

ARE SOLE SOURCE SPECIFICATIONS ENFORCEABLE?



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Are Sole Source Specifications Enforceable?

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A sole source specification restricts a bidder to providing materials, equipment, or labor, from one source. For example, a specification that requires the contractor to furnish a 1200 ton Trane CenTraVac® chiller would preclude furnishing any other make or model of chiller.

Sole source requirements are enforceable on private projects where the parties are free to contract with whomever and for whatever they want, so long as their contract is lawful and does not violate public policy. But sole source requirements can conflict with the policy behind public procurement laws that require competitive procurement to avoid squandering of public funds, cronyism, and corruption.

If a public entity wants a sole source specification on a public project, it must overcome the presumption that its purpose for the specification is to evade the competitive procurement laws. To do this, the public entity must have a rational basis to explain why a less restrictive specification would not, due to special circumstances, meet its needs. For example, the Department of Defense may require installation of a 1200 ton Trane CenTraVac® chiller if the rapid cooling requirements of this chiller are needed to protect records stored in a mission critical data center, but not if another chiller's cooling characteristics would provide adequate protection, or if the chiller is specified for a building where rapid cooling would be nice, but not necessary.

A recent controversy involving a sole source solicitation illustrates the need for a rational justification. The State Department had awarded a 5-year, \$16.5 million no-bid contract to Amazon® to provide Kindle® e-readers for second language teaching overseas. The State Department rationalized its sole source solicitation by explaining that this was “the only e-Reader on the market that meets the Government’s needs . . . and Amazon [was] the only company possessing the essential capabilities required by the Government.” After widespread criticism of its rationale, the State Department cancelled the contract, and proceeded with a competitive proposal process open to all qualified bidders.

Some specifications overtly require a sole source. Others are more subtle and their nature as a sole source specification does not become apparent until the contractor tries to meet the technical requirements of the specification. The engineer responsible for this type of specification may not have intended to specify a sole source, in which event it is more likely that the public entity cannot provide a rational basis for the use of the restrictive technical requirements. Including the words “or equal” will not save a sole source specification if only one source meets the specifications.

The fact that a product is covered by a patent or other proprietary right alone does not justify specifying that product as a sole source. Rather, the public entity would need to provide a rational basis for why that proprietary product is necessary due to its special circumstances.

All states have procurement laws that set standards for sole source procurement. These laws typically address matters such as: approval authority; standards and justification for sole source procurement;

standards for cost, pricing, and negotiating; record keeping and reporting requirements; specific applications to specific agencies or to specific goods or services; and exemptions from approval requirements.

Georgia's law defines a sole source as "those procurements made pursuant to a *written determination* by a governing authority that there is only one source for the required supply, service, or construction item." O.C.G.A. § 36-91-2 (emphasis added). Thus, if a public entity plans to specify a sole source, it must provide a rational basis for doing so in writing, explaining why a less restrictive specification will not meet its special circumstances, and then obtain approval for such sole source by the supervising fiscal authority. On a local project, the supervising fiscal authority will typically be the board of commissioners or city council in that locality.

As a result, public entities should (1) determine whether they have special circumstances that require a restrictive specification, (2) research whether a less restrictive specification will meet their needs, (3) contact multiple vendors to determine whether their products could be used to meet the public entities' needs, and (4) comply with the State and local requirements for sole source solicitation. As recognized by the Association County Commissioners of Georgia, the Internet is an invaluable tool to find other firms that provide the same product or are authorized to install particular products.

One potential loophole to the restrictions on using sole source specifications is through the small dollar procurement exception to the competitive procurement laws. This exception effectively allows use of a sole source if the engineer's estimate of the project's cost is less than the statutory threshold. For example, Georgia's public

procurement laws do “not apply to public works construction projects, when the same can be performed at a cost of less than \$100,000.00.” Public entities in Georgia should be aware, however, that they could be in violation of these laws if they purposely subdivide a project into multiple small dollar projects to evade the provisions of Georgia’s competitive procurement laws.

In sum, the public procurement laws recognize that sole source specifications may be used in special circumstances; otherwise, it is unlawful for the public entity to either specify a sole source, or draft a specification in such a way that only one source can meet it.

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