

SCHOOL DISTRICT CONSTRUCTION LAW

Pre-Construction Procedures

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I.

INTRODUCTION/SCOPE OF MATERIALS

These materials address various legal issues faced by California school districts in the context of public works construction. General principles are set forth and discussed throughout the materials, with specific references to relevant legal authority where appropriate. These materials are not intended to comprehensively analyze any specific area of construction law. Rather, they are an overview of selected issues related to public works pre-construction procedures.

II.

RISK MANAGEMENT

School districts and their counsel should implement pre-construction procedures and operate within a structured framework as a means of preventing litigation and limiting liability once problems develop. Early on, as a means of prevention, school districts should ensure that their employees and representatives are apprised of and understand, the relevant issues and are trained to identify potential problems. In this regard, it is important to contact and seek advice from counsel regarding any potential and/or existing claims. Further, the district should consider its values and goals in light of the particular construction project (e.g. where timely completion of a project is necessary for state matching funds).

III.

PREQUALIFICATION

One of the best options a school district has to avoid “problem contractors” is requiring all prospective bidders to prequalify. Under such a process, all bidders must submit evidence of experience, competence and financial ability before bidding on a project. If a school district chooses to prequalify all bidders, the district must have previously established a prequalification process meeting certain statutory requirements, one of which is that the process is formally adopted by the district’s governing board. P.C.C. § 20111.5. Also, a school must ensure that it awards construction contracts only to licensed contractors. The school district may obtain information regarding license status from the Contractor’s State License Board.

IV.

BID ALTERNATES, SUBSTITUTIONS, PRE-BID SITE VISIT AND CONFERENCE

A. Bid Alternates

It is important for school districts to identify how bid alternatives will affect the determination of which bid is the lowest. Pursuant to P.C.C. § 20103.8. when bids will include alternates, one of the following methodologies shall be used in determining the basis for the award of the contract: (1) lowest bid on the base contract; (2) lowest bid on the base contract and specified alternatives; (3) lowest bid based on additive or deductive items taken in order from a specific list; or (4) lowest bid determined in a manner that prevents any information identifying the bidders. See also Gibbs & Hunt, California Construction Law (16th ed. 2004), §2.02(F)(3).

B. Substitution of Materials

Pursuant to P.C.C. § 3400, if a school district specifies a brand name it must also state that “equal” products will be accepted as substitutions unless: (a) there is only one source; (b) it seeks to match products currently in use on other campuses; (c) the product is being used in a field test to determine its suitability for future use; or (d) in certain emergencies. P.C.C. § 3400 requires public agencies to provide in their specifications for “a period of time prior to the award of the contract” for submission by a contractor of data supporting a request for substituting an “or equal” item. However, if no such time period is specified, a request for a substitution of an “or equal” item may be submitted up to 35 days after the award of the contract. P.C.C. § 3400; See also 1 Acet, California Construction

of Subcontractors

Several statutory provisions apply where the general contractor seeks to replace a subcontractor listed in the original bid with a different subcontractor. See e.g. P.C.C. §§ 4107 and 4107.5. A school district may consent to the substitution of a subcontractor only under limited circumstances. For example, subject to certain limitations, P.C.C. § 4107(a) provides that the awarding public entity may consent to the substitution of another person in place of the subcontractor listed in the original bid when: (1) the listed subcontractor fails or refuses to execute a written contract; (2) the listed subcontractor becomes bankrupt or insolvent; (3) the listed subcontractor fails or refuses to perform its subcontract; (4) the listed subcontractor fails or refuses to meet the general contractor's bond requirements; (5) the general contractor establishes that the original subcontractor was listed as a result of an inadvertent clerical mistake; (6) the listed subcontractor is not licensed; (7) the awarding public agency determines the subcontractor's work is unsatisfactory; (8) the subcontractor is ineligible to work on public works projects pursuant to Labor Code §§ 1777.1 or 1777.7, which address, inter alia, a failure to pay prevailing wages; or (9) the awarding public agency determines that the listed subcontractor is not a responsible contractor.

In the event a general contractor seeks to substitute a listed subcontractor based on an "inadvertent clerical error in the listing of [the] subcontractor," P.C.C. § 4107.5 imposes a statutory duty on the general contractor to provide notice to the listed subcontractor. See also Cal-Air Conditioning, Inc. v. Auburn Union School Dist., 21 Cal. App. 4th 655, 26 Cal. Rptr. 2d 703 (1993). The school district must also provide this notice to the listed subcontractor. See

P.C.C. § 4107. Very short time frames are involved here.

Before approving a request by the general contractor for a substitution of a subcontractor, the school district must provide written notice of the request to the listed subcontractor, and the reasons for such request. P.C.C. § 4107(a). In addition, if after receiving notice the listed subcontractor objects to the substitution, a school district must provide at least five days notice to the listed subcontractor of a hearing on the general contractor's request for substitution. Id.

A school district has certain rights in the event the general contractor fails to comply with its obligations regarding substitution. If the general contractor violates any of the provisions of the Subletting and Subcontracting Fair Practices Act (P.C.C. §§ 4100-4114), the school district may cancel its contract with the general contractor or assess the general contractor a penalty in an amount of not more than ten percent of the amount of the subcontract involved. P.C.C. § 4110. Under P.C.C. § 4110, the general contractor is entitled to a public hearing and five days notice of the time and location of the penalty hearing.

D. Pre-Bid Site Visit and Conference

The district should provide all of the bidders with information regarding the existing condition of the site. In addition, the district should be sure to document all pre-bid site visits and conferences, including the attendees, date, etc.

V.

BID IRREGULARITIES

Public entities are generally required to award a construction contract to the lowest responsible bidder, but a public entity may waive an irregularity and accept a low bid that substantially conforms to a call for bids if the variance could not have affected the amount of the bid or given the bidder an advantage or benefit not allowed to other bidders. See 1 Acret, California Construction Contracts and Disputes (C.E.B. 3rd ed. 2003), § 4.7. See also Ghilotti Constr. Co. v. City of Richmond, 45 Cal. App. 4th 897, 53 Cal. Rptr. 2d 389 (1996) (Court found no evidence of favoritism; bidder could easily bring its bid into compliance without affecting bid amount).

School districts may not waive an irregularity if the effect would be to give a bidder a competitive advantage. Public entities must guard against the possibility that the waiver of an irregularity in a bid would give the low bidder a “last look” enjoyed by no other bidder. See 1 Acret, California Construction Contracts and Disputes (C.E.B. 3rd ed. 2003), § 4.7. See also Valley Crest Landscape, Inc. v. City Council, 41 Cal. App. 4th 1432, 49 Cal. Rptr. 2d 184 (1996) (City engineer allowed bidder either to submit, or not submit, additional information to explain an irregularity).

VI.

WITHDRAWAL OF BIDS AFTER OPENING

A bidder who discovers that it has made a mistake in its bid after the bids have been opened may seek relief from its mistake under certain circumstances. Pursuant to P.C.C. § 5103, in order to be relieved from its bid, the bidder must establish: (1) a mistake was made; (2) the contractor gave the school district written notice of the mistake within five days after the opening bids, specifying in the notice in detail how the mistake occurred; (3) the mistake made the bid materially different than the bidder intended it to be; and (4) 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. See also Gibbs & Hunt, California Construction Law (16th ed. 2004), §2.02(E).

VII.

ISSUANCE OF NOTICE TO PROCEED

Under most prime contracts the issuance of the Notice to Proceed starts the time period under the contract for completion. The failure to issue the Notice to Proceed within a reasonable period (often ten days) after the contract is awarded can lead to delay claims against the school district. In addition, the date on which the Notice to Proceed is issued is significant because liability insurance coverage is often triggered on the date of issuance.