

**PREQUALIFICATION:**  
A Tool for Eliminating Poor Performers

- Public Contract Code §20118.4 authorizes school districts to prevent unqualified contractors from submitting bids.
- Unique benefits:
  - Contractors can be evaluated based upon the specific needs of individual projects, and
  - Districts have more time to assess contractors' qualifications.
- Reserve the right to disqualify a contractor based upon references contacted after bids are submitted.

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**PREQUALIFICATION,** continued

- Districts must use a uniform system of rating bidders, based on:
  - experience in performing public works projects, and
  - financial ability to construct the project.
- The same standards for determining whether a contractor is “responsible” still apply.

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**PREQUALIFICATION,** continued

- Even if you establish an earlier deadline for submitting prequalification packages, you should consider all packages which are submitted at least 5 days before the bid date. (PCC §20111.5, subd. (d).)
- In some areas, the “Informal Bidding Act” (PCC §22000 et seq.) provides the same and additional benefits for school districts.

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**BID ALTERNATES:**

Possibly the Most Important Part of the Bid Form

- Public Contract Code section 20103.8 limits districts' ability to choose among contractors by picking alternates after receiving bids.
- Four alternatives:
  - Lowest base bid;
  - Lowest price for the base bid and pre-identified alternates;
  - Bid which provides the greatest number of alternates within pre-identified funding amount; or
  - Blind-bid system.

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**BID ALTERNATES, continued**

- These options control which bid is chosen. They do not control which alternates the District must choose.

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**SUBSTITUTION OF MATERIALS:**

Avoid Costly Disputes Later

- Public Contract Code section 3400 establishes the “or equal” system, to prevent favoritism among suppliers.
- School districts can specify a single product when:
  - there is truly only one product of its type;
  - certain emergencies exist;
  - they intend to use the product in tests; or
  - “in order to match other products in use [installed] on a particular public improvement either completed or in the course of completion.”

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SUBSTITUTION OF MATERIALS, continued

- Districts cannot adopt certain products as “standards” without meeting one of these criteria.
- Consider limiting the time for requesting substitutions to the pre-bid period.

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PRE-BID SITE VISITS AND CONFERENCES: Mandatory is Acceptable

- Use your pre-bid site visits to highlight particularly stringent general conditions requirements.
- Specify who must attend:
  - Estimators, or
  - project managers.
- Require attendees to sign in and out.

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BID IRREGULARITIES:  
When is a Mistake Acceptable?

- Always reserve the right, in the bid package, to waive irregularities.
- Districts can waive irregularities only when:
  - the requirement isn’t established by statute;
  - the discrepancy doesn’t materially affect the bid; and
  - the contractor couldn’t obtain a competitive advantage due to the discrepancy.
- If you waive an irregularity for one contractor, you establish a precedent for other contractors which make the same mistake.

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**WITHDRAWAL OF BIDS AFTER OPENING:**

Playing Games Doesn't Pay Off

- Contractors can withdraw their bids after opening if:
  - the bid was materially different than intended;
  - the problem was a clerical error (not an error in judgment); and
  - the contractor notifies the school district of the grounds for withdrawal within 5 days after bids are opened.(PCC §5100 *et seq.*)
- A contractor which withdraws its bid cannot bid again if the project is re-bid.

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**WITHDRAWAL OF BIDS AFTER OPENING, continued**

- Forcing a contractor to honor an exceedingly low bid will land you in litigation, one way or another.
  - It's better to explain to the contractor how to comply with the withdrawal statutes if it appears the contractor could meet the requirements. (*Emma Corporation v. Inglewood Unified School District* (2004) 8 Cal.Rptr. 213.)
  - If the contractor does sign the contract, expect pricing and scope-of-work disputes throughout the job.

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**NOTICE TO PROCEED:**

Avoid Delay Damages at the Very Start

- Contractors are entitled to receive their notices to proceed within a "reasonable" period of time after the contract is awarded. This period is often about 10 days.
- If there will be a long wait between the date bids are received and the date work can commence:
  - Do wait to award the contract until just before work commences.

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NOTICE TO PROCEED, continued

- Also acceptable:
  - state the date that construction can commence in the bid documents; or
  - get the contractor to waive any delay damages for pre-construction "delays" before awarding the contract "early."
- Don't assume that you can wait to issue the Notice to Proceed for as long as the District could have waited to award the contract.

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SUBSTITUTION OF SUBCONTRACTORS:  
Don't Be Blindsided by Subcontractor Changes

- Contractors must list all subcontractors which will perform at least .5% of the work on a project. (PCC §4104.)
- Contractors may work with other contractors only if:
  - the school district determines that the subcontractor is not qualified to perform the work;
  - the subcontractor was listed due to an inadvertent clerical error;
  - the subcontractor is not licensed;

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SUBSTITUTION OF SUBCONTRACTORS, continued

- the subcontractor is prohibited from working on public works due to labor law violations;
- 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;
- the subcontractor doesn't submit a bond (if the general contractor's advertisement for subcontractors stated that bonds would be required);
- the subcontractor doesn't perform its work;

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**SUBSTITUTION OF SUBCONTRACTORS, continued**

- the school district determines that the subcontractor's work is substantially unsatisfactory or that the subcontractor is substantially delaying or disrupting the work; or
- the subcontractor becomes bankrupt or insolvent.

• **Procedure:**

- the contractor sends the district a letter stating why the listed subcontractor should be substituted;
- the district gives the listed subcontractor written notice of the request and the general contractor's reasons;

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**SUBSTITUTION OF SUBCONTRACTORS, continued**

- the listed subcontractor may object to the request to substitute; and
- if the listed subcontractor does object to the request, the district holds a hearing to determine if the statutory requirements have been met.

(PCC §4107.)

- If the general contractor violates the subcontractor listing laws, the district may:

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**SUBSTITUTION OF SUBCONTRACTORS, continued**

- If the general contractor violates the subcontractor listing laws, the district may:

- terminate the main contract; or
- withhold 10% of the affected subcontract from the general contractor.

(PCC §4110.)

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