
Bowie, Arneson,
Wiles & Giannone

Pre-qualification of Bidders

C.A.S.H. Workshop

March 25, 2003

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Guidance in Requests for Qualifications

- **Authorized by *Public Contract Code §20111.5* --**

“A governing board may require all prospective bidders to submit a standardized questionnaire and financial statement in a form specified by the school district, including a complete statement of the prospective bidder’s financial ability and experience in performing public works.”

- **Must be verified under oath** -- Declaration under penalty of perjury under the laws of the State of California.

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Guidance in Requests for Qualifications

- **District must adopt & apply a uniform & objective system of rating prospective bidders in order to avoid challenges to the pre-qualification process**
 - Must apply to all prospective bidders equally.
 - Carefully choose criteria that results in disqualification.
 - Used to rate bidders regarding size/scope of contracts upon which bidder is pre-qualified to bid.
 - District may chose to disclose the rating of an individual firm only upon written request.

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Guidance in Requests for Qualifications

- **Submitted at least 5 days before bid opening date**
 - District must accept pre-qualification package even if it is submitted on the 5th day prior to bid opening.

- **Pre-qualification process may be updated quarterly & may be valid for one (1) calendar year**
 - District may elect to establish these criteria.
 - One year runs from date of initial pre-qualification.
 - Public Contract Code §20111.5(d) added in 1997.

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Guidance in Requests for Qualifications

- **Completed Questionnaires and Financial Statements are confidential & may not be produced as a “Public Record”**
- District should have procedure of recordkeeping that prevents accidental disclosure, except that the name(s) of contractor(s) who have requested pre-qualification may be produced.

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Guidance in Requests for Qualifications

- **Compare with: *Education Code §17250(b)*** -- Pre-qualification questionnaire for design-build entities designed by the Director of the Department of Industrial Relations (“DIR”)
 - Must use standard DIR form questionnaire.
 - If school district reserves right to hold discussions or negotiations with responsive bidders, it must specify so in the Request for Proposal (“RFP”) and either publish separately or incorporate into the RFP the rules & procedures to ensure they are conducted in a fair & impartial manner.

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Guidance in Requests for Qualifications

- **Compare with: *Public Contract Code §20101* - Contracting by Local Agencies (not school districts)**
 - May use DIR form questionnaire and/or model guidelines by DIR in rating of bidders.
 - Must have appeal process, notification & opportunity to rebut evidence used to disqualify.
 - Financial statement not required from a contractor who qualifies as a “Small Business Administration” entity under certain circumstances.

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Legal Perspective – Do Your Pre- Qualification Documents Have Teeth? ”

- **Do you have adequate procedures in place to disqualify bidders in the Questionnaire?**

- Automatic Disqualification (Identified on Pre-
Qualification Questionnaire)
 - ~ Omission of requested information
 - ~ Falsification of information
 - ~ Debarment from the Division of Labor
Standards Enforcement (“DLSE”)
 - ~ Failure to execute Pre-Qualification
Questionnaire under penalty of perjury
 - ~ Failure to include Financial Statement with
Pre-Qualification package

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Legal Perspective – Do Your Pre- Qualification Documents Have Teeth? ”

- Automatic Disqualification (con't.)
- ~ Use of alternative form not approved by the District
- ~ Criminal conviction/plea re: business or work on a project(s)
- ~ Bankruptcy within past 7 years
- ~ Default on public works project resulting in Surety making payments to owner or subcontractor(s)
- ~ Collusion to obtain bid award
- ~ Failure to have **notarized** statement from admitted Surety

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Legal Perspective – Do Your Pre- Qualification Documents Have Teeth? ”

- Discretionary Disqualification Based on Evidence/Answers (Identified in policies/procedures of the District)
- ~ Forced to pay liquidated damages
- ~ Excessive Stop Notices (more than 15% of project cost over the life of construction or more than 50% of retention monies held)
- ~ Poor references (Check all references listed!)
- ~ Invalid/revoked contractor's license
- ~ 2 or more citations on contractor's license
- ~ Business less than 5 years old

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Legal Perspective – Do Your Pre-Qualification Documents Have Teeth? ”

- Discretionary Disqualification (con't)
- ~ Prior lawsuits/claims – Be Cautious!!
 - Limit to within past 5 years
 - Allow opportunity to explain
 - Contact owner & architect involved
- ~ Previously terminated from project
- ~ Number of change orders on last few projects
- ~ Had a portion of retention monies taken by the school district at end of project
 - Ascertain why
 - Contact owner & architect involved

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Legal Perspective – Do Your Pre- Qualification Documents Have Teeth? ”

- Discretionary Disqualification (con't.)
- ~ No prior school construction experience (caution) vs. no prior public works construction experience.
- ~ Insurance Policy limits – less than \$1 mill. per occurrence & \$2 mill. aggregate in liability insurance
- ~ Previously ineligible to bid on any public works project before; why?
- ~ Do you pay prevailing wages (AB 1506 now requires)

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Legal Perspective – Do Your Pre- Qualification Documents Have Teeth? ”

- Financial Capacity:

- Pre-qualification to bid on projects up to a maximum dollar amount based on the lesser of
 - 10 times working capital (current assets less current liability), OR
 - 10 times net worth (total assets less liabilities)

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Legal Perspective – Do Your Pre- Qualification Documents Have Teeth? ”

■ Financial Document:

- Audit or review report by licensed CPA or public accountant
- Must have been done in past 12 months
- CPA must be in good standing with State regulatory agencies (get copy of license)
- “Letter of Bank Credit” – optional or mandatory
- Should be an unqualified opinion
- Evidence of working capital and net worth
- Excess costs over billing to date

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Legal Perspective – Do Your Pre- Qualification Documents Have Teeth? ”

■ Notifying bidders of disqualification

- 1. Initial notice
- 2. Due process hearing/interview – allow bidder to explain areas of concern to the District
- 3. Further consideration
- 4. Final notification
- 5. Notice of Appeal – procedures need to be in place for appeal
- 6. Decide if bid opening will be delayed

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Legal Perspective – Do Your Pre-Qualification Documents Have Teeth? ”

- Document, Document & Document your efforts in pre-qualifying bidders
 - Review documents routinely to ensure they meet District’s criteria as established by the District’s Resolution
 - If challenged, correct area of inquiry/issue before next pre-qualification & redo prequalification request
 - Use list of questions in checking references & write down what was said
 - Check all references
 - Document phone conferences with bidder
 - Document notification of disqualification

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Legal Perspective – Do Your Pre-Qualification Documents Have Teeth? ”

■ **Suggestions to avoid challenges:**

- Have legal counsel review your documents
- Make sure Board understands each criteria to be used – evaluate for each project &/or quarterly
- If not certain on criteria, use as discretionary rather than automatic disqualification criteria
- Hire consultant or commit district staff to spend considerable time in evaluating pre-qualification packages
- Have same person evaluate all pre-qualification packages

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Enforcing Your Pre-Qualification Process

- Main focus in on established criteria identified in your pre-qualification documents
 - Make sure they are not inconsistent!
- Do not deviate
 - No favoritism (You may have to disqualify your favorite contractor.)
- Due process hearing/interview
 - Required, even if time restraints
- Consult legal counsel

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Enforcing Your Pre-Qualification Process

- If you do not have time to prepare & adopt Resolution and policy/procedure manual to support your pre-qualification process, don't pre-qualify bidders
 - Resolution should give authority for Superintendent or designee to pre-qualify bidders
- If you do not have District staff or consultant who can commit full time to analysis of pre-qualification packages, don't pre-qualify bidders

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Enforcing Your Pre-Qualification Process

- If you don't have an established protest or appeal procedure in place before 1st pre-qualification, don't pre-qualify bidders
 - Being prepared will prevent further delay
- If you do not have funds to consult with legal counsel when protests/appeals are filed, don't pre-qualify bidders

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*Question: Should your District pre-qualify
bidders?*

