

Public Works Contracts in a Tough Economy:

Tips and Techniques for
City Attorneys

Presenters

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The Basics

- Must comply with applicable authority
 - Constitution
 - Statute
 - Regulation
 - Local Ordinance or Municipal Code
 - Caselaw
 - Invitation for Bids
- Traditional: Award to lowest responsive, responsible bidder
- Bidders are conclusively presumed to know an agency's authority

Void Contract Rule

- California Supreme Court Decisions Dating Back to 1862
- *Miller v. McKinnon*: “Where the statute prescribes the only mode by which the power to contract shall be exercised, the mode is the measure of the power. A contract made otherwise than as so prescribed is not binding or obligatory as a contract”

Generally No Authority to Pay

- Cal. Constitution Art. XI, § 10:
 - Local entity may not “pay a claim under an agreement made without authority of law”
- Public may compel disgorgement
- Contractor has no right to *quantum meruit*

Exception? Public Contract Code section 5110

- Defect in the competitive bidding process
- Caused solely by the public entity
- Contractor’s good faith belief the contract was valid
- Costs, not profits
- Constitutionality not yet challenged

Key Procurement Questions

- Is the bid *responsive*?
- If the bid is non-responsive, is it *materially* non-responsive?
- Is the bidder *responsible*?

A Bid Must Be Responsive To Be Selected for Award

- Promises to do what bidding instructions demand
- Based on contents of the bid
- Generally less complex than determining responsibility

Materiality

- Immaterial deviations may – but need not – be waived
- Material deviation affects price or gives an advantage over other bidders
- Option to be bound is an improper advantage

A Bidder Must Be Responsible To Be Selected For Award

- Trustworthiness
- Quality, fitness, capacity, and experience to “satisfactorily perform” the contract (Public Contract Code section 1103)

Bidder Responsibility: Practice Tips

- Requires a hearing to find not responsible
 - Must include “certain minimal elements of due process”
 - Must
 - Notify the low bidder of negative evidence
 - Allow rebuttal
 - Permit evidence of bidder’s responsibility
- Not limited to the face of the bid

Great West Contractors v. Irvine Unified School District

187 Cal. App. 4th 1425 (2010)

- “If you can’t be a good example, then you’ll just have to serve as a horrible warning.”
– Catherine Aird

*Great West Contractors v.
Irvine Unified School District*

187 Cal. App. 4th 1425 (2010)

- How to distinguish a nonresponsive bid from *de facto* determination that bidder is not a responsible bidder
- How not to handle a bid protest. (Hint: Don't withhold bids from review.)
- Bibliography of important California bid protest decisions

**Common Bid Protest Issues:
Subcontractor Listing**

- Bidders must list:
 - Subcontractors performing over .5% of bid amount
 - Subcontractor's name and location
 - "Portion" of work to be done
- Failure to list a subcontractor means
 - Bidder must perform the work
 - Bidder represents it is qualified to perform the work
- Contractor must use listed subcontractors or receive permission to substitute

Subcontractor Listing Protest Examples

- Failure to list a subcontractor
- Listing of an unlicensed subcontractor
- Second-tier subcontracting
 - General contractor
 - Further subcontracting work
- Disagreements over “portion” of work
- “Substituting” materials supplier

Common Bid Protest Issues: Incomplete bid

- Failure to sign the bid (*Menefee v. County of Fresno*, 163 Cal. App. 3d 1175 (1985))
 - Missing signature page
- Insufficient or missing bid security
 - “Not to exceed” limitation
- Failure to submit all required forms or certifications
 - Required by City or State law?
- Failure to acknowledge addenda

Common Bid Protest Issues: Practice Tips

- Include a list of all forms that *must* accompany the bid (*i.e.*, “idiot-proof” the forms)
- Stating that an omission “*shall*” result in a bid rejection can limit a city’s ability to waive an immaterial deviation

Common Bid Protest Issues: Bid Mistakes

- Bidder may withdraw its bid if:
 - Bidder made a mistake
 - Making the bid “materially” different
 - Clerical (typographical or arithmetical) error
- Bidder may not withdraw its bid for:
 - Error in judgment or carelessness
 - Error in subcontractor’s bid to prime contractor
- Bidder claiming mistake cannot participate further on the project
- What if no mistake is claimed?

Common Bid Protest Issues: Failure to Attend *Mandatory* Pre-Bid Conference

- For a non-routine project, a mandatory pre-bid conference may be advisable
- Requiring attendance at a pre-bid conference can create grounds for protest
- Tip: Require a sign-in sheet to avoid uncertainty
- Tip: Ask whether the pre-bid conference really must be mandatory

Common Protest Issues: Bid Alternates

- Failure to clearly specify how bids will be evaluated:
 - lowest price on the base bid only;
 - lowest price on the base bid plus identified alternates;
 - lowest price on the base bid plus/minus alternates taken in an order stated in the IFB, until reaching a stated funding amount;
 - bidders are anonymous while pricing is evaluated.
- Evaluating subcontractor percentages
- Award, if different from evaluation

Common Protest Issues: Unclear Bid Documents

- Dealing with material conflicts and ambiguities in the bid documents
- Rejecting all bids and rebidding is sometimes the best solution

Minimizing the Likelihood of Protest: Prequalification

- Focus on financial capacity: may decrease likelihood of non-responsible bidders
- Public Contract Code section 20101
 - Bidders' questionnaire with project references; financial statement
 - Not public records
 - Must adopt and apply a uniform rating system based on objective criteria
 - Must include an appeal process
- Adapting DIR Model Guidelines – one size doesn't always fit all . . .

Minimizing the Likelihood of Protest: Control Information

- Mandatory Pre-Bid Conference
 - IFB “shall include the time, date, and location of the mandatory prebid site visit, conference or meeting”
 - At least five calendar days after IFB is issued
- Single point of contact
- Global response to bidder questions
 - Establish a Q&A period
 - Respond after deadline if IFB is ambiguous

Minimizing the Likelihood of Protest: Legal Review

- Attorney review of bid documents *before* release
 - Bid protest procedures?
 - Order of precedence clear and logical?
 - Current legal requirements included?
 - See Chapter 7, Part I.E of Municipal Law Handbook
 - Clear and consistent use of defined terms?
 - Any mandatory rejection language?

Practical Tip: Adopt Good Protest Procedures

- Objective: prompt, fair and consistent resolution of protests
 - Time, place and contents of protest
 - Opportunity to reply?
 - Mandatory procedures
 - Require a filing fee?

Practical Tip: Be Clear On The Basis For Rejecting/Selecting Bid

- Be clear on your basis for rejecting a bid (or accepting a bid with an immaterial deviation)
- Don't make a bidder guess why their bid was rejected
- Make public records promptly available

Practical Tip: Allow Sufficient Time

- Ensure sufficient time to respond to bid protest before scheduled contract award
 - Time for submission of protests, *plus*
 - Time for response to protest, *plus*
 - Time for attorney's analysis and preparation of written opinion and recommendation to Council
 - *NB: This may require inservice training of public works staff*

Practical Tip: Transparency

- Actions
 - Make bids available on request
 - Give notice of grounds for rejecting bids (remember *Great West*)
 - Make opinion letter available to all
- Benefits
 - Avoids the appearance of malfeasance or favoritism
 - Minimizes the risk of litigation
 - Ensures a clear record in the event of a legal challenge

Questions?

Thank you!