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## **CONTRACTS 101: A PRACTICE GUIDE SELECTED PUBLIC WORKS CONTRACTS ISSUES**

### ***I. INTRODUCTION***

This paper discusses selected issues concerning public works contracts: a city's ability to award a contract in an emergency, without adhering to competitive bidding requirements; recent cases on the use of bid "alternatives"; use of standard form contracts provided by the American Institute of Architects ("AIA"); and the use of validation actions under the Code of Civil Procedure.

### ***II. AWARDING A CONTRACT IN AN EMERGENCY WITHOUT COMPETITIVE BIDDING. Competitive Bidding Requirements.***

Public Contract Code Sections 20160 through 20174 govern the competitive bidding requirements applicable to cities on public projects. <sup>1</sup> A "public project" is defined as a project for the erection, improvement, painting or repair of public buildings and works; work in or about streams, bays, waterfronts, embankments, or other work for protection against overflow; street or sewer work except maintenance or repair; and furnishing supplies or materials for any such project, including maintenance or repair of streets or sewers. <sup>2</sup> In general, when the expenditure required for a public project exceeds \$5,000, a city must comply with the competitive bidding requirements (e.g., publish a notice inviting bids, and award the contract to the lowest responsible bidder). <sup>3</sup> Competitive bidding requirements are intended to protect the public from misuse of public funds; provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices; eliminate favoritism, fraud and corruption in the awarding of public contracts; to guard against improvidence and extravagance; prevent the waste of public funds; and to obtain the best economical result for the public. (Section 100; *Graydon v. Pasadena Redevelopment Agency* (1980) 104 CA3d 631, 164 CR 56.) **B. What is an "emergency?"**

An "emergency" is defined in Section 1102 as "a sudden, unexpected occurrence that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property or essential public services." Section 20168 provides:

"In case of an emergency, the legislative body may pass a resolution by a four-fifths vote of its members declaring that the public interest and necessity demand the

immediate expenditure of public money to safeguard life, health, or property. Upon adoption of the resolution, it may expend any sum required in the emergency without complying with this chapter..."Before the 1994 amendment to Section 20168, an award of a contract in emergency circumstances required "a great public calamity, as an extraordinary fire, flood, storm, epidemic, or other disaster, or if it is necessary to do emergency work to prepare for national or local defense." The legislature arguably expanded the scope of an "emergency" for bidding purposes when it deleted this language.

**C. Emergency Contracting Procedures.** In the case of an emergency, a public agency, pursuant to four-fifths vote of the governing body, may repair or replace a public facility, take any directly related and immediate action required by that emergency, and procure the necessary equipment, services and supplies for those purposes without giving notice for bids to let contracts. <sup>4</sup> Prior to taking any action, the governing body must make a finding, based on substantial evidence set forth in the minutes of the meeting, that the emergency will not permit a delay resulting from a competitive solicitation for bids, and that the action is necessary to respond to the emergency. <sup>5</sup> The governing body may, by four-fifths vote, delegate by resolution or ordinance, the authority to order any action to the county administrator, the city manager, chief engineer, or other non-elected agency officer. <sup>6</sup> If the public agency has no county administrator, city manager, chief engineer or other non-elected agency officer, then the governing body may delegate its authority) to an elected officer. <sup>7</sup> It would appear that the delegation discussed in these sections might occur if, for example, there was some question as to the need to take emergency action, and the governing body wished to allow action to be taken depending upon the circumstances, before its next meeting. If the governing body decides to delegate its authority, the person delegated with the authority must report to the governing body at its next meeting, the reasons justifying why the emergency will not permit a delay resulting from a competitive solicitation for bids and why the action is necessary to respond to the emergency. <sup>8</sup> Additionally, the governing body must initially review the emergency action within seven days after the action, or at its next regularly scheduled meeting if that meeting will occur within 14 days after the action. The governing body must continue to review the action at every regularly scheduled meeting thereafter until the action is terminated to determine, by four-fifths vote, that there is a need to continue the action, unless a person with delegated authority has terminated the emergency action prior to the governing body reviewing the action. <sup>9</sup> If the governing body does not delegate its authority, it must review the emergency action at its next regularly scheduled meeting and at every regularly scheduled meeting thereafter until the action is terminated, to determine, by a four-fifths vote, that there is a need to continue the action. If the governing body meets weekly, it may review the emergency action every 14 days. <sup>10</sup> When reviewing the emergency action, the governing body must terminate the action at the earliest possible date that conditions warrant so that the remainder of the emergency action may be completed by giving notice for bids to let contracts.

<sup>11</sup> Obviously, the evidence which supports the emergency finding must be as strong as possible, and clearly a part of the record before the city council. A city would be well-advised to have a written opinion in the record from a licensed professional concerning the exact nature of the emergency, particularly if there is any question whatsoever as to the existence of a true emergency. Even if the emergency seems fairly obvious, it may

be less clear what portion of the work should be undertaken to alleviate an emergency, versus what might be left for later. In one case our office worked on, an historically significant (but very dilapidated) building faced imminent collapse of its roof and edifice after heavy rains. The city quickly brought in an architect with experience in renovating historic structures. He provided the opinion that immediate work was necessary to support the roof and repair the edifice, in particular to avoid injury to passersby. The city council ordered work on an emergency basis without bidding in order to correct those problems. However, competitive bidding was used to award a contract for permanent repair of the roof and other restoration steps.

**D. Emergency Exemption from CEQA.** An emergency exemption from CEQA compliance exists for appropriate projects. Public Resources Code Section 21080 (b)(4) exempts "specific actions necessary to prevent or mitigate an emergency. " Public Resources Code Section 21080 (b)(2) also exempts "emergency repairs to public service facilities necessary to maintain service. " CEQA Guidelines Section 15359 defines an emergency as "a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to life, health, property, or essential public services. Emergency includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage. " For a further discussion of the "emergency" exemptions from CEQA, see *Western Municipal Water District v. Superior Court* (1987) 187 CA3d 1104, 232 CR 359.

**E. Prevailing Wage Requirement.** Note that even though an emergency action may be exempt from state competitive bidding requirements, the contract may still be subject to the prevailing wage requirements of Labor Code Sections 1770, *et seq.* A full discussion of prevailing wage requirements is beyond the scope of this paper; see section IV(B)(8) of the Municipal Law Handbook and cases cited there; see also "*Update on the Prevailing Wage Law and the Role of the Public Agency*" prepared by H. Thomas Cadell, Jr., Chief Counsel, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, and presented at the City Attorneys Annual Conference in October, 1992.

**III. RECENT CASES ON THE USE OF ALTERNATIVE BIDS** Alternative bids allow an agency to obtain bids for portions of a project depending upon the availability of funding without the delay and expense associated with having to go out to bid again after learning the price of the base bid. Alternates are essentially additions to or subtractions from a base bid. They should be bid simultaneously with the base bid, and fully detailed in the agency' s bid specifications. An agency generally has a set budget for an entire project; some portions may not be considered a necessary part of the project, but are desirable if funding permits. An agency may not know whether it can afford alternate portions until base bids are obtained. If the agency also obtains bids on the alternate portions, it can choose which alternates it can afford along with the base bid. This ability to "pick and choose " points up the key concern regarding the use of alternative bids. Once the agency opens the bids, it knows which contractors have bid what dollar amounts for the base bid and each alternate. A low bidder on the base bid might not

end up being selected, depending upon which alternates the agency selects. The agency could thus choose a favored contractor through its choice of alternates, and that calls into question the fundamental fairness of the competitive bidding process.

Until recently, apparently the only case on this issue was one in which the Supreme Court denied review, and ordered that the appellate opinion not be officially published. In *FTR International, Inc. v. City of Pasadena* (1997) 62 CR2d 1, the court was concerned with possible manipulation of bids by selecting those alternates that would allow the contract to be awarded to a particular bidder when the city knows the identity of the bidders prior to the selection of the alternates. Although the court ultimately concluded that the city's use of the alternate bidding procedure did not violate competitive bidding laws, the court recommended that the alternative bids either be selected before the bids are opened (which might well defeat the purpose of using them in the first place) or that the identification of the bidders should be withheld until after the decision of which bidder is the lowest has been determined. Again, however, the opinion was not published and of course cannot be cited as authority. We do have a published opinion now that provides guidance on the use of alternative bids. In *Tilden-Coil Constructors v. City of Cathedral City* (1997) 59 CA4th 404, 68 CR2d 902, a general law city wished build a public library. Contractors were to bid on the base bid, as well as 16 alternate bids. The bids were opened and the council chose 12 alternates and awarded the contract to the lowest base bidder. When the low bidder was unable to submit the required bond, the city council rescinded the award and sought to determine which of the next two lowest base bidders would be awarded the contract. The council awarded the contract to Williams-Hedley, for the base bid plus seven alternates. The council's award to Williams-Hedley was accompanied by evidence that the council wished to favor a local contractor in the award. The third lowest base bidder, Tilden-Coil, sued, arguing that the city had failed to compare its base bid plus the same seven alternates, the total of which was lower than the total Williams-Hedley bid. Tilden-Coil argued that by its consideration of alternate bids, the city manipulated the bidding process to obtain a low bid for the favored local bidder. It argued that by changing the process for determining who was the low bidder, after the bids were known, the city council allowed the appearance of favoritism to creep into the process, and invalidated a meaningful comparison of the bid prices.

The court agreed with Tilden-Coil's concerns, and held that the only valid basis for determining the low bidder was by reference to the base bids, and not the alternates. Tilden-Coil thus won the battle and lost the war, since Williams-Hedley's base bid was lower than Tilden-Coil's. The court noted that alternate bids are not necessarily inconsistent with the Public Contract Code. However, the court stated that if a bid alternate is necessary for the operation of the completed project, it should not be stated as an alternate, but rather should be part of the plans and specifications for the base bid.

#### **IV .USE OF AIA STANDARD FORM AGREEMENTS**

A city attorney can be asked to review and approve the use of standard form agreements provided by the American Institute of Architects ("AIA") for a public works project. Form agreements exist for a variety of purposes, including agreements between owners and contractors, and owners and architects. One of our clients recently went through a review of the AIA contracts for a major public works project. We were surprised to find some fairly vehement views on the use of these agreements. We were tempted to throw out the AIA contracts and start from scratch, but the project's condensed time frame (to say nothing of the architect's strong preferences) simply wouldn't allow it. Accordingly, we ended up with extensive supplemental conditions which drastically modified the AIA agreements and took precedence over inconsistent provisions in the AIA agreements.

Two of the major areas for inquiry in using the AIA documents concern allocation of risk, and compliance with statutory requirements applicable to California public agencies. For example, the standard AIA documents vest in the architect significant power to decide disputes between the contractor and the owner, and to generally construct the project as the architect determines, and decide claims and disputes as the architect determines. (Compare Civil Code Section 1670.) Ultimately, the public agency lawyer would probably want the city manager and city council to have some reviewing authority over the ultimate resolution of disputes. As another example, the performance bond contained in the AIA documents can operate prejudicially to the project owner, because it conditions the surety's obligation on the basis of specified meetings and notices, and also defines an "owner default" as any breach of the contract, whether material or immaterial, granting the surety an arguable full defense of the bond in many cases. Similarly, the standard payment bond in the AIA documents requires revision to comply with the Public Contract Code. The indemnification clause does not satisfy the requirements of Civil Code Section 2782, as applicable to public agencies.

These are just a few of the concerns that can be raised concerning the AIA documents. There is an entire text that address pros and cons of AIA documents, *Alternative Clauses to Standard Construction Contracts*, by James E. Stephenson (Wiley Law Publications, 1990; updated 1997). See also *Sweet on Construction Industry Contracts: Major AIA Documents* (Wiley, 1987). If you are presented with AIA documents to review, anticipate making major revisions to adequately protect your public agency client's needs.

## **V. VALIDATION ACTIONS**

Code of Civil Procedure Sections 860 through 870 provide public agencies with the authority to obtain judicial validation of certain matters, including contracts, warrants, evidence of debt and other obligations. A final judgment in such an action is "forever binding and conclusive, as to all matters therein adjudicated or which at that time could have been adjudicated, against the agency and against all other persons, and the judgment shall permanently enjoin the institution by any person of any action or proceeding raising any issue as to which the judgment is binding and conclusive."<sup>12</sup> Under Section 860, a validation action is a proceeding *in rem*. If no one appears to

challenge the action and a judgment is entered, there is a thirty-day appeal period. Under a 1994 amendment, if there is no answering party, only issues related to the jurisdiction of the court to enter a judgment in the action may be raised on appeal.<sup>13</sup> Jurisdiction of If all interested parties " may be had by publication of a summons in a newspaper of general circulation designated by the court. The court may require notice to specific parties by mail or other means.<sup>14</sup> There are detailed procedures for bringing the action. Counsel should carefully review the statutes, particularly noting the time requirements for publication of summons and taking a default judgment if no one appears to challenge the action.

If the agency does not bring a validation action, then any "interested person" may bring such an action. Either way, the action must be brought within sixty days after the determination by the agency which is the subject of the action.

There is a good list of certain situations in which a validation action may be brought in the Municipal Law Handbook at section VIII(I)(6), including: Mello-Roos Act bond issuance; validity of annexations; redevelopment agency agreements; community facilities; redevelopment bonds; special district reorganizations; and municipal improvements. An ordinance adopting a redevelopment plan may be validated (*Bernardi v. City Council of the City of Los Angeles* (1997) 54 CA4th 426, 63 CR2d 347, review denied; as may a redevelopment agency agreement for the construction of an underground parking garage (*Graydon v. Pasadena Redevelopment Agency* (App. 2 Dist. 1980) 104 CA3d 631, 164 CR 56, *cert. denied* 449 US 983, 101 S.Ct. 400, 66 L.Ed.2d 246, *rehearing denied* 449 US 1104, 101 S.Ct. 905, 66 L.Ed.2d 832). A very recent case illustrates the usefulness of validation actions. In *Friedland v. City of Long Beach*, 98 Daily Journal D.A.R. 3123 (March 27, 1998) (copy enclosed), the court considered a validation judgment concerning the issuance of revenue bonds for the Long Beach Aquarium. The plaintiff filed a taxpayer suit after the appeal period had run on a default judgment taken by Long Beach when no one appeared to contest its validation action. The city had issued bonds in reliance on the judgment. The trial court granted a demurrer without leave to amend, and the Court of Appeal affirmed. In so doing, the court noted that the types of contracts that are the subject of validation actions are not *all* contracts of a local public agency, but "contracts involving financing and financial obligations." One might ask what types of public agency contracts do *not* involve some sort of "financial obligation". An agreement to pay an attorney to provide legal services to certain indigent persons was held to involve a "public agency financial obligation", but not the kind contemplated in Sections 860 and 863, "such as bonds and assessments". *Phillips v. Seely* (1975) 43 CA3d 104, 117 CR 863. However, it does not appear that the term "contract" should be construed so narrowly as to apply only to bond issues, particularly given the need for finality in many municipal transactions and the underlying purposes of the validation statutes. For example, a validation action was the vehicle used to determine the validity of a tax increment revenue sharing agreement between a redevelopment agency and a county. *Meaney v. Sacramento Housing and Redevelopment Agency* (1993) 13 CA4th 566; 16 CR2d 589 (cited by the court in *Friedland*). In appropriate circumstances, obtaining a validation judgment can provide a good deal of insulation against future challenges to a municipal action. \_\_\_\_\_<sup>1</sup> All

statutory references in Section II are to the Public Contract Code unless otherwise indicated.<sup>2</sup> Section 20161.<sup>3</sup> Section 20162.<sup>4</sup> Section 22050 (a)(1).<sup>5</sup> Section 22050 (a)(2).

<sup>6</sup>. Section 22050 (b)(1).<sup>7</sup>. Section 22050 (b)(2).<sup>8</sup>. Section 22050 (b)(3).

<sup>9</sup>. Section 22050 (c)(2).<sup>10</sup>. Section 22050 (c)(1).<sup>11</sup>. Section 22050 (c)(3).

<sup>12</sup>. CCP Section 870. All statutory references in Section V are to the Code of Civil Procedure.<sup>13</sup>. Section 870(b).<sup>14</sup>. Section 861. Attachment 1: *Joel B. Friedland, et al., v. City of Long Beach* (1998) California Court of Appeal, Second Appellate District, Division Three, Filed March 27, 1998  
(Case not available in electronic format)