

KEEPING CONSTRUCTION PROJECTS ON TRACK AND
OUT OF LITIGATION FROM THE VERY BEGINNING:
STEPS TO TAKE IN THE PRE-CONSTRUCTION PHASE

COALITION FOR ADEQUATE SCHOOL HOUSING

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1. PREQUALIFICATION

Public Contract Code section 20111.5 authorizes school districts to prequalify contractors to bid on construction projects, and, by exclusion, to disqualify contractors from bidding:

(a) The governing board of the district may require that each prospective bidder for a contract, as described under Section 20111, complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district, including a complete statement of the prospective bidder's financial ability and experience in performing public works. The questionnaire and financial statement shall be verified under oath by the bidder in the manner in which civil pleadings in civil actions are verified. The questionnaires and financial statements shall not be public records and shall not be open to public inspection.

(b) Any school district requiring prospective bidders to complete and submit questionnaires and financial statements, as described in subdivision (a), shall adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements, in order to determine the size of the contracts upon which each bidder shall be deemed qualified to bid.

The text of the statute implies that the prequalification process must be carried out without taking the characteristics of particular projects into account. In practice, most districts who prequalify do so on a project-by-project basis.

Prequalification provides two significant benefits: (1) the ability to establish reasonable minimum experience standards for specialized projects and (2) the

time and information to more thoroughly investigate the qualifications of potential bidders. Both decrease the likelihood that districts will discover later that the contractors they are working with are either unqualified or not inclined to provide quality service.

The prequalification process itself can, however, lead to administrative appeals and litigation. Prequalifying contractors does not allow districts to eliminate contractors because other contractors are more qualified; the determination is still whether the contractor is or isn't minimally qualified to perform the job.

When a statute requires that an award be made to the lowest (or highest) responsible bidder, it must be awarded accordingly unless that bidder is found not responsible, i.e., not qualified to perform the particular work under consideration. Although public bodies have discretion to determine which bidders are responsible, they may not, if they determine more than one bidder is responsible, made the award on the basis of relative superiority.

(Boydston v. Napa Sanitation Dist. (1990) 222 Cal.App.3d 1362, 1368-69.)

In other words, if the project includes a pool, the district can require contractors to have built pools before, but cannot disqualify half of the potential bidders because they haven't built as many pools as the other contractors.

Most attorneys interpret section 20111.5 to hold that contractors must be allowed to submit prequalification packages up to five days prior to the bid date, even if the district has set an earlier deadline:

A proposal form required pursuant to subdivision (c) shall not be accepted from any person or other entity who is required to submit a completed questionnaire and financial statement for prequalification pursuant to subdivision (a), but has not done so at least five days prior to the date fixed for the public opening of sealed bids or has not been prequalified, pursuant to subdivision (b), for at least one day prior to that date.

(Subdivision (d).)

We recommend that districts explicitly reserve the right to call references for the lowest responsible bidder after bids are received, even if the prequalification process has been used. In reality, there just isn't enough time or inclination to call an adequate number of references for all contractors that are prequalified.

2. BID ALTERNATES

Prior to the enactment of Public Contract Code section 20103.8 in 2000, it was sometimes possible for districts to select one bidder over another by deciding which bid alternates it would accept. Section 20103.8 requires districts to decide prior to receiving bids how it will factor alternates into the low-bid calculation. The four options are:

- (a) accept the bid with the lowest base bid;
- (b) identify the alternates which will be used for determining the lowest bid in the bid documents and accept the bid which has the lowest price for the base bid and identified alternates;
- (c) identify the order in which alternates will be considered in the bid documents, identify the funding amount prior to opening bids and accept the bid which would provide the greatest number of alternates within the identified funding amount; or
- (d) use a blind-bid system.

In general, the choices are best in the following situations:

- (a) is best when the district is unlikely to accept any alternates, or the alternates are very low priority.
- (b) is best when the district is pretty certain which alternates it wants to accept.
- (c) is best when the district knows how it prioritizes the alternates, but wants to get the highest number of alternates for the lowest price.
- (d) is best when there is a high likelihood that the district's priorities will change between the date the bid package hits the street and the date that bids are opened.

It is a very good idea to have your attorney review your bid form after it has been customized for the project, due to the high number of mistakes which occur in describing how alternates will be considered and the high stakes involved.

Finally, while this system establishes how the lowest bid will be identified, it does not limit the district in its choice of alternates:

This section does not preclude the local agency from adding to or deducting from the contract any of the additive or deductive items after the lowest responsible bidder has been determined.

3. SUBSTITUTION OF MATERIALS

Public Contract Code section 3400 prohibits public agencies from discriminating among products of equal value and utility, to avoid enriching certain companies over others.

The three important factors in complying with section 3400 are: (a) letting bidders know that they are generally allowed to substitute similar products for those specified; (b) making it clear when exceptions to this rule apply; and (c) deciding whether to limit the time during which bidders can ask to substitute products.

Section 3400 states that specifications must identify other products which are equal to the specified product and add the phrase "or equal" after products for which no equal product is known. Unless there is truly one product available, an emergency exists or the product is being tested for possible future use, the only time that this rule can be disregarded is:

in order to match other products in use [installed] on a particular public improvement either completed or in the course of completion.

(Pub. Cont. Code §3400, subd. (b)(2).) If a district adopts a "standard" for future projects, it must establish that the product is incorporated into another facility, not simply describe how the product is superior.

Another way to discourage contractors from attempting to substitute inferior materials is to describe in great detail the characteristics of the product which make it more desirable. If the contractor realizes up front how difficult it would be to show that another product is truly equal, it is less likely to base its bid on another product.

Substitution of inferior products, or a district's refusal to allow substitutions, can lead to lengthy and costly litigation. One way to legally minimize substitutions is to limit the amount of time during which contractors can request permission to substitute products. Districts can require contractors to submit their requests either before or after bids are received (or allow both), but if they do not specify a time, contractors will be allowed to request substitutions during the first 35 days after award of the contract.

We recommend that districts require contractors to submit their requests at least ten days prior to the bid date, except in circumstances such as the unavailability of the specified product. (List all of the exceptions to this rule in the bid package.) This greatly minimizes the likelihood that bidders will seek to substitute any but the most significant systems.

4. PRE-BID SITE VISIT AND CONFERENCE

The pre-bid site visit and conference are districts' best opportunities to highlight unusual site conditions and general condition requirements which are more stringent than typical.

School districts may make site visits and conferences mandatory for potential bidders. (Whether you want to do so will of course depend in part upon how hot the bidding climate is at the time.) If you do make them mandatory, you may also require the contractors to send representatives who fill certain roles, such as estimators or project managers, and to sign in and out of the meetings.

If you make these meetings mandatory, it is highly recommended that you require all bidders to attend a single meeting. If you do not, you should make it clear in advance that the only information at these meetings which is binding upon the district is that which is incorporated into a post-meeting addendum.

5. BID IRREGULARITIES

Bid irregularities are those seemingly minor differences between the district's bid requirements and the content of the bids received, such as failure to include attachments or to acknowledge the receipt of addenda.

School districts should always include a provision in the bid package that states that the district reserves the right to waive irregularities in the bids. School districts may disregard discrepancies if they have reserved this right and:

- (a) the requirement is not established by statute;
- (b) the discrepancy does not materially affect the bid; and
- (c) the discrepancy could not give the contractor a competitive advantage over the other bidders.

Remember that the last criteria is whether the discrepancy could not result in a competitive advantage, not whether it did result in an advantage.

Examples of competitive advantages are when the contractor has the option of either confirming its bid or using the discrepancy to void its bid and when an omission could create an opportunity for the bidder to undercut its competitors' prices.

6. WITHDRAWAL OF BIDS AFTER OPENING

Bidders may not withdraw their bids after the deadline for submission if the reason for doing so is failure to carefully consider the cost of the project ("error in judgment") or carelessness in reading the bid documents or inspecting the project site.

A contractor may withdraw its bid if:

- (a) the bid was materially different than intended;
- (b) the difference was due to an error in filling out the bid; and
- (c) it notifies the school district of the grounds for the withdrawal within five days after the bids were opened.

(Pub. Cont. Code §5101, 5013.)

It is not a wise idea to play games with a contractor which has informed the district of its intent to withdraw a bid. In January, the Second Appellate District issued its decision in Emma Corporation v. Inglewood Unified School District, holding that the School District could not collect against the contractor's bid bond, despite the fact that the contractor did not fully comply with section 5100 *et seq.* and thereafter refused to sign its contract. (Emma, 8 Cal.Rptr. 213.)

Emma Corporation sent the School District a letter stating that it was withdrawing its bid due to a clerical error, but did not describe how the error had occurred. When the contractor called the District's construction manager about withdrawing the bid, the construction manager replied that the District's attorney would contact the contractor if it required any additional information. The School District apparently decided not to do anything to clarify the contractor's letter and did not make any further contact with the company.

The courts held that the District had acted in bad faith by implying that it would notify the contractor if any necessary information was missing. For this reason, it was not allowed to collect the difference between Emma Corporation's bid and the next highest bid, and the contractor was awarded its costs on appeal.

7. ISSUANCE OF THE NOTICE TO PROCEED

If there will be a long period of time between the time bids are received and when the work will commence, it is important not to issue the Notice to Proceed too early. Often school districts will issue the Notice very quickly after awarding the contract, to allow the contractor to begin to order supplies. This can result in the district being liable to the contractor for significant delay damages.

Unless there is an explicit, documented agreement between the district and the contractor, the district should not award the contract until approximately 10 days prior to the date that it will issue the Notice to Proceed.

Contractors are entitled to receive notices to proceed within a "reasonable" period of time after the contract is awarded. What a "reasonable" period of time is depends upon the parties' expectations and other circumstances. There is no rule of thumb, but many courts and administrative tribunals have found that 7-12 days is appropriate, to allow the contractor time to sign the contract and submit bonds and insurance certificates.

Public agencies often think that they may issue the Notice to Proceed at any time prior to the expiration of the time that the agency has to award the contract. For example, if an agency reserves the right to award the contract up to 90 days after bids are submitted, it may mistakenly assume that it can issue the Notice to Proceed on day 89, even if the contract was awarded five days after the bid date. This is not true.

The respondent contends that it had 120 days from bid opening in which to make award, which is correct. The respondent contends that if it had taken that full 120-day period to award the contract, the Notice to Proceed would have been issued about January 27, 1986, when it was in fact issued. This contention is also correct. The respondent then concludes, also correctly, that Goudreau could not have been certain when preparing its bid that it would be able to perform the work before the end of 1985, which is a basic premise of the Goudreau claim. The Coast Guard then argues that this combination of circumstances precludes appellant from recovery While the Coast Guard could have delayed until the 120th day after bid opening to make award, it elected not to do so. Once an award is made and the requisite bonds and certificate of insurance have been furnished by the contractor, the obligation to issue a Notice to Proceed with reasonable promptness comes into force. "The reasonable period runs from the date of the award of the contract, and the Government may not count the time it could have taken but did not in making the award."

(Appeal of Goudreau Corporation (1988) 88-1 BCA ¶20,479, quoting Freeman Electric Constn. Co. (1977) 77-1 BCA ¶12,258. While these federal administrative hearing decisions are not precedential in California courts, their reasoning is given weight in their decisions.)

8. SUBSTITUTION OF SUBCONTRACTORS

Contractors may use subcontractors other than the ones they listed only when the new subcontractor is approved by the school district, for one of the following reasons:

- (a) the school district determines that the subcontractor is not qualified to perform the work;
- (b) the subcontractor was listed due to an inadvertent clerical error;
- (c) the subcontractor is not licensed;
- (d) the subcontractor is prohibited from working on public works due to labor law violations;
- (e) the subcontractor refuses to enter into a contract with the general contractor at the price and on the terms agreed to prior to bids being submitted;
- (f) the subcontractor doesn't submit a bond (if the general contractor's advertisement for subcontractors stated that bonds would be required);
- (g) the subcontractor doesn't perform its work;
- (h) the school district determines that the subcontractor's work is substantially unsatisfactory or that the subcontractor is substantially delaying or disrupting the work; or
- (i) the subcontractor becomes bankrupt or insolvent.

Districts should be aware, however, that the conditions listed above can sometimes be created by the general contractor, in an attempt to be able to negotiate a lower price with another subcontractor, and that this is not allowable.

In order to obtain approval, the contractor must send a letter to the district describing the grounds for the proposed substitution. The district must then give

the named subcontractor written notice of the proposed substitution. If the original subcontractor objects to being substituted off of the project, the district must hold a hearing to determine whether the general contractor can make the showing required by section 4107.

When contractors use subcontractors which were not listed in their bids or approved by the district, the district can (a) cancel the main contract or (b) withhold 10% of the subcontract from the general contract as a penalty. (Pub. Cont. Code §4110.)

Appendix: Relevant Public Code Provisions

§3400 – BIDS ON PUBLIC WORKS; SPECIFICATIONS BY BRAND OR TRADE NAMES NOT PERMITTED; EXCEPTIONS

(a) No agency of the state, nor any political subdivision, municipal corporation, or district, nor any public officer or person charged with the letting of contracts for the construction, alteration, or repair of public works, shall draft or cause to be drafted specifications for bids, in connection with the construction, alteration, or repair of public works, (1) in a manner that limits the bidding, directly or indirectly, to any one specific concern, or (2) calling for a designated material, product, thing, or service by specific brand or trade name unless the specification is followed by the words "or equal" so that bidders may furnish any equal material, product, thing, or service. In applying this section, the specifying agency shall, if aware of an equal product manufactured in this state, name that product in the specification. Specifications shall provide a period of time prior to or after, or prior to and after, the award of the contract for submission of data substantiating a request for a substitution of "an equal" item. If no time period is specified, data may be submitted any time within 35 days after the award of the contract.

(b) Subdivision (a) is not applicable if the awarding authority, or its designee, makes a finding that is described in the invitation for bids or request for proposals that a particular material, product, thing, or service is designated by specific brand or trade name for any of the following purposes:

(1) In order that a field test or experiment may be made to determine the product's suitability for future use.

(2) In order to match other products in use on a particular public improvement either completed or in the course of completion.

(3) In order to obtain a necessary item that is only available from one source.

(4)(A) In order to respond to an emergency declared by a local agency, but only if the declaration is approved by a four-fifths vote of the governing board of the local agency issuing the invitation for bid or request for proposals.

(B) In order to respond to an emergency declared by the state, a state agency, or political subdivision of the state, but only if the facts setting forth the reasons for the finding of the emergency are contained in the public records of the authority issuing the invitation for bid or request for proposals.

§4107 – PRIME CONTRACTOR WHOSE BID IS ACCEPTED; PROHIBITIONS

A prime contractor whose bid is accepted may not:

(a) Substitute a person as subcontractor in place of the subcontractor listed in the original bid, except that the awarding authority, or its duly authorized officer, may, except as otherwise provided in Section 4107.5, consent to the substitution of another person as a subcontractor in any of the following situations:

(1) When the subcontractor listed in the bid, after having had a reasonable opportunity to do so, fails or refuses to execute a written contract for the scope of work specified in the subcontractor's bid and at the price specified in the subcontractor's bid, when that written contract, based upon the general terms, conditions, plans, and specifications for the project involved or the terms of that subcontractor's written bid, is presented to the subcontractor by the prime contractor.

2) When the listed subcontractor becomes bankrupt or insolvent.

(3) When the listed subcontractor fails or refuses to perform his or her subcontract.

(4) When the listed subcontractor fails or refuses to meet the bond requirements of the prime contractor as set forth in Section 4108.

5) When the prime contractor demonstrates to the awarding authority, or its duly authorized officer, subject to the further provisions set forth in Section 4107.5, that the name of the subcontractor was listed as the result of an inadvertent clerical error.

(6) When the listed subcontractor is not licensed pursuant to the Contractors License Law.

(7) When the awarding authority, or its duly authorized officer, determines that the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications, or that the subcontractor is substantially delaying or disrupting the progress of the work.

(8) When the listed subcontractor is ineligible to work on a public works project pursuant to Section 1777.1 or 1777.7 of the Labor Code.

(9) When the awarding authority determines that a listed subcontractor is not a responsible contractor.

Prior to approval of the prime contractor's request for the substitution, the awarding authority, or its duly authorized officer, shall give notice in writing to the listed subcontractor of the prime contractor's request to substitute and of the reasons for the request. The notice shall be served by certified or registered mail to the last known address of the subcontractor. The listed subcontractor who has been so notified has five working days within which to submit written objections to the substitution to the awarding authority. Failure to file these written objections constitutes the listed subcontractor's consent to the substitution.

If written objections are filed, the awarding authority shall give notice in writing of at least five working days to the listed subcontractor of a hearing by the awarding authority on the prime contractor's request for substitution.

(b) Permit a subcontract to be voluntarily assigned or transferred or allow it to be performed by anyone other than the original subcontractor listed in the original bid, without the consent of the awarding authority, or its duly authorized officer.

(c) Other than in the performance of "change orders" causing changes or deviations from the original contract, sublet or subcontract any portion of the work in excess of one-half of 1 percent of the prime contractor's total bid as to which his or her original bid did not designate a subcontractor.

§4110 – VIOLATIONS OF CHAPTER AND CONTRACTS; CANCELLATION OR PENALTY; NOTICE AND HEARING

A prime contractor violating any of the provisions of this chapter violates his or her contract and the awarding authority may exercise the option, in its own discretion, of (1) canceling his or her contract or (2) assessing the prime contractor a penalty in an amount of not more than 10 percent of the amount of the subcontract involved, and this penalty shall be deposited in the fund out of which the prime contract is awarded. In any proceedings under this section the prime contractor shall be entitled to a public hearing and to five days' notice of the time and place thereof.

§5101 – RELIEF OF BID BY CONSENT OF AWARDING AUTHORITY; MISTAKES; ACTION TO RECOVER FORFEITED AMOUNTS; COSTS; REPORT

a) A bidder shall not be relieved of the bid unless by consent of the awarding authority nor shall any change be made in the bid because of mistake, but the bidder may bring an action against the public entity in a court of competent jurisdiction in the county in which the bids were opened for the recovery of the amount forfeited, without interest or costs. If the plaintiff fails to recover judgment, the plaintiff shall pay all costs incurred

by the public entity in the suit, including a reasonable attorney's fee to be fixed by the court.

(b) If an awarding authority for the state consents to relieve a bidder of a bid because of mistake, the authority shall prepare a report in writing to document the facts establishing the existence of each element required by Section 5103. The report shall be available for inspection as a public record. In the case of the University of California or a California State University, the report shall be filed with the regents and the trustees, respectively, and shall be available as a public record.

§ 5103 – GROUNDS FOR RELIEF

The bidder shall establish to the satisfaction of the court that:

(a) A mistake was made.

(b) He or she gave the public entity written notice within five days after the opening of the bids of the mistake, specifying in the notice in detail how the mistake occurred.

(b) The mistake made the bid materially different than he or she intended it to be.

(d) The mistake was made in filling out the bid and not due to error in judgment or to carelessness in inspecting the site of the work, or in reading the plans or specifications.

§20103.8 – ADDITIVE AND DEDUCTIVE ITEMS

A local agency may require a bid for a public works contract to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted. Whenever additive or deductive items are included in a bid, the bid solicitation shall specify which one of the following methods will be used to determine the lowest bid. In the absence of a specification, only the method provided by subdivision (a) will be used:

(a) The lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items.

(b) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purpose of determining the lowest bid price.

(c) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that when taken in order from a specifically identified

list of those items in the solicitation, and added to, or subtracted from, the base contract, are less than, or equal to, a funding amount publicly disclosed by the local agency before the first bid is opened.

(d) The lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders or proposed subcontractors or suppliers from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

A responsible bidder who submitted the lowest bid as determined by this section shall be awarded the contract, if it is awarded. This section does not preclude the local agency from adding to or deducting from the contract any of the additive or deductive items after the lowest responsible bidder has been determined.

(e) Nothing in this section shall preclude the prequalification of subcontractors.

§20111.5 – BIDDER QUESTIONNAIRE AND FINANCIAL STATEMENT; BID PROPOSAL FORM

(a) The governing board of the district may require that each prospective bidder for a contract, as described under Section 20111, complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district, including a complete statement of the prospective bidder's financial ability and experience in performing public works. The questionnaire and financial statement shall be verified under oath by the bidder in the manner in which civil pleadings in civil actions are verified. The questionnaires and financial statements shall not be public records and shall not be open to public inspection.

(b) Any school district requiring prospective bidders to complete and submit questionnaires and financial statements, as described in subdivision (a), shall adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements, in order to determine the size of the contracts upon which each bidder shall be deemed qualified to bid.

(c) Each prospective bidder on any contract described under Section 20111 shall be furnished by the school district letting the contract with a standardized proposal form that, when completed and executed, shall be submitted as his or her bid. Bids not presented on the forms so furnished shall be disregarded.

(d) A proposal form required pursuant to subdivision (c) shall not be accepted from any person or other entity who is required to submit a completed questionnaire and financial statement for prequalification pursuant to subdivision (a), but has not done so

at least five days prior to the date fixed for the public opening of sealed bids or has not been prequalified, pursuant to subdivision (b), for at least one day prior to that date.

(e) Notwithstanding subdivision (d), any school district may establish a process for prequalifying prospective bidders pursuant to this section on a quarterly basis and may authorize that prequalification to be considered valid for up to one calendar year following the date of initial prequalification.