

# **C.A.S.H. Workshop: Managing Your New Construction and Modernization Projects – Legal Issues**

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## **Bid Protests – Legal Issues**

- Bid Protests Generally:
  - When a bidder believes that the District has made an incorrect determination as to the “lowest responsive, responsible bidder,” it may file a bid protest.
  - Bid protests should be investigated before award of the contract.
  - The Instructions to Bidders should limit the time for filing protests.

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## **Bid Protests – Legal Issues**

- A protesting bidder's damages are limited to:
  - Bid preparation expenses.
  - Bid protest expenses.
  - Unabsorbed overhead.
  - Prejudgment interest.
- A protesting bidder cannot recover for lost profits.  
(*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal. 4th 305.)

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## **Bid Protests – Legal Issues**

- **What happens after a bid protest?**
  - Petition for a writ of administrative mandamus (CCP 1094.5), if filed within 90 days of the award of the contract
  - Petition for a traditional writ of mandamus (CCP 1085), for non-discretionary decisions (e.g., determination of responsiveness)

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## Bid Protests – Legal Issues

- Hypothetical - **Responsiveness**: Bid day was 2 days ago. Bidder B is the 2nd lowest bidder. Bidder B files a written protest stating that Bidder A, the lowest bidder, is not licensed to do roofing and it did not list a roofing subcontractor—the contract calls for a new roof on two buildings.
- What do you do?

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## Bid Protests – Legal Issues

- A bid is responsive only if it accurately includes all the information required by the bid documents.
- Responsiveness can be waived if the “irregularity” is not significant. A waivable defect cannot give the bidder the right to withdraw the bid due to mistake or affect the amount of the bid.

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## **Bid Protests – Legal Issues**

- District Staff Should:
  - Require Bidder A and Bidder B to respond in writing to each other's contentions.
  - Summarize for the Board all the documentation and make its recommendation for award.

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## **Bid Protests – Legal Issues**

- Finding Bidders Non-Responsible --  
What Could be the Risk?

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## Bid Protests – Legal Issues

- Hypothetical - **Responsibility**: Each bidder turns in a questionnaire that includes references from other school projects. District staff checks and finds that Bidder A has been terminated twice, had liquidated damages assessed on 3 of the projects, its performance bond surety had to complete 1 project.
- What do you do?

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## Bid Protests – Legal Issues

- Determining if a bidder is “responsible” involves judgments as to the bidder’s trustworthiness and ability to perform the work.
- The District must provide the rejected bidder due process--an opportunity to present evidence and to rebut the District’s evidence.

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## Bid Protests – Legal Issues

- Options:
  - Find Bidder A to be Non-responsive
    - Award the contract to the next lowest responsive responsible bidder.
    - A finding of non-responsive can be fatal to a contractor. Bidder A will likely sue to overturn the Board's decision.
  - Award the Contract to Bidder A
    - It might be a bumpy ride.
  - Reject all bids

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## Bid Protests – Legal Issues

- **New Case**: A public agency cannot declare a bid nonresponsive merely because the bidder listed an unlicensed subcontractor. *D.H. Williams Construction, Inc. v. Clovis Unified School District* (Jan. 10, 2007) \_\_\_\_ Cal.App.4th \_\_\_\_.

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## Bid Protests – Legal Issues

- **Williams v. Clovis Facts:** Contractor submitted lowest bid for concrete and fencing work on District multi-prime project. Contractor listed a subcontractor whose license had expired approximately a week before the bids were opened. District notified contractor and contractor indicated it would perform the work with its own forces or request substitution pursuant to Public Contract Code. District found Contractor's bid nonresponsive and awarded to 2<sup>nd</sup> low bidder. Contractor sued.

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## Bid Protests – Legal Issues

- **Williams v. Clovis Holding:**
  - Listing an unlicensed subcontractor in the bid of a properly licensed prime bidder does not render the bid nonresponsive under Business and Professions Code section 7028.15.
  - “[T]he District, while purporting to find [Contractor’s] bid nonresponsive, in legal effect found Contractor was not a responsible bidder.”
  - Since District did not provide due process to the Contractor prior to that finding, the District abused its discretion in rejecting the bid.

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## **Bid Protests – Legal Issues**

- **Williams v. Clovis Key Issues**

- Neither the bid documents nor the statute required a listed subcontractor to be licensed on bid day.
- Furthermore, bid documents that require all subcontractors be licensed do not have effect upon the contractor until after the contract has been awarded.
- Subcontractors are not required to be licensed at the time it submits its sub-bid (B&P Code section 7026), but must be licensed when it signs its subcontract with the prime bidder

## **Subcontractor Substitutions – Legal Issues**

- Substitution of a listed subcontractor is permitted in limited situations, including when the subcontractor refuses to sign a subcontract, is unlicensed, becomes insolvent, or fails to perform its work. (Pub. Contract Code § 4107)

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## **Subcontractor Substitutions – Legal Issues**

- Hypothetical – **Subcontractor Substitution**: The contractor is a month behind and brings a subcontractor substitution request for the sheet-rock subcontractor who is refusing to perform its work because of a payment dispute and a performance dispute. Also, it appears this subcontractor never signed a contract with the contractor.
- What do you do?

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## **Subcontractor Substitutions – Legal Issues**

- **District** must provide notice to the subcontractor (certified mail, RRR) of this request.
- If the subcontractor files a written objection to the substitution within 5 working days, the District must hold a hearing to determine whether the District will grant the contractor's request for substitution.
- District staff should conduct this hearing.
- District Board should approve/reject the substitution request based on the information that District staff gives to the Board and on District staff's recommendation.

## **Contractor Termination – Legal Issues/Options**

- Option No. 1: Try To Work It Out
  - Terminating will almost never speed up construction
  - Have a “get religion” discussion with the contractor
  - Post meeting letter

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## **Contractor Termination – Legal Issues/Options**

- Remove Scope
  - Short of termination, remove a portion of the contractor’s work so the contractor can get back on schedule
  - Can result in an angrier and an even less cooperative contractor
  - You may have just removed its profit
- Do I have to bid the removed scope?
  - Lawyer’s answer: maybe, maybe not

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## **Contractor Termination – Legal Issues/Options**

- Get The Surety Involved Short Of Termination
  - Notify surety of problems
  - State clearly that termination will be the District’s only other option
  - Some sureties are more cooperative than others
  - Suggest the surety determine if its assistance in staffing, expertise, or funding would keep the Contractor out of formal default

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## **Contractor Termination – Legal Issues/Options**

- Do it: Terminate The Contractor In Writing
  - Address a “notice of termination” letter to the contractor and the surety that:
    - Terminates the contractor
    - Demands performance from the surety
  - State that District staff will go to the Board to approve the termination
    - Termination not effective until Board action

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## **Contractor Termination – Legal Issues/Options**

- Do it: Terminate The Contractor In Writing (cont'd.)
  - State all pending timelines (e.g., approaching milestones, past milestones)
  - State whether the District will self perform any work
  - Cite contract provisions on termination and failures of the contractor

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## **Contractor Termination – Legal Issues/Options**

- What You Will Hear From Your Attorney:  
We Are In A Termination Situation
  - I.e., we are in a pre-litigation situation
  - Don't release any funds or sign anything without attorney review

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## **Contractor Termination – Legal Issues/Options**

- Remember, the surety is not on your side of the table.
- But working with a surety will usually benefit the District. At least work more closely with the surety than you might the contractor.

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## **Contractor Termination – Legal Issues/Options**

- Bankruptcy Potential
  - A defaulting contractor is often a pre-bankrupt contractor. Even so, notify the contractor (it's lawyer?) of all actions being taken by District and surety.

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## **Contractor Termination – Legal Issues/Options**

- Get to know your lawyer even better