

date will not be met, then the Government has a responsibility to provide early notification of this fact to the contractor. If the contractor has reason to believe that a delivery date will not be met, the contractor is responsible for providing early notification as well as informing the Government of what is being done to correct the problem.

Third, we must recognize our responsibilities under the contract. Very few, if any, of our procurements are contracts to "try" -- they are contracts to produce. Both parties to the contract must recognize their responsibilities before they enter into the contract and plan to meet these obligations. Problem areas or uncertainties don't go away by our failure to take notice of them; however, many times we can bring an undesirable situation under control by positive, aggressive and timely action. This is your responsibility under the contract and anything short of this is unsatisfactory performance.

In summary, we have many new, and some not so new, procurement innovations designed to assist in the acquisition of quality products, delivered on time, at the lowest over-all cost. We must view these concepts in proper perspective - use when appropriate, not because it's the latest fad - recognizing that the purpose of the procurement is to obtain what is needed, where it's needed, when it's needed. Failing to do this, the procurement is less than a complete success.

## **TWO-STEP FORMAL ADVERTISING**

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## **TWO-STEP FORMAL ADVERTISING**

Recognizing that Two-Step Advertising is not new, there are those that would have you believe that this type of procuring for the Government is no longer used and that it is too complicated and burdensome to be used effectively. It is the purpose of this presentation to discuss how Two-Step Advertising was initiated, its use, and that it can be utilized successfully in Government Contracting.

We are all aware of the fact that Formal Advertising is the general rule of procuring, and when there are procurements that do not meet the criteria of Formal Advertising that negotiation may be utilized. A combination of Formal Advertising and negotiation results in Two Step Formal Advertising.

The Air Force was the first to use Two-Step Formal Advertising and drafted a procedure which is substantially what we have in the Armed Services Procurement Regulations (ASPR) today. At the outset, the Two-Step Formal Advertising method was tested by the Comptroller General, who was asked to decide the protest of two companies whose technical proposals were considered unacceptable and their price proposed was not acceptable and refused by the Government in the 2nd step. The ruling by the Comptroller General was that procurements cannot

be left open indefinitely, nor bidders permitted to engage in activity which would bring about that result by amending proposals that were evaluated unacceptable. ASPR states that a marginal proposal can be made acceptable only when the Contracting Officer determines that there are not sufficient acceptable proposals and that further time, effort and delay would be in the best interest of the Government. Actually the purpose of Two-Step Advertising is to expand the use and obtain the benefits of Formal Advertising where there are inadequate specifications. Before the use of Two-Step Advertising and where specifications were inadequate, negotiation was used, and was the only means of procuring. The law and rules today are that procurement shall be made by Formal Advertising including Two-Step Advertising whenever such method is feasible and practical under the existing condition and circumstances, even though such conditions and circumstances would otherwise satisfy the requirements of the law permitting negotiation. Two-Step Formal Advertising will be used where feasible, in fact the effect is that the Contracting Officer is obligated before proceeding to negotiate to use Two-Step Formal Advertising or justify why it can't be used.

Two-Step Formal Advertising shall be used in preference to negotiation when all of the following conditions are present, unless other factors require the use of negotiation:

1. Specifications are not definite or may be too restrictive to permit competition without technical evaluation. When the specifications are not definite or complete, there is a need to get a technical proposal for evaluation and the possibilities of conducting a discussion that assures a clear understanding that the proposer has acceptable solutions to the area of inadequacies.
2. Criteria exist for evaluating technical proposals. Definitive evaluation criteria are musts in Two-Step Advertising.
3. More than one technical qualified source is expected to be available. If more than one source is not available, there is no need to continue the two-step procedure but procurement by negotiation would be permissible.
4. Sufficient time available. Sufficient time is necessary to conduct the Two-Step which involves evaluating the need priorities and the expected time frame that qualified sources would need to respond with acceptable technical proposals.
5. Firm Fixed Price or Fixed-Price with escalation are the only authorized types of contract in Two-Step Formal Advertising (the same as conventional formal advertising).

In the first step the Government is primarily concerned with receiving acceptable technical proposals. The first step must be specific and state that prices or pricing information are not to be submitted with the technical proposal.

A required form or format is not necessary in step one, a letter will suffice but there are several instructions that must be included.

1. Purchase description or specification.
2. Closing date, hour for receiving technical proposals.
3. A statement that each source submitting an unacceptable proposal will be so notified.
4. Requirements of the technical proposal such as drawing, data and any other presentations to be submitted.
5. Criteria for evaluating technical proposals.
6. A statement that the Government may discuss the technical aspect of certain proposals.

7. A statement that in step two only bids based on acceptable proposals will be considered for award.
8. Whether one or more technical proposals may be submitted.

Proposals may be grouped initially into three categories: Acceptable, Marginal, and Unacceptable. Acceptable proposals meet all the requirements of the Request for Technical Proposal. A proposal that doesn't conform to all the material requirements or specifications is unacceptable. Once a proposal is ruled unacceptable, there is no second chance, the door is closed. The proposal that is reasonably susceptible of being made acceptable by additional information, clarifying, or supplementing, but not basically changing the proposal are considered marginal. Their proposals may be acceptable if the Contracting Officer determines that there are not sufficient proposals that are acceptable, and that further time, effort or delay is available, and to increase competition would be in the best interest of the Government, otherwise the Contracting Officer may proceed to Step Two.

After final evaluation, including any necessary clarification, all technical proposals will be classified as acceptable or unacceptable. Those that are acceptable will be invited to submit a price under the same procedure as in Formal Advertising. In the second step the delivery date is also submitted with the price.

In the event no acceptable proposals are received, or there is only one acceptable proposal, a notice of discontinuance of the procurement under the Two Step method will be issued and the procurement may be continued under negotiation.

It cannot be denied that the procedure of Two-Step Advertising will increase competition not only by sources participating in the procurement as well as submission of one or more proposals by some of the competitors.

It is reasonable to expect that where the Government has increased competition the required quality would be provided at reduced cost. Two-Step Formal Advertising was instigated by the Senate Armed Services Committee and more or less forced on the agencies within the Department of Defense to increase competition and diminish the procedure of sole source procurement by negotiation.

All of the advantages and disadvantages of Two-Step Advertising are not known as this procedure of procuring has not been tried and tested to the same extent as formal advertising and negotiation. Some of the advantages are that it stimulates competition, enables the Government to receive the best possible price, and a minimum of administration is required on a Firm Fixed Price Contract. To mention the disadvantages can be time consuming because of the evaluation of numerous technical proposals, some that are non-responsive as well as not acceptable.

In conclusion, the real intent and objective of Two-Step Advertising was to extend the benefits of advertising to procurements which previously were negotiated on a sole source basis.

ASPR states that only three things must be performed in evaluating technical proposals.

(1) The evaluation must be based on the criteria set forth in the request for technical proposals, (2) the evaluation must not include consideration of capacity and credit, and (3), proposals which deviate from the essential requirements of the specification must be rejected. As long as the evaluation is based on the factors which are spelled out in request for technical proposal, and responsibility (capacity and credit) is not mentioned or taken into consideration, it is likely that the General Accounting Office and others will not attempt to second guess the evaluation.

The final decision is entirely up to the Contracting Officer, whether to proceed with the proposals that have been evaluated acceptable or whether it would be in the best interest of the Government to take the additional time and effort to bring the marginal proposals in to an

acceptable status. It must be remembered that changes to a marginal proposal can only be to clarify or supplement the original proposal, it may not basically change the proposal as originally submitted, and time must be available and is an important factor in bringing or making marginal proposals acceptable.

## TWO-STEP FORMAL ADVERTISING

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Like many other of the multitude of concepts, policies, regulatory principles, and guideline principles that have been promulgated by the Department of Defense in its Armed Services Procurement Regulations, the concept of two-step formal advertising originated as the result of a recommendation made by a Congressional Subcommittee in the course of an investigative study.

As indicated by Mr. McGathy, the two-step procurement concept was originally suggested by the Subcommittee for Special Investigations of the House Armed Services Committee. It was documented in a 15 June 1957 Report of that Subcommittee. It was initially incorporated into the Air Force Procurement Instructions in 1957, and three years later, on 22 July 1960, was picked up in Revision No. 1 to the 1960 Edition of the Armed Services Procurement Regulation. It has since undergone several ASPR revisions.

If this represented the end of the story historically, there would then be little left for me to say to you today, particularly after the excellent discussion of the two-step concept which you have just heard presented by Mr. McGathy, except to suggest that you read ASPR thoroughly. The concept itself is simple, and relatively non-controversial, and the ASPR coverage thereof is, in my opinion, excellent and to the point.

Unfortunately, however, for both the Department of Defense and its suppliers, this simple type of dismissal would be overlooking the very important matter of implementation. And, as you all know, many a worthwhile and universally-endorsed concept or policy has been launched with champagne hopes on the high seas of Government procurement from private industry, only to flounder on the jagged rocks of implementation problems.

Let us, therefore, turn now to a brief examination of some of the problems which have arisen during, and at least partly as a result of, implementation of two-step formal advertising.

Most of the difficulties which have arisen have resulted from the experiences of unsuccessful bidders, and have been highlighted by protests to the Comptroller General against awards made by contracting officers employing the two-step procurement method.

One of the earliest questions raised in such an award protest was a contention "that the two-step formal advertising procedure is so unreasonably restrictive as to violate the concept of full and free competition required in ordinary formal advertising." This view was expressed by an unsuccessful bidder in an award protest to the Comptroller General relative to a 1960 procurement covering highly specialized equipment. This bidder had a well established reputation, as well as a demonstrated capability to perform work of the type contemplated.