What is the “competition rule”?

And why does it matter?
The competition rule in federal procurement

- In the procurement process, a government entity solicits bids from two or more contractors and chooses one from which it will buy the goods and services it requires through a prescribed bidding process.

- The “competition rule” sets forth a general standard that says such bidding process must be conducted through “full and open competition.”

- State and local agencies using federal funds must gain approval from federal agency issuing those funds to use bid criteria—which feds evaluate based on competition rule.
What does full and open competition mean?
The Competition Rule: A Brief Legal History

Anticorruption = transparent procedures + open bidding

Original competition ideal

Federal-Aid Highways Act 1956, am. 1968, § 112(b)

"competitive bidding"

1984 Competition in Contacting Act

"full & open competition"

1986 OLC Opinion

"maximizing bids & lowest possible price"

OMB Uniform Guidance (aka Common Grant Rule) (1988)

"full & open competition"

2013 OLC Opinion

"undue burden" on bid pool

Efficiency = low price + no bid conditions related to price that limit pool

Modern competition rule
§200.319 Competition.

(a) All procurement transactions for the acquisition of property or services required under a Federal award must be conducted in a manner providing full and open competition consistent with the standards of this section and §200.320.

(b) In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:

1. Placing unreasonable requirements on firms in order for them to qualify to do business;
2. Requiring unnecessary experience and excessive bonding;
3. Noncompetitive pricing practices between firms or between affiliated companies;
4. Noncompetitive contracts to consultants that are on retainer contracts;
5. Organizational conflicts of interest;
6. Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement; and
7. Any arbitrary action in the procurement process.

(c) The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.