

C.A.S.H. 30TH ANNUAL CONFERENCE ON SCHOOL FACILITIES

30 YEARS OF SCHOOL FACILITIES LEADERSHIP ADVOCACY ♦ EDUCATION ♦ COLLABORATION

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Room 307

Workshop # 8

What to Do With the Minimally-Qualified Contractor: Pre-Construction Strategies

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The Market Has Changed

- Construction work in the commercial and residential sectors has slowed dramatically.
- Unemployment in the construction sector has reached levels unprecedented in our lifetime (exceeding 10%).
- Prevailing wage labor costs have continued to increase based on previously approved increases with the union wages.
- Supply and demand issues have driven material prices down; however the decline in overall construction costs are far greater than the reduction in material prices.

The Market Has Changed, continued

- Sureties are tightening bonding limits available to contractors as a measure of mitigating their risks.
- General tightening of available funding.

Impacts on the K-12 Bid Market

- Many contractors/subcontractors are entering the K-12 marketplace with little or no experience in building schools or dealing with regulatory agencies.
- Contractors/subcontractors learning at the expense of school districts.
- Contractors are projecting unrealistic productivity in order to beat the competition, keep their employees working and their businesses open.

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Through the Looking Glass

- The availability and timing of State funding is still in question.
- There will continue to be a tightening in the bond and financing marketplace.
- The number of contractors/subcontractors bidding K-12 projects will continue to increase, even doubling and tripling.
- There will continue to be some funding in the K-12 marketplace, mainly through local bond initiatives. Some passed in 2008:
 - Southern California (\$22 Billion)
 - Northern California (\$4 Billion)

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Through the Looking Glass, continued

- No signs that the private sector will rebound within the next one to two years.
- The “Buyers Market” for procuring construction services will continue.
- Budget cuts and staff reductions at the State level will likely impact project approval timelines.
- Competition for the available work will continue to increase through contractors/subcontractors entering the marketplace from other construction sectors and other states.

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Remember the 1990's

- Contractors were unable to rely upon upcoming jobs to make up project losses.
- Who got awarded the project?
 - the contractors that knew the least about school construction,
 - the contractors that made the biggest bid mistake, and
 - the biggest gamblers.

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Remember the 1990's, continued

- Contractors' unfamiliarity with DSA and school construction led to quality issues and delays while disputes were resolved.
- Contractors, subcontractors and suppliers went bankrupt and defaulted.
- The "birth" of school construction litigation.
- The emergence of construction management in the K-12 community to assist in managing the risk.

Start With the Right Consultants

- Accurate plans are more important than ever.
- Constructability reviews / BIM are crucial.
- Find attorneys who have track records working with contractors during troubled projects.
- Consider alternative procurement where you can pick your partners based on qualifications, reputation, financial strength and experience.
- Consultants' style and personality count, big time.

Start With the Right Consultants, continued

- Check them out:
 - insist upon knowing the team,
 - verify their capacity,
 - consult with their peers and
 - check references.

Mitigate Your Risk Exposure

- Identify which types of additional work might be hidden behind the walls and below the surface of your projects.
 - Assume that you will find surprises during modernization.
 - Survey similar District facilities to develop lists of likely unforeseen conditions.
 - Notify contractors of possibilities and preferred approaches in specifications, to assist them in preparing in advance.

Mitigate Your Risk Exposure, continued

- Even “new” sites present challenges.
 - Every site has a history.
 - Talk with the former owners about prior uses.
- Many contractors will likely be targeting and taking advantage of change order opportunities to enhance their profitability. Consider more investigation up front to minimize your exposure.
- Contractors who are not familiar with school work are less prepared and less inclined to work with school districts in addressing the impact of change orders on the contract price.

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Responsible? Who, Me?

- Determine whether the bid is responsive, then whether the contractor is responsible.
- A bid can be found nonresponsive if it does not conform to the instructions in every way. A school district may waive certain irregularities, but does not have to.
- A contractor must be allowed to attempt to show that the bid was responsive, but is not entitled to any hearing.

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Responsible? Who, Me?, continued

- A responsible bidder is “a bidder who has demonstrated the attributes of:
 - trustworthiness,
 - quality,
 - fitness,
 - capacity, and
 - experience

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Responsible? Who, Me?, continued

- to satisfactorily perform the public works contract. (Public Contract Code §1103)
- If a contractor meets this standard, it is illegal to eliminate it simply because it is less qualified than other contractors.
 - Responsibility factors can include:
 - type and quantity of previous experience, particularly for specialized systems,

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Responsible? Who, Me?, continued

- the size and type of the project,
 - A contractor might be “responsible” to perform one project, but not responsible to perform a different project.
- financial capacity,
- size of staff,
- other ongoing projects, and
- documented poor performance on other projects.

Responsible? Who, Me?, continued

- Before rejecting a bid on the theory that a contractor is not responsible, a school district must:
 - notify the contractor of the non-bid information that it received,
 - give the contractor the opportunity to counter the information.
- The responsibility “hearing” can be before a staff person, and does not have to be before the Governing Board.

Now is the Time to Prequalify

- Even if the school district doesn't always prequalify, the time is right now.
- Be sure that prequalification panel has time to perform a meaningful analysis.
- Oakland Unified School District's Hybrid Prequalification System
 - "Short Form" – twice a year – insurance and surety information, judgments, violations of law, lists of current and former projects, identification of staff

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Now is the Time to Prequalify, continued

- "Long Form" – over \$250,000, with bids – updated projects lists, key personnel, bonding capacity and type of ownership.
- McCarthy Building Companies, Inc. – project-specific prequalification
 - Financial Strength
 - Experience on Similar Projects
 - Number of completed K-12 Projects in Previous 5 Years
 - Safety Record / Violations
 - Litigation History
 - Bondability

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Useful Construction Phase Strategies

- Establish a problem-resolution process in advance
 - Use unilateral change orders.
 - Speed the change order process by getting the Governing Board to:
 - commit to special meetings, or
 - establish a change order process.

Useful Construction Phase Strategies, continued

- Educate contractors early, rather than incrementally.
 - Avoid the “do over” direction.
 - Can help the District avoid violating prompt payment laws.
 - Consider session with subcontractors on stop notices.
- Keep in touch with sureties . . . but reassure contractors.