritten by the author for publication in *Purchasing Pulse*, in May, 2001. The article has, again, been edited for publication on my web site, April, 2009 and now contains 2,850 words.