



# Bid Protests: Minimizing And Managing Liability

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## **BID PROTESTS: MINIMIZING AND MANAGING LIABILITY**

### **I. INTRODUCTION**

When public bidding is required, bid protests are inevitable. Not every public bid draws a protest, but enough do to make protests an ongoing problem for cities awarding public works contracts. At best, bid protests can require some extra staff and legal time. At worst, they can result in litigation, project delay, and even loss of project funding. The objective of this paper is to provide practical recommendations for avoiding bid protests—or at least those that can be avoided—and recommendations for managing bid protests and minimizing their impact when they do arise. This paper will focus on bid protests in the context of competitive bidding for municipal public works projects.

There is reason to expect an uptick in those protests in the near future, based on alleged (or actual) non-compliance with the new contractor and subcontractor registration requirements.<sup>1</sup> In addition, a recent appellate opinion held that a losing bidder may state a cause of action against a winning bidder for tortious intentional interference with prospective economic advantage. This decision could invite more bid protest litigation, with awarding agencies caught in the crossfire.<sup>2</sup> In light of these recent developments, this is a very good time for cities to take a considered, planned approach to avoiding the avoidable bid protests and managing the unavoidable ones.

Most public contract bid protests are not particularly complex from a legal perspective, and there is a well-developed body of law in California governing bidding and award of public contracts.<sup>3</sup> However, even a routine bid protest takes time and money to address and many of those can be avoided by following some—or all—of the recommendations in Part II on Avoiding Bid Protests. As for the bid protests that cannot be (or are not)

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<sup>1</sup> Labor Code § 1725.5, enacted by SB 854 (Stat. 2014), provides that a public agency may not accept a bid from or enter into a contract with a contractor that is not registered with the California Department of Industrial Relations.

<sup>2</sup> *Roy Allen Slurry Seal, Inc. v. American Asphalt South, Inc.* (2015) 234 Cal.App.4th 748 [holding that a second-place bidder stated a cause of action for intentional interference with prospective economic advantage where the winner's bid was lower due to its failure to pay prevailing wages]. This case has troubling implications for awarding agencies because of its reasoning that an economic relationship exists between a bidder and an awarding agency, as discussed in the dissenting opinion.

<sup>3</sup> See, e.g., *Great West Contractors, Inc. v. Irvine Unif. Sch. Dist.* (2010) 187 Cal.App.4th 1425, 1428, fn 1 (“*Great West*”) [noting the extensive body of law and listing a bibliography of California state court published decisions on public contract cases from 1916 through 2010].

avoided, Part III on Managing Bid Protests provides recommendations for managing liability and avoiding delay.

### **A. The Economics of Bid Protests.**

It is useful to begin by considering the economic context for bid protests. Some practitioners expected that bid protest litigation would become a rarity after 2000, when the California Supreme Court held that a wrongfully rejected low bidder could not recover prospective lost profits, and that damages were limited to the cost of preparing its bid.<sup>4</sup>

However, even without the possibility of recovering lost profits, the possibility of securing a plum public contract at a premium price is ample motivation for many contractors. A contractor must keep work coming in just to stay in business and maintain its workforce, so even work with a low profit margin can provide motivation to aggressively pursue a public contract that offers just enough profit to keep the doors open. When a contractor has an opportunity to win a public contract with a high profit margin, the incentive to aggressively pursue that contract ratchets up to another level.

For example, if Contractor A submits the lowest bid for \$10 million for a city contract and Contractor B submits the next lowest bid for \$10.5 million, Contractor B has \$500,000 worth of incentive to get Contractor A's bid disqualified for a bidding error, so that Contractor B can get the contract for its higher price. Even if it costs Contractor B \$100,000 in legal costs to challenge the low bid, if a successful protest or lawsuit results in award of contract to Contractor B, that means a net gain of \$400,000 for Contractor B—for performing the same work that Contractor A would have done.

Given the economic incentive, it is no surprise that disappointed bidders continue to file bid protests or even lawsuits in order to secure the same contract for a premium price. Meanwhile, cities have to absorb the costs of the protests, the litigation, and sometimes a more costly contract.

### **B. The Legal Framework for Bid Protests.**

An understanding of the economic context helps to understand why contractors are motivated to invest in legal costs to challenge a low bid and why there is commensurate economic incentive for a city to take affirmative steps to avoid bid protests. Understanding the legal context is also important, not simply to evaluate the merits of a bid protest, but also to inform an overall strategy to avoid and manage protests.

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<sup>4</sup> *Kajima/Ray Wilson v. Los Angeles Metropolitan Transportation Authority* (2000) 23 Cal.4th 305 [holding that a wrongfully rejected low bidder could recover bid preparation costs, but not lost profit, under a theory of promissory estoppel].

## 1. Responsiveness vs. Responsibility.

While some bid protests are based solely on objections to the manner in which the city is conducting the bid, most involve a higher bidder seeking to invalidate the bid of the low bidder in order to secure the contract—at a higher price—as in the example above. These bidder-against-bidder protests are based either on allegations that the low bid was “nonresponsive” or that the low bidder is not “responsible” (or both). Since different legal standards apply to issues of responsiveness and issues of responsibility, it is important to understand the meaning of each.

Responsiveness refers to the *bid* itself, which encompasses all of the documents that must be submitted by each bidder within its sealed bid envelope. That includes the bid proposal form, bid security, the subcontractor list form, the non-collusion declaration, and any other documents that the bidders are required to submit for a particular bid. A bid is responsive if it promises to do what the bidding instructions require.<sup>5</sup> Responsiveness is generally determined from the face of the bid, without outside investigation or information.<sup>6</sup>

A determination of responsiveness boils down to a simple binary analysis: whether or not the bidder complied with the bidding instructions.<sup>7</sup> If a city determines that a bid deviates from the bidding instructions, a secondary binary analysis applies: whether or not the deviation is material or immaterial. If it is material, the city must reject the bid. If the deviation is not material, the city has the option—though not the requirement—to waive the deviation and accept the bid.<sup>8</sup>

Responsibility refers to the *bidder*. Public Contract Code section 1103 defines “responsible bidder” to mean “a bidder who has demonstrated the attributes of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract.” Thus, determinations of responsibility are based on the “personal quality of the bidder.”<sup>9</sup>

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<sup>5</sup> *Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181, 1187 (“*Bay Cities*”).

<sup>6</sup> *Great West, supra*, at 1453-1454.

<sup>7</sup> For example: “There was a question [in the bidding instructions]. Great West answered it. Period.” (*Great West, supra*, at 1457 [holding that Great West’s bid was responsive because it answered the question as instructed]).

<sup>8</sup> *MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359, 374 [“The point of discretion is that the agency may properly act in either direction. It may waive or refuse to waive such deviation.”].

<sup>9</sup> *Great West, supra*, at 1451.

Determinations of responsibility are more complex, since they require investigation into the bidder's history, experience, and "trustworthiness." Therefore, before a bidder can be disqualified as non-responsible, it is entitled to basic due process:

"[T]he public body must (1) notify that bidder of any evidence reflecting upon the bidder's responsibility received from others or adduced as a result of independent investigation, (2) afford the bidder an opportunity to rebut such adverse evidence, and (3) permit the bidder to present evidence of qualification."<sup>10</sup>

Disqualification based on a finding that a bidder is not responsible is often vigorously contested since it may adversely affect the bidder's reputation and even its bonding capacity.

Fortunately, most bid protests are based on issues of responsiveness, which is not surprising given that public bids are usually completed and packaged for submission on a very last-minute basis. Typically, a bid runner will be parked outside city hall waiting for subcontractor quotes, which are called in at the last minute to avoid bid shopping. The runner has to complete the subcontractor list form, complete the bid schedule, enter the final bid amount on the bid proposal form, and seal the bid and all of the required attachments in an envelope before dashing into the city clerk's office to meet the bid submission deadline. Imagine finishing a brief and assembling multiple exhibits while parked outside the courthouse, minutes before a filing deadline. Small wonder that bidding errors arise on such a routine basis.

## **2. The City Attorney's Role.**

Responsibility and responsiveness are *legal* issues. As such, bid protests raising these issues should be evaluated by the city attorney's office, and the city attorney's office should provide a legal opinion on the merits of the protest to the city council.<sup>11</sup> While this may appear to state the obvious, sometimes public works or engineering staff will take unilateral action on a protest, without first consulting the city attorney's office (e.g., by rejecting the protest or submitting a recommendation for action in a staff report to the city council). Public works or engineering staff may view bid protests as public works matters rather than legal matters. And sometimes, staff may believe that

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<sup>10</sup> *Boydston v. Napa Sanitation Dist.* (1990) 222 Cal.App.3d 1362, 1369 [holding that a public agency must afford a bidder the opportunity to rebut and present evidence before it can be disqualified as not responsible].

<sup>11</sup> In the interest of simplicity, this paper assumes that the city council will take final action on a protest at the same time that it takes action on awarding the contract. If the council has delegated its authority to award a contract and to act on bid protests, the city attorney's office should advise the council's authorized delegate on the legal merits of a protest.

involving the city attorney's office will result in delay to a critical project schedule. However, because they do raise legal issues, bid protests should always be referred to the city attorney's office regardless of perceptions.

Indeed, as discussed in Part II, below, the city attorney's office should be involved in implementing preventive measures even before a project goes to bid, including drafting and review of the bid and contract documents. The city attorney's office should also play a central role in managing and responding to bid protests when they do arise. That includes legal analysis of each bid protest and either drafting or reviewing the staff report containing the options and recommendations for council action, as discussed in Part III.

## **II. AVOIDING BID PROTESTS**

Most of the recommendations that follow in this Part are intended to limit opportunities for error, both in the bid documents and in the bidding process. By planning ahead and implementing some (or all) of the following recommendations, a city can minimize the impact of or even avoid many bid protests.

### **A. Time for Legal Review of Bid Documents.**

Avoiding bid protests can start during the early planning stages for a project. Many avoidable bidding errors arise because of problems with the bid documents<sup>12</sup> themselves, sometimes due to unclear or inconsistent bidding instructions, or because the plans and specifications were published before they were properly completed. Often these problems can be avoided simply by ensuring time for legal review before the bid documents are released to bidders. Since the bid documents for significant public works projects are frequently provided or prepared by outside design professionals (architects or engineers), including specific requirements for pre-publication legal review can set the stage for better quality control—provided, of course, that the legal review takes place as planned.<sup>13</sup>

The professional services agreement should require the design professional to complete the bid documents in time for legal review and approval before publishing the notice inviting bids. This may apply either to bid documents provided by the design professional or to the design professional's use of the city's bid forms.

To schedule the time for legal review of the bid documents, it is important to identify any "drop dead" dates for awarding the contract and starting the work. That might

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<sup>12</sup> The "bid documents" include the notice inviting bids, the instructions to bidders, the bid proposal form, the subcontractor list form and any other form or document that applies to *bidding* for the contract as distinct from *constructing* the project.

<sup>13</sup> See Section III.D, below, on pre-publication review of bid documents.



require working back from the date by which the project must be completed or might depend on state or federal funding that is contingent upon award of contract by a specific date. Ideally, the city attorney's office and public works or engineering department will work together at a very early stage in project development to work out a realistic schedule and to identify critical deadline dates.

The resulting schedule may be used as the basis for the relevant milestone dates included in the design professional services agreement. For example:

*The bid documents must be completed and submitted to the City Attorney's office for legal review no later than \_\_\_\_\_.*

The project schedule may even be included as an attachment to the professional services agreement so that the design professional's performance is closely tethered to the city's scheduling requirements. For example:

*Time is of the essence for completing the services required under this Agreement. A copy of the City's Planned Schedule for design, bidding and construction of the Project is attached as Exhibit \_\_\_. Design Professional must ensure that it meets all submittal deadlines included in this Agreement to avoid causing delay to the Planned Schedule. The Design Professional will be responsible for any delay costs incurred by the City which are caused solely by Design Professional's failure to comply with the submittal deadlines in this Agreement.*

By making the design professional responsible for timely completion and delivery of bid documents for legal review, a city can reduce the likelihood of bid protests arising from poorly drafted and unreviewed bid documents.

## **B. Clear and Consistent Bid Documents.**

Generally speaking, the easier it is for the bidder to understand and follow the bid instructions, the less likely it is that bidders will make mistakes in the rush to complete the bid. By reducing opportunities for error, a city can reduce opportunities for bid protests. The following recommendations apply specifically to the bid documents.

### **1. Limit bid submittals to essential documents.**

Limiting the number of documents that must be submitted with the bid is one of the best ways to avoid bidder errors at bid time. Many such errors involve the bidder's inadvertent failure to include a separate document or to properly sign or complete each

separate document.<sup>14</sup> Requiring numerous attachments with each bid increases opportunities for error, and often there are more efficient ways to obtain the relevant information.

Under state law, certain documents *must* be submitted with a public works bid, e.g., bid security,<sup>15</sup> the subcontractor list form (for most projects),<sup>16</sup> and a non-collusion declaration.<sup>17</sup> Additional submittals may be mandatory, depending on funding requirements. Some public agencies will require many additional documents to be submitted with each bid, documents that are not required by law and not required as a condition for funding. That means more moving parts at bid time—and more opportunities for that runner parked outside city hall to overlook a page or two.

Some of these non-essential attachments are intended to obtain information or certifications that are irrelevant to determining the low bid, or are only important with respect to the selected bidder, or which can be obtained without separate attachment.

For example, some public agencies still require submission of a separate “Workers’ Compensation Certificate” with each bid, just to provide the one-sentence certification required under Labor Code section 1861. Protests based on a bidder’s failure to include the separate certification are not uncommon, but are completely avoidable. Section 1861 does not require that the certification be submitted as a separate document. It doesn’t even require it from every bidder. It is only necessary to obtain it from the Contractor “prior to performing the work of the contract.” Rather than requiring a separate document that could be inadvertently omitted or left unsigned, the certification requirement may be incorporated directly into the contract form:

*Under Labor Code Section 1861, by signing this Contract, Contractor certifies as follows: “I am aware of the provisions of Labor Code Section 3700 which require every employer to be insured against liability for workers’ compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the Work on this Contract.”*

In general it is advisable to consider which documents are truly needed from *each* bidder or are only needed from the apparent *low* bidder. For example, instead of requiring each bidder to submit information on past projects, the bidding instructions can require submission of the information from the low bidder *after* the bid, upon request by the city. That ensures that the city can quickly get specific information about

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<sup>14</sup> See, e.g., *Bay Cities, supra*, [arising from the low bidder’s omission of the first page of the bid bond form].

<sup>15</sup> Public Contract Code § 20170.

<sup>16</sup> Public Contract Code § 4104.

<sup>17</sup> Public Contract Code § 7106.

the lowest bidder's experience, but avoids the problem of higher bidders using past project lists as the basis for alleging that a bid is nonresponsive. This is not a theoretical problem. It arises with disappointing regularity.<sup>18</sup>

## **2. Include an "order of precedence" provision.**

Protests sometimes arise from conflicting instructions in the bid documents, particularly when the bid documents have been copied and pasted together from various sources. In a perfect world, such conflicts would be caught and corrected before the bid opening. This is not a perfect world, so including an "order of precedence" provision in the contract documents is essential to govern internal conflicts and inconsistencies among the various contract documents, including the bid documents.

For example, if the notice inviting bids requires each bidder to submit references with its bid, but the instructions to bidders requires only the apparent low bidder to submit references within a specified time after the bid, an order of precedence provision can resolve the conflict by stating which document controls in the event of such a conflict.

## **3. Control information.**

Some bid protests are based on allegations of disparate information when one bidder is provided information that was not made equally available to other bidders—usually because a well-intended city employee or consultant answered a direct question from a bidder. The bid documents should provide a single point of contact for questions regarding the project or the bid documents, and require that *all* questions be submitted in writing (usually email) to that contact person. It is equally important to make sure that staff and consultants know to avoid any off-the-record responses to bidders.

Answers to written questions should be provided in written addenda issued to all known plan-holders. Make sure the bid proposal form requires each bidder to confirm receipt of each addendum. Controlling supplemental information in this manner will help avoid protests based on disparate information.

## **4. Do not limit the city's discretion.**

Some bid documents are riddled with repeated admonitions that a non-compliant bid "will be rejected" if the bidder fails to comply with various provisions. When there is a bidder error involving a provision containing such an admonition, a protesting bidder will latch on to the admonition to insist that the error cannot be waived and that rejection is mandatory. It's a fair argument. But it is an avoidable argument.

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<sup>18</sup> The sample bid protest opinion letter, provided as Attachment B to this paper, includes a fairly typical protest based, in part, on the contents of the low bidder's list of past projects.

Such admonitions are neither necessary nor helpful. If a bid is nonresponsive it may be rejected as a matter of law. Bidders already know this. They do not need reminders. As discussed above, if the deviation is material, the bid *must* be rejected. However, if the deviation is not material, the city may exercise its discretion to waive the deviation.<sup>19</sup> Statements that a bid *will* be rejected for a particular error may operate to deprive the city of its discretion to waive an immaterial error, thereby forcing the city to award to a higher bidder, even for a trivial deviation.

#### **5. Reserve the right to reject bids.**

While it is clear under California law that a city has the right to reject all bids,<sup>20</sup> it may still be useful to say so in the bid documents. For example:

*City reserves the right, acting in its sole discretion, to waive immaterial bid irregularities, to accept or reject any and all bids, or to abandon the Project entirely.*

In the *Bay Cities* decision, the appellate court took particular note of the fact that the City of San Leandro had expressly reserved its rights in this regard in both the bid documents and in its municipal code, even quoting the provisions of each.<sup>21</sup> Did that make a difference? Hard to know, but it couldn't hurt and it might just help to include an express reservation of rights if it might give a court another reason to uphold a city's exercise of discretion, or even if it just reminds bidders that the city is under no obligation to award the contract at all.

#### **C. Consider Prequalification.**

Although protests based on non-responsibility occur less frequently than protests based on nonresponsiveness, they do arise from time to time. As discussed above, a protest based on responsibility will require more time and legal process than one based on responsiveness, especially if it results in disqualifying a low bidder on grounds it is not responsible.

Although many cities now use prequalification<sup>22</sup> as a matter of routine, particularly for larger projects, some public works and engineering departments remain reluctant to even try prequalification, based on the belief that it will take too much time. A prequalification procedure will indeed require some additional time, but one of the

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<sup>19</sup> *Bay Cities*, *supra*, 223 Cal.App.4th 1181, 1188.

<sup>20</sup> *See, e.g.*, Public Contract Code § 20166 ("In its discretion, the legislative body may reject any bids presented and readvertise.")

<sup>21</sup> *Bay Cities*, *supra*, at 1188 and fn. 3.

<sup>22</sup> *See* Public Contract Code § 20101, authorizing prequalification by local agencies.

potential benefits of prequalification is that it should eliminate any basis for submitting a protest based on responsibility. After all, a bidder that has been prequalified by the city has effectively been pre-determined to be a responsible bidder. Moreover, it is generally easier to eliminate a non-responsible bidder through prequalification instead of rejecting a low bidder as non-responsible after the bid.

Compared to the time and cost required to disqualify a low bidder as non-responsible—particularly if the bidder files a legal action to challenge the disqualification—a prequalification process might look like a more attractive option. Limiting bidding to prequalified bidders is unlikely to make any difference in terms of avoiding protests based on nonresponsiveness, but for larger projects, the extra time may be worthwhile to avoid protests based on non-responsibility.

#### **D. Legal Review of Bid Documents.**

As discussed in Section II.A, above, legal review of the bid documents can avoid bid protests by identifying and correcting any inconsistencies, conflicts or ambiguities before the bid documents are released to the bidders. City attorneys who have limited experience with public contract law may feel daunted by the prospect of such review, especially when a two-volume draft project manual is dropped off for review. Fortunately, no one expects the city attorney to review the specifications for sheet rock installation or HVAC commissioning. The city attorney's review is limited to the "legal stuff" at the beginning, including the bid documents. And for the most part, that requires the same skill set that applies to review of other contract documents.

With respect to the bid documents, the reviewing attorney should consider whether, as a practical matter, the bidder is provided with clear and unambiguous directions for preparing and submitting its bid, including all required supporting documents, e.g., the subcontractor list form, the non-collusion declaration, an itemized bid schedule, etc. It helps to think like a bidder, but one with a law degree.

If the bid documents are based on a front end template that has already been approved by the city attorney's office, the reviewing attorney should confirm that the required template has in fact been used and with no unauthorized modifications. Sometimes—well, fairly often—non-attorneys such as design professionals, city engineers and even clerical staff, acting with the very best of intentions, will tinker with the city's template bid documents, and do so without consulting the city attorney's office. Use of a "compare documents" feature in word processing software can provide an easy way to electronically check the draft against the approved template and identify any unauthorized modifications.

The reviewing attorney should also consider whether the bid documents are generally structured to avoid bid protests, as discussed in section II.B, above. Likewise, the

reviewer should consider whether the bid documents include provisions that will help the city to manage bid protests, as discussed in greater detail in Part III, below.

Finally, it's obviously a good idea to make sure the bid documents comply with current law. *The California Municipal Law Handbook* can be a useful resource for a reviewing attorney with limited familiarity with public works contracts.<sup>23</sup>

### **III. MANAGING BID PROTESTS**

A city can control what it includes in its bid documents and how it manages its bid procedures. But a city cannot entirely prevent bidders from making errors and, unless it has prequalified bidders, it cannot prevent unqualified bidders from submitting bids. Some protests are simply unavoidable. This part will focus on managing bid protests in order to limit risk exposure, cost and delay.

#### **A. Bid Protest Procedures.**

Comprehensive bid protest procedures are essential for timely, fair and efficient handling of bid protests. A lack of bid protest procedures can hamstring a city's efforts to manage a bid protest because there simply are no limits on when a protest must be submitted, what it must contain, and how it must be submitted. Protesting bidders are quick to take advantage of an open-ended opportunity to pursue their own agendas.

The Public Contract Code does not provide any bid protest rules or requirements for cities, so it is up to cities to adopt their own. Some cities enact bid protest procedures as part of their municipal code. Others include bid protest procedures in the bid documents, typically in the instructions to bidders.

Good bid protest procedures should ensure that all of the information needed to evaluate the protest is provided promptly and with finality. This is not litigation: the protester should not be granted the right to amend its protest, to add new grounds for protest, or to otherwise needlessly drag out the proceeding. The protest procedures should require that the protest be specific, complete and include all supporting evidence. Likewise the protested bidder should be given the opportunity to provide a complete response within a similarly limited amount of time.

The procedures should enable the city attorney's office to obtain all information necessary for legal analysis of the protest in order to advise the city council on the merits of the protest and the lawful actions the council may take in response.

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<sup>23</sup> See City Attorneys' Department, League of California Cities, *The California Municipal Law Handbook* (Cont. Ed. Bar 2014 ed.), Chapter 7, Part 1E, "The Contract Documents and Contract Provisions" (§ 7.36 *et seq.*).

Depending on the merits of the protest (as determined by legal review), those actions may include: 1) rejecting the protest as lacking legal merit; 2) finding that the protest has merit (in whole or in part), but that the bidding error may be waived as immaterial;<sup>24</sup> or 3) finding that the protest has merit and the bidding error is material, such that the protested bid must be rejected as a matter of law.

A sample bid protest provision excerpted from an “Instructions to Bidders” form is provided as Attachment A. The following are specific suggestions and options for drafting fair and efficient bid protest procedures.

**1. Limit eligibility to protest.**

A city should limit eligibility to submit a protest to a general contractor who has actually submitted a timely bid, and specifically exclude subcontractors or others with a secondary interest. Eligibility can be further limited to the bidder that may be awarded the contract if its protest is successful. Generally, however, a bidder will only submit a protest if it seems to have a realistic opportunity to win the bid.

**2. Limit time to file and respond.**

Protest procedures should be structured to avoid delaying contract award, and that means short timeframes for submission and resolution. There should be a deadline for submitting a protest, the timing of which can vary depending on the scope and complexity of the bid. For routine public works bids two or three working days is generally adequate time for a bidder to submit a protest—as long as the city makes the bids available for review immediately after the bid opening (more on that in Section III.B, below). An additional two or three days is sufficient for the protested bidder to submit a response, plus a couple more days for analysis and preparing a short opinion letter. There is no need for a city to delay project award by providing protest deadlines that are longer than what is truly required under the circumstances.

**3. Do not require a public hearing for all protests.**

Some public agencies operate under the mistaken belief that a public hearing is required for any bid protest. Good news: that is incorrect. As discussed in Section I.B, above, a bidder whose bid is challenged on grounds of responsiveness is not entitled to a hearing; review is limited to the face of the bid. A bidder who is alleged to be non-responsible is entitled to a hearing, but as a practical matter, that’s only necessary if the city intends to reject the bidder as non-responsible. While this does occur from time to time, it is not necessary to include a special procedure for responsibility hearings, particularly if the city has already adopted general hearing procedures. Therefore there is no need to require hearings on bid protests as a matter of routine and a mandatory

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<sup>24</sup> See Section I.A, above, on discretion to waive immaterial errors.

hearing procedure may needlessly delay resolution of the protest, award of contract and even work on the project.

#### **4. Consider a non-refundable fee.**

Some cities now require submission of a non-refundable fee to cover the administrative cost of processing the protest. Obviously, in order to pass constitutional muster, any such fee must be based on the city's estimated reasonable costs to process bid protests.<sup>25</sup> The potential benefits of a reasonable bid protest fee are two-fold. First and foremost, it will help defray the city's costs to process bid protests. Second, a fee requirement may help to discourage frivolous protests. Admittedly, this secondary benefit depends on bidders behaving as rational economic actors who can fairly assess the legal merit of a potential protest.

To date, there are no published opinions in California addressing the legality or limits of requiring a bid protest fee. Cities that handle a high volume of bid protests may wish to consider implementing such a fee—being mindful of constitutional limitations—even if there is no case law guidance yet.

### **B. Administer Protests Promptly, Fairly and Transparently.**

#### **1. Release bid documents immediately upon request.**

The best bid procedures will be of limited benefit if the bidders are denied access to the bids or to any other relevant information. Many bidders (especially the second and third lowest bidders) will ask to review the low bid immediately after the opening to see if there is any ground for disqualifying the low bidder. Staff should make the bids available for inspection and copying as soon as possible after the bids are opened. In addition, to avoid any appearance of favoritism, it is imperative that all bidders have equal access to the bids.<sup>26</sup>

It is true that under the Public Records Act, the City has up to ten days to respond to a records request.<sup>27</sup> However, waiting for ten days will only delay resolution of any possible protest, foster ill-will and mistrust, and can potentially operate to prejudice a bidder's ability to file a timely protest. Staff should be prepared to copy (or scan) each bid packet immediately after the bid opening, and to make the copies available immediately to each requesting bidder.

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<sup>25</sup> Cal. Const. XIII C § 1e.

<sup>26</sup> In *Great West*, the defendant school district permitted some bidders immediate access to copies of bids, but stonewalled requests from the plaintiff contractor, creating a disparity of information and further evidence of “favoritism most foul.” (*Great West*, *supra*, at 1429.)

<sup>27</sup> Govt. Code § 6253(c).



## **2. Maintain fairness and transparency.**

While most bid protests are resolved without litigation, some are ultimately litigated, at which point it is especially important to have a well-documented record of the city's handling of the bid protest. That record should reflect fair and balanced treatment of the bidders, and should also include a detailed explanation of why the protest was either rejected or accepted based on the evidence and applicable law. An open and transparent process will ensure that all parties have equal access to information and demonstrate that the city maintained a level playing field and did not engage in favoritism.

Ideally, the city attorney's office or outside counsel will promptly review both the bid protest and any response from the protested bidder, then prepare a written legal opinion on the merits of the protest based on the law and evidence. This opinion may be in the form of a letter to the protesting bidder or its legal counsel, or as a memorandum to the city council. A sample legal opinion drafted as a letter to the protesting bidder is provided as Attachment B. An opinion drafted as a letter to the protesting bidder may be attached to the staff report containing the recommendation for council action on the protest and on awarding the contract.

However the legal opinion is addressed, both the protesting bidder and the protested bidder should be provided a copy of the legal opinion, so they are equally informed of the analysis and the basis for the recommendation for council action on the protest. Often, once the protesting bidder or its counsel has the opportunity to review an opinion explaining why a protest should be rejected, the protest will be voluntarily withdrawn and no further action is necessary. If the protest is not withdrawn, it should be submitted to the city council to act on, as discussed in Section III.A, above. Absent a specific threat of litigation, the city council's action should take place in open session, during which the council should take the related and sequential actions of 1) taking action on the protest, then 2) awarding the contract (or rejecting all bids).

### **C. Rejecting and re-bidding.**

Most protests involving minor bidding errors are fairly easy to resolve, especially when the city has excellent bid documents. However, sometimes a protest is more problematic, particularly if the protest arises from problems with the bid documents or the manner in which the city conducted the bid—for example, if there was conflicting information in the bid documents, or if a public works employee passed along significant information to one bidder, but not the others.

If the bid documents or bid process are flawed beyond remedy, in order to avoid litigation, it may be in the city's best interest to reject all bids and re-bid the project, taking corrective measures as needed to avoid the problems that arose with the first

bid.<sup>28</sup> Even for routine protests, unless the council is very experienced with bid protests, it is advisable to remind them that they always have the authority to reject all bids. Of course, if insufficient time has been budgeted for re-bidding the project, this might not be a viable option as a practical matter, so it is important to plan ahead when timing is critical.<sup>29</sup>

#### **D. Indemnification for Bidding Errors.**

When a disappointed bidder decides to bring a legal challenge to a city's award to another bidder, even if the city ultimately prevails, it will likely be out of pocket for legal costs. For example, if there was an error in the low bid, but the city waived the error as immaterial, and awarded to the low bidder, the protesting bidder may file a lawsuit alleging that the city improperly waived the error and seek to invalidate the award, so that it is next in line for the contract. That was the fact pattern in the recent *Bay Cities* case.<sup>30</sup> It seems unfair that the city should ultimately pay the price for the low bidder's error.

One possible approach to shifting the cost burden to the bidder responsible for the error is to extend the contractual indemnity to apply to claims or litigation arising from the successful contractor's bidding errors. Expressly extending the contract indemnity provision to encompass bidding errors would not be effective until the parties actually entered into the contract. However, once that bidder enters into the contract it will be bound by the indemnity obligation.

Any indemnity requirement should comply with Civil Code section 2782. That section provides that an indemnity provision in a public agency construction contract is void and unenforceable if it requires the contractor to indemnify the public agency for the agency's sole or active negligence. However, provided an indemnity provision is drafted to comply with Civil Code section 2782, it may be effective to shift the burden of defense to the contractor responsible for the bidding error:

***Indemnity.*** *To the fullest extent permitted by law, Contractor must indemnify, defend, and hold harmless Owner, its agents and consultants, Design Professional, and Construction Manager (individually, an "Indemnatee," and collectively the "Indemnitees") from and against any and all liability, loss, damage, claims, expenses (including, without limitation, attorney fees, expert witness fees, paralegal fees, and fees and costs of litigation or arbitration) (collectively, "Liability") of every nature*

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<sup>28</sup> See Public Contract Code § 20166 for a city's authority to reject and re-bid.

<sup>29</sup> See discussion of calculating sufficient time for bidding under Section III.A, above.

<sup>30</sup> *Bay Cities, supra* [holding that the city properly exercised its discretion to waive the low bidder's inadvertent omission of the first page of its form bid bond as an immaterial error].

*arising out of or in connection with the acts or omissions of Contractor, its employees, Subcontractors, representatives, or agents, in bidding or performing the Work or its failure to comply with any of its obligations under the Contract, except such Liability caused by the active negligence, sole negligence, or willful misconduct of an Indemnatee. **This indemnity requirement applies to any Liability arising from alleged defects in the content or manner of submission of the Contractor's bid for the Contract.** Contractor's failure or refusal to timely accept a tender of defense pursuant to this provision will be deemed a material breach of this Contract. Owner will timely notify Contractor upon receipt of any third-party claim relating to the Contract, as required by Public Contract Code Section 9201.*

It should be noted that this is a relatively novel approach to shifting the risk for bid protest litigation and has not been addressed in any published decision in California. It is possible that a court might decline to enforce the indemnity obligation against the erring contractor, particularly under circumstances where the awarding city appears to share some responsibility for the bidder error, e.g., ambiguous bid instructions. However, under the right circumstances this could potentially be an effective tool to shift the risk and cost of litigation arising from a bidding error to the bidder that was solely responsible for that error.

#### **E. Public Policy Objectives.**

In addition to the many affirmative steps a city may take to avoid or manage liability from bid protests, it is also important to be guided by the public policy objectives underlying public bidding requirements, as expressly stated in the Public Contract Code.

“The Legislature finds and declares that placing all public contract law in one code will make that law clearer and easier to find. Further, it is the intent of the Legislature in enacting this code to achieve the following objectives:

- (a) To clarify the law with respect to competitive bidding requirements.
- (b) To ensure full compliance with competitive bidding statutes as a means of protecting the public from misuse of public funds.
- (c) To provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices.
- (d) To eliminate favoritism, fraud, and corruption in the awarding of public contracts.”<sup>31</sup>

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<sup>31</sup> Public Contract Code § 100.

These objectives underpin the statutory requirement that cities award public contracts to the lowest responsible bidder.<sup>32</sup> California courts often reference these objectives when enforcing public bidding laws that require award to the low bidder:

“[W]here a statute requires a public entity to award a contract to the lowest responsible bidder, the courts have been vigilant in not excusing attempts by public entities to circumvent that requirement.”<sup>33</sup>

When addressing a close call on a bid protest, it is worthwhile to bear in mind that, absent fairly egregious circumstances, the courts tend to weigh in favor of the low bidder rather than the protesting bidder, as reflected in the following passage:

“It certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal...of the low bidder after the fact, [and] cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid. Such construction would be adverse to the best interests of the public and contrary to public policy.”<sup>34</sup>

Before advising that the city council may reject a low bidder and award to a higher bidder, make sure there are solid grounds for doing so.

#### **IV. CONCLUSION**

The practical recommendations in the paper are intended to assist a city attorney’s office to play an active role in minimizing and managing liability arising from bid protests, and to do so in a manner that will support timely contract award and project delivery.

There is no surefire method to avoid bid protests or even litigation arising from a protest, particularly when confronted with an aggressive, economically motivated bidder that is willing to sue for a public contract. However, it is possible to minimize and manage the risk posed by protests by implementing affirmative, practical steps to manage public bidding in a manner that is consistent with the underlying policy objectives. When bid documents are clear and consistent, when bidders are assured of a level playing field, and when protests are handled in a fair, efficient and transparent manner, a city is likely to avoid many protests and to minimize the potential cost and delay from protests that it cannot avoid.

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<sup>32</sup> Public Contract Code § 20162.

<sup>33</sup> *Great West, supra*, 187 Cal.App.4th at 1448.

<sup>34</sup> *Bay Cities, supra*, 223 Cal.App.4th at 1189.

**BID PROTESTS:  
MINIMIZING AND MANAGING LIABILITY**

**ATTACHMENT A**

**SAMPLE BID PROTEST PROCEDURES**

- 11. Bid Protest.** Any bid protest must be in writing and received by City at \_\_\_\_\_ before 5:00 p.m. no later than two working days following bid opening (the “Bid Protest Deadline”) and must comply with the following requirements:

**11.1 General.** Only a bidder who has actually submitted a Bid Proposal is eligible to submit a bid protest against another bidder. Subcontractors are not eligible to submit bid protests. A bidder may not rely on the bid protest submitted by another bidder, but must timely pursue its own protest. If required by City, the protesting bidder must submit a non-refundable fee in the amount specified by City, based upon City’s reasonable costs to administer the bid protest. Any such fee must be submitted to City no later than the Bid Protest Deadline, unless otherwise specified. For purposes of this Section 11, a “working day” means a day that City is open for normal business, and excludes weekends and holidays observed by City.

**11.2 Protest Contents.** The bid protest must contain a complete statement of the basis for the protest and all supporting documentation. Material submitted after the Bid Protest Deadline will not be considered. The protest must refer to the specific portion or portions of the Contract Documents upon which the protest is based. The protest must include the name, address, email address, and telephone number of the person representing the protesting bidder if different from the protesting bidder.

**11.3 Copy to Protested Bidder.** A copy of the protest and all supporting documents must be concurrently transmitted by fax or by email, by or before the Bid Protest Deadline, to the protested bidder and any other bidder who has a reasonable prospect of receiving an award depending upon the outcome of the protest.

**11.4 Response to Protest.** The protested bidder may submit a written response to the protest, provided the response is received by City before 5:00 p.m., within two working days after the Bid Protest Deadline or after actual receipt of the bid protest, whichever is sooner (the “Response Deadline”). The response must include all supporting documentation. Material submitted after the Response Deadline will not be considered. The response must include the name, address, email address, and telephone number of the person representing the protested bidder if different from the protested bidder.

**11.5 Copy to Protesting Bidder.** A copy of the response and all supporting documents must be concurrently transmitted by fax or by email, by or before the Bid Protest Deadline, to the protesting bidder and any other bidder who has a reasonable prospect of receiving an award depending upon the outcome of the protest.

**11.6 Exclusive Remedy.** The procedure and time limits set forth in this section are mandatory and are the bidder's sole and exclusive remedy in the event of bid protest. A bidder's failure to comply with these procedures will constitute a waiver of any right to further pursue a bid protest, including filing a Government Code Claim or initiation of legal proceedings.

**11.7 Right to Award.** The City Council reserves the right to award the Contract to the bidder it has determined to be the responsible bidder submitting the lowest responsive bid, and to issue a notice to proceed with the Work notwithstanding any pending or continuing challenge to its determination.

**BID PROTESTS:  
MINIMIZING AND MANAGING LIABILITY**

**ATTACHMENT B**

**SAMPLE BID PROTEST OPINION LETTER**

*Author's note: The following sample letter was adapted from an actual opinion letter with the names changed to protect the privacy of the parties involved. The protesting bidder withdrew its protest within an hour after receiving the original letter, so this never had to go to the city council.*

John Doe, President  
Costly Construction, Inc.  
1234 Fictional Street  
Fictional City, CA

Re: City of Anytown | Sports Field Project, Contract No. 123  
Bid Protest Response

Dear Mr. Doe:

This letter responds to your bid protest, dated July 14, 2014, protesting the bids submitted by Acme Construction, Inc. ("Acme"), the apparent low bidder, and by Basic Construction, Inc. ("Basic"), the next lowest bidder, for the contract to construct the City's Sports Field Project (the "Project"). Following review and analysis of the protest and consultation with legal counsel, I have determined that your protest lacks merit for the reasons stated below. Therefore, I will recommend that the City Council reject Costly Construction's bid protest and award the contract for the Project to Acme as the lowest responsible, responsive bidder.

**I. LEGAL STANDARDS**

California Public Contract Code section 20162, which governs the City's award of the contract for this Project, requires that the contract be awarded, if at all, to the lowest responsible bidder. In Section 1 of the *Notice to Contractors: Call for Bids* for this Project, the City expressly reserves its rights to evaluate bid compliance and to waive minor bidding errors:

"The City reserves the right to reject any or all bids and to waive any informality or irregularity in any bid received and to be the sole judge of the merits of the respective bids received. The award, if made will be made to the lowest responsive, responsible bidder."

The City's discretion to waive inconsequential informalities or irregularities is well-established under California law:

“[I]t is further well-established that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given the bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential” (*Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181, 1188 (“*Bay Cities*”).)

In general, issues of responsiveness are determined by looking exclusively at the face of the bid. (*Great West Contractors, Inc. v. Irvine Unif. Sch. Dist.* (2010) 187 Cal.App.4th 1425, 1453.) Therefore, allegations that go beyond the face of the bid are generally not relevant for determining responsiveness.

In addition, allegations of nonresponsiveness must be evaluated from a practical, rather than speculative or hypertechnical perspective, and based on the public interest:

“They must also be viewed in light of the public interest, rather than the private interest of a disappointed bidder. It certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal...of the low bidder after the fact, [and] cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid. Such construction would be adverse to the best interests of the public and contrary to public policy.” (*Bay Cities, supra*, at 1189; internal quotation marks omitted.)

From this legal framework, we consider Costly’s allegations.

## **II. ANALYSIS**

### **A. Project References**

#### **1. Acme’s Exhibit E is responsive on its face.**

Costly’s bid protest alleges that Acme failed to comply with the instructions for listing certain past project references in Exhibit E to the Bid Form. Bidders were required to list their five most recently completed synthetic turf field projects, with a construction value of at least \$1,500,000, and which the bidder completed within three years. Assuming the three-year period is measured from the July 3, 2014 date of the bid, applied strictly, that would mean relevant projects completed since July 2, 2011.

Exhibit E does not require bidders to list the completion date for each listed project, only the date of award. On the face of Exhibit E, Acme has complied by listing five projects and providing the requested information for those projects. However, you urge the City to look beyond the face of the bid by alleging that one of the five past projects listed by Acme, the College Field Project, was completed in March of 2011, and therefore falls outside of the three-year window.

Even if it were appropriate for the City to look beyond the face of the bid in this regard, Costly’s factual allegation is evidently incorrect. The detailed response to your bid protest, submitted by Acme on July 15, 2014, a copy of which is attached, asserts, with substantial documentation, that Acme’s work on the College Field Project was still ongoing well within the three-year window. Acme has complied with the relevant requirements of Exhibit E and its bid is fully responsive in that regard.



## **2. Basic's References**

Costly's bid protest similarly alleges that the Exhibit E references supplied by Basic are nonresponsive. Basic responded to the requirements of Exhibit E by submitting a list of 35 past field projects, listed by year of completion in chronological order, beginning with the most recent. Of the most recent seven projects listed, i.e., those that were completed in or after 2011, only one falls below the construction value benchmark of \$1,500,000. Basic's most recent project, which it identifies as "in progress," is for \$11,873,000—approaching ten times the required benchmark amount. You have objected on grounds that of the 35 projects listed by Basic, the most recent is still in progress rather than "completed," and that the listed contract amount for one of the 2012 projects is \$1,110,844—just below the benchmark.

The City is satisfied that Basic has complied with the relevant requirements of Exhibit E by providing more relevant references than the minimum required and that its bid is fully responsive in that regard. Even if looking beyond the face of Exhibit E supported a hypertechnical determination that Basic's references did not include five within the three-year period that were all above the \$1,500,000 and all "completed" prior to bid time, any such irregularity is immaterial. It does not affect the amount of Basic's bid and there is simply no evidence that this would afford Basic an advantage over other bidders.

However, the City is *not* required to look beyond the face of Basic's bid to determine its responsiveness. Since Basic's bid is responsive on its face, Costly's protest lacks merit.

### **B. Restroom Building Product Requirements**

Next, with respect to both protested bids, you have alleged, based on erroneous assumptions and inferences, that the two lowest bids are nonresponsive because they both list the Public Restroom Company ("PRC") as a subcontractor for "Pre Fab Structures" (Acme) or "Bldg" (Basic). From these entries on the low bidders' respective *List of Subcontractors* (Exhibit A to the Bid Form), you assert: 1) that it is impossible that the low bidders can provide the two of the items listed by model number in Section 10.2.16 of the Specifications, 2) that bidders are required to submit proposed "or equal" substitutions prior to bid time, and 3) that, therefore, the low bidders cannot possibly supply the specified items or timely submit requests for substitutions.

It is not necessary to address all of the erroneous assumptions and inferences on which this argument is based: it is sufficient to note, as Acme has ably done in its attached response, that "or equal" substitutions may be submitted after award of the contract, which, we further note, is entirely consistent with the applicable provisions of Public Contract Code section 3400.

Costly's protest pertaining to the "restroom building product requirements" lacks merit. The *List of Subcontractors* submitted by each of the low bidders is responsive on its face.

### **III. CONCLUSION**

Based upon the foregoing, and based upon City staff's determination that Acme is the lowest responsible bidder and that Acme's bid is responsive on its face, I will recommend that the City Council reject Costly's bid protest in its entirety as lacking merit. City staff intends to recommend that the Council then award the contract for the Project to Acme. The City appreciates your interest in this project and wishes you success with your next project.

Sincerely,

CITY OF ANYTOWN

Mary Smith, City Attorney

Enclosure: Acme letter of July 15, 2014, and attachments

c:      Acme Construction, Inc.  
        Basic Construction, Inc.