

School Construction Project Liabilities and Protections

The Attorneys' Perspective

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Project Delivery Method

Must Comply with Rules Applicable to
Selected Project Delivery Method



Competitive Bid

Design – Bid – Build

(Pub. Contract Code (“PCC”) § 20111.)

2008 Bid Limits:

\$72,400

Equipment, materials or supplies

Services (except construction)

Repairs, including routine maintenance, landscaping and minor repainting

\$15,000

Construction, reconstruction, repair or painting

Other Project Delivery Methods

Design – Build

(Ed. Code § 17250.10 *et seq.*)

Lease – Leaseback

(Ed. Code § 17406.)

Multiple Prime Contractors

(PCC § 20111.)

Construction Manager At-Risk ?

Exceptions to Public Bidding in the Construction Context

Emergency (PCC § 20113.)

Unique Product (PCC § 3400.)

Day Labor / Force Account (PCC § 20114.)

Uniform Construction Cost Accounting (PCC § 22000.)

Professional Services (PCC § 20111.)

“Unique Circumstances” resulting in no public benefit
(Graydon v. Pasadena Redev. Agency (1980)
104 Cal.App.3d 631.)

Piggybacking (Public Contract Code § 20118.)

Architect / Engineer Contract

State Funding (Ed. Code § 17070.50; Govt. Code § 4525.)

On the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required.

No State Funding (Govt. Code § 4529.10 (competitive process).)

Indemnity Provision must be stated in RFP. (PCC § 20103.6.)

Cannot require AE to indemnify for school district's sole or active negligence. (Civil Code § 2782.)

School District owns plans and specifications subject to AE's copyrights. (Ed. Code § 17316.)

Construction Management Contract

Where school district does not have employees who possess adequate construction management experience (Ed. Code § 17070.98.)

State Funding (Govt. Code § 4525.)

Individual or firm and its personnel carrying out onsite responsibilities must have demonstrated expertise and experience (Govt. Code 4529.5.)

No State Funding (Govt. Code § 4529.10.)

Competitive process

Cannot require CM to indemnify for school district's sole or active negligence (Civil Code § 2782.)

The Field Act

Education Code section 17370 states:

“ . . . nothing in this article shall be construed as relieving any member of the governing board of a school district of any liability for injury to persons or damage to property imposed by law.”

This means a governing board member could be *personally liable* for injury.

The Field Act

DSA Approval is required before award of the contract.

If no DSA approval, the contract is not valid and no public money can be used to pay for work done or any labor or materials provided under the contract. (Ed. Code § 17307)

Any person who violates the Field Act or makes any false statement in any verified report or affidavit required under the Field Act is guilty of a **FELONY**. (Ed. Code § 17312)

Design Responsibility

School District cannot require the bidder to assume responsibility for the accuracy and completeness of the plans and specifications. (PCC § 1104.)

But the School District can require the bidder, in the capacity of a contractor and not in the capacity of a licensed design professional, to review the plans and specifications prior to bid submission and report any errors or omissions. (PCC § 1104.)

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The Bid



For a district to accept a bid, the bid must be **responsive** to the notice for bids and the bidder must be **responsible**.

But what does that mean?

Responsive Bids

If a bid does not conform to the bid specifications, it may not be accepted, because it is not *responsive*.

Responsiveness is usually determined from the “four corners” of the bid. Taylor Bus Service, Inc. v. San Diego Board of Education (1987) 195 Cal.App.3d 1331, 1341.

However, a bid which *substantially conforms*, though not strictly responsive, must be accepted if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders.

(Ghilotti Construction v. City of Richmond (1996) 45 Cal.App.4th 897.)

Responsible Bidders

- Public construction contracts must be awarded to the lowest bidder unless the bidder is not qualified to do the particular work under consideration.
- City of Inglewood-L.A. County Civic Center Authority v. Superior Court of Los Angeles County (1972) 7 Cal.3d 861.
- Due process must be afforded.

Bid Protests

- Bid protests are brought by unsuccessful bidders.
- Bid protest procedures should be included in bid instructions (e.g., limitation on time).
- Failure to comply with mandatory procedures set forth in the bid instructions for bid protests may result in a waiver of the protest right of a bidder. (MCM Const., Inc. v. City and County of San Francisco (1998) 66 Cal.App.4th 359, review denied.)

Avoiding Liability During the Bid Process

- Avoid vague or conflicting bid instructions
- Understand what is and is not a “clerical error” in a bid
- Have clear “prebid” requirements
- Comply with the requirements for altering bid information

Liability Considerations related to Licensing

Contractors License Law: Business & Professions Code § 7000 *et seq.*

School District must specify type of license in bid (PCC § 3300.)

Misdemeanor for contractor to submit a bid to a public agency without a license (B&P Code § 7028.15.)

School District must verify license status of bidder (B&P Code § 7028.15.)

If not licensed, bid must be rejected as non-responsive (B&P Code § 7028.15.)

School District official/employee who knowingly awards a contract or issues a purchase order to an unlicensed contractor is subject to citation by the Contractors State License Board and a civil penalty of not less than \$200 but not greater than \$15,000 (B&P Code § 7028.7.)

Contract Considerations



Board Approval

No contract is valid or enforceable against a school district until the contract has been approved by the governing board.

(Ed. Code § 17604.)

Terms to Consider When
Negotiating Professional
Contracts

Architect Agreements

Compensation	Services to be rendered
Insurance	Ownership of Documents
Indemnity	Damages
Prevailing Wages	Master Agreement

Construction Management Agreements

- Compensation
- Duties and Responsibilities
- Hold Harmless and Indemnification
- Insurance
- Bonus
- Liquidated Damages
- Prevailing Wages

Independent Contractor Agreements

- Is the party really an independent contractor?
- Payment Terms
- Services to be Rendered
- Term
- Termination
- Insurance

Construction Contractor Agreements – Terms to Consider

- Liquidated versus Actual Damages
- Payment
- Insurance
 - General liability
 - Worker's compensation
 - Builder's All Risk
 - Fire

Construction Contracts Additional Terms

Warranties	Indemnity
Fingerprinting	Dispute Resolution

Change Orders

- The Governing Board may approve change orders for existing contractors without bidding if the cost of the change order does not exceed the greater of either (1) the amounts specified in Public Contract Code sections 20111 or 20114 or (2) 10% of the original contract price.
- If any change or alteration of a contract is ordered by the school district, the change or alteration must be in writing and the cost agreed upon between the governing board and the contractor.

Liability Considerations when Construction Disputes Arise

Contractor Default

Surety Bonds: Why You *Need* Them

Bid Bond

- Provides a security guaranteeing that bidder is committed to performing work if contract is awarded.

Performance Bond

- Protects the District in the event of a contractor failing to complete a project.
- Not required, but *highly* recommended.

Payment Bond

- Protects the District against a contractor failing to pay its subcontractors and suppliers.
- Required for any project over \$25,000. (Civil Code § 3247.)

Contractor Default Options

- Demand Cure and Correction of Work
- Removal of Contractor from Project
- Surety Takeover (Performance Bond)
- Contractor Termination
- Complete Project with District Forces

Surety Takeovers

- Takeover Agreements
- Responsibility for Delays
- Selection of Replacement Contractor

Contractor Bankruptcy Considerations

- Consult with legal counsel.
- Keep sureties informed and involved.
- Once a bankruptcy court is involved, the rules may change.
- Bankruptcy may impact ability to terminate a contractor.



Stop Notices – Technical Requirements

- Determine whether stop notice is timely.
- Assess what work has actually been completed.
- Assess what has been paid to the contractor.
- Withhold the appropriate funds.



Stop Notices - Strategy

- Communicate with the Contractor.
- Notify the Surety.
- Assess potential liability.
- Consider interpleading the withheld funds.

Architect Disputes

- Is it related to a larger construction dispute?
- Consider the Contract
- Expert Confirmation

Thank you for Attending!