

Bid Protests in a Time of Hungry Contractors



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CURRENT BID CLIMATE

How Healthy is Private Works Construction?

- Residential construction is dead
- Commercial construction is dying
- Industrial construction is sick

CURRENT BID CLIMATE

- Migration of private work contractors to your projects
- More contractors bidding on school projects
- Artificially low bids due to shrinking profit margins
- Inexperienced contractors

- Too Many, Too Low, Too Green = More Bid Protests

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LEGAL ISSUES

Bid Responsiveness

- Must award to lowest responsive, responsible bidder
- Bid is responsive if it promises to do what the bidding instructions require
- Look at the “face of the documents” or “four corners”
- No outside investigation or information necessary

Taylor Bus Service, Inc. v. San Diego Board of Education (1987) 195 Cal.App.3d 1331

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LEGAL ISSUES

Waiving Irregularities

- Is the irregularity substantial or inconsequential
- Does it have a material affect on the bid price
- Does it provide the bidder an unfair advantage
- Can the bidder withdraw its bid without adverse consequences to its bid bond
- Will the irregularity deprive the District of its assurances that the contract will be entered into and performed

Valley Crest Landscape, Inc. v. City Council (1966) 41 Cal.App.4th 1432
47 Ops.Cal.Atty.Gen. 129 (1966)

LEGAL ISSUES

Examples- Waivable?

- Bid mailed and received by District on time, but not delivered to the room where bids were opened
- Bid not read aloud
- Late bid
- No bid bond
- Improper DVBE documentation
- Deviation/ Notation to bid documents
- Not signing the Bid Form

LEGAL ISSUES

Bidder Responsibility

- Quality, fitness and capacity to perform the work
- Usually involves outside investigation or information
- Not awarding a contract due to bidder responsibility issues triggers certain due process rights
- Non-responsibility hearing
- Bid documents should address bid responsiveness, not bidder responsibility issues

City of Inglewood- L.A. County Civic Center Authority v. Superior Court (1972) 7 Cal.3d 861

SOURCES OF BID PROTESTS

Subcontractor Listing Issues

- Bidder does not designate subcontractors for trades that are more than one-half of one percent of the total bid
- Bidder does not designate any subcontractors
- Bidder does not designate a required manufacturer-approved or certified subcontractor
- Bidder designates a subcontractor with an expired license

SOURCES OF BID PROTESTS

Subcontractor Listing Issues

- Prime contractor with a B license can self-perform work if:
 - There are at least two or more unrelated trades or crafts other than framing or carpentry
 - The work in question does not require a C-16 (fire protection) or C-57 (water well drilling) license

Business and Professions Code §§ 7057(b) and (c)

SOURCES OF BID PROTESTS

Subcontractor Listing Issues

- Designating a subcontractor with an expired license does not make a bid non-responsive
- Court ruled it was a bidder responsibility, rather than a bid responsiveness issue
- Court noted other available remedies under the Public Contract Code

D.H. Williams Construction, Inc. v. Clovis Unified School District (2007) 146 Cal.App.4th 757

SOURCES OF BID PROTESTS

Certification/ Licensing/ Experience Requirements

- Don't bury these requirements in the technical specifications
- Specifying subcontractor requirements- pros & cons
- Be aware of restrictions under Public Contract Code §3400
- Sole source items/ proprietary specifications
- Consider prequalification
- Bid responsiveness v. contract performance issues- don't confuse the two

SOURCES OF BID PROTESTS

Poorly Coordinated Bid Documents

- Pozar doctrine- must comply with your own bidding requirements
- Prequalification forms in the bid documents
- Burying bidding requirements in the specifications
- Inconsistent provisions for requests for substitutions
- DVBE documents
- District standards that violate Public Contract Code §3400

TRICKS OF THE TRADE

Circumventing Bid Requirements & Laws

- Use of the second tier subcontractor
- Listing unlicensed subcontractors
- The ever-growing payroll of the prime contractor
- Bid shopping and the subsequent request for substitution
- The “shell” subcontractor
- Vague or overly broad subcontractor designations

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WHAT TO DO WHEN YOU RECEIVE A BID PROTEST

- Contact legal counsel
- Notify bidder being challenged of bid protest
- Limit communications with bidders
- Compile key/ relevant documents
- Note key dates/ deadlines
- Evaluate bid protest with consultants and counsel and agree on a recommendation
- Consider rejection of all bids

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WHAT TO DO WHEN YOU RECEIVE A BID PROTEST

- Coordinate Board meetings and award of contract
- Handling public comments during Board meeting
- Award the contract
- Have contractor commence work
- Take steps to be prepared should disappointed bidder file a writ of mandate or take other legal action

MINIMIZING BID PROTESTS

- Schedule time to review and coordinate bid documents with consultants and legal counsel
- Schedule time to address pre-bid activities such as prequalification of bidders, sole sourcing, etc.
- Schedule time to address RFI's from bidders and issue addenda if necessary
- Don't include documents related to bidder responsibility issues in the bid documents
- Prequalify contractors

Question & Answer Session

Thank You

For questions or comments, please contact

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