



City Attorneys' Department Presents:

***Public Works Contracts in a Tough Economy:
Tips and Techniques for City Attorneys***

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**UNDERSTANDING
THE PUBLIC
CONSTRUCTION BIDDING
PROCESS**

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A. Authority Governing Public Contracting

The competitive bidding process usually involves public advertisement for the submission of sealed bids, the public opening of bids, and the award of contracts to the lowest responsible bidder that is responsive to the solicitation for bids. This process is almost exclusively governed by statute. The Public Contract Code applies in one respect or another to virtually all public entities in California.

Pursuant principally to the California Public Contract Code, with limited exceptions, public agencies have a duty to publicly bid certain contracts, particularly construction contracts. Specific provisions applicable to cities are set forth in §20160-§20175.2 of the Public Contract Code.

Public Contract Code §1100 contains an express declaration of legislative intent, stating that the purpose of the code is to:

(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.

The importance of competitive bidding stems from the California Constitution and more than 140 years of California Supreme Court precedent precluding all payments on contracts violating the competitive bidding laws. As stated in *Konica Business Machines U.S.A., Inc. v. Regents of University of California*, 206 Cal. App. 3d 449 (1988):

The purpose of requiring governmental entities to open the contracts process to public bidding is to eliminate favoritism, fraud and corruption; avoid misuse of public funds; and stimulate advantageous market place competition. [Citations, including *Miller v. McKinnon*, 20 Cal. 2d 83, 88 (1942).] Because of the potential for abuse arising from deviations from strict adherence to standards which promote these public

benefits, the letting of public contracts universally receives close judicial scrutiny and contracts awarded without strict compliance with bidding requirements will be set aside. This preventative approach is applied even where it is certain there was in fact no corruption or adverse effect upon the bidding process, and the deviations would save the entity money. [Citations, including *Miller v. McKinnon*.] The importance of maintaining integrity in government and the ease with which policy goals underlying the requirement for open competitive bidding may be surreptitiously undercut, mandate strict compliance with bidding requirements.

Id. at 456-57; *see also Domar Elec., Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 175-76 (1994) (stating that “bidding requirements must be strictly adhered to in order to avoid the potential for abuse in the competitive bidding process”). As stated by one court, the “importance of maintaining integrity in government and the ease with which policy goals underlying the requirement for open competitive bidding may be surreptitiously undercut, mandate strict compliance with bidding requirements.” *Ghilotti Constr. Co. v. City of Richmond*, 45 Cal. App. 4th 897, 907-08 (1996). Given these policies underlying the competitive bidding laws, the California Constitution and case law prohibit any payment on a contract made in violation of those laws. Cal. Const. art. XI, § 10; *Miller v. McKinnon*, 20 Cal. 2d 83 (1942); *Reams v. Cooley*, 171 Cal. 150 (1915); *Zottman v. San Francisco*, 20 Cal. 96 (1862).

This fundamental principle prohibiting payments on contracts made without authority of law does not distinguish between cases where there was a defect in the bidding process and cases where there was an absence of competitive bidding. It is settled law that no payments of any kind can be made where the agency was without authority to make the contract. Cal. Const. art. XI, § 10. As explained by the California Supreme Court in *Miller v. McKinnon*, when a statute prescribes the method of contracting, a contract made in violation of the statutorily prescribed mode is void and no liability under *quantum meruit* can arise:

“. . . Under such circumstances the express contract attempted to be made is not invalid merely by reason of some irregularity or some invalidity in the exercise of a general power to contract, but the contract is void because the statute prescribes the only method in which a valid contract can be made, and the adoption of the prescribed mode is a jurisdictional prerequisite

to the exercise of the power to contract at all and can be exercised in no other manner so as to incur any liability on the part of the municipality. 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 and the doctrine of implied liability has no application in such cases.”

20 Cal. 2d at 91-92 (quoting its earlier decision in *Reams v. Cooley*); *see also Zottman v. San Francisco*, 20 Cal. at 102 (where the mode describing how to contract is prescribed, that mode is the measure of the power and must be followed; “[a]side from the mode designated, there is a want of all power on the subject”); *Great West Contractors, Inc. v. Irvine Unified School District*, 187 Cal. App. 4th 1425, 1447 (2010) (stating that the “amount of leeway a public entity has in awarding a contract is governed by the statutory or municipal law framework applying to that contract”). The California Supreme Court held that not only is a contractor precluded from recovery under *quantum meruit* for the value of services rendered, but, indeed, is required to return any payments received. *Miller*, 20 Cal.2d at 88-92; *see also Amelco Elec. v. City of Thousand Oaks*, 27 Cal. 4th 228, 234 (2002) (under “long-standing California law” a contractor may not be paid on a void contract, even under *quantum meruit*). The rationale is twofold. First, the competitive bidding laws are designed to protect against “fraud, corruption, and carelessness on the part of public officials and the waste and dissipation of public funds.” *Miller*, 20 Cal. 2d at 88; Pub. Cont. Code § 100. Second, persons contracting with public agencies are presumed to know the laws regarding bidding, and, if a contractor performs an invalid contract, that contractor is merely a volunteer acting at its peril. *Amelco*, 27 Cal. 4th at 234-35; *Miller*, 20 Cal. 2d at 89; *see also P&D Consultants, Inc. v. City of Carlsbad*, 190 Cal. App. 4th 1332, 1341 (2010) (not only are contractors presumed to know the law with respect to a public agency’s authority to contract, but also the extent of a public officer’s authority and power to bind the government).

As set forth above, absent an express exception, statutory authority generally prescribes competitive bidding as the method, or the mode, by which a valid public construction contract can be made. Thus, it is a “jurisdictional prerequisite to the exercise of the power to contract” and the prescribed mode “is the measure of the power.” *Miller*, 20 Cal. 2d at 91-92. When, as a result of either a defect in the bidding process or on an absence of competitive bidding, the contract is awarded to one other than the lowest responsible bidder, the award violates the prescribed mode and thus the public entity lacks all authority to make

the contract. Therefore, there can be no right of recovery, whether under contract, *quantum meruit* or equitable estoppel for the value of services rendered.

At first blush, this may not seem to be too consequential to the public entities themselves because they apparently are not at substantial financial risk for misawarding a construction contract.¹ However, the potential impact on the contractor, and on those bidders who may choose to challenge a public entity's actions, can affect the public entity by spawning litigation that necessarily involves the public entity. Some obvious repercussions of litigation include the fact that the public entity's litigation costs may or may not be recoverable, depending on the circumstances, and, more importantly, the project completion may be delayed. Additionally, public entities can be liable to some extent for a misawarded contract. If a bid is let to one other than the lowest responsible bidder, a successful challenging bidder can recover certain damages from the public entity including bid preparation costs, but not lost profits. See *Kajima/Ray Wilson v. Los Angeles County Metropolitan*, 23 Cal. 4th 305 (2000). Further still, if a public entity terminates a contract before the work is completed, and enters into a completion contract with another contractor without complying with the competitive bidding requirements, the original contractor may be able successfully to argue that it cannot be charged for the completion costs because those costs were not legally paid. Thus, the public entity could lose a claim for backcharges and/or other damages associated with completion.

B. Void Contract Rule

The California Supreme Court has long-recognized that a public entity may only contract pursuant to its authority. A public entity's authority may be derived from statute, regulation, ordinance, or even procedures manuals properly adopted by a local entity. A public entity's authority to contract, and to make payments on a void contract, were analyzed in the seminal case of *Miller v. McKinnon*, 20 Cal. 2d 83 (1942). As recognized in *Miller*, a public entity must strictly comply with its authority to contract. Bidders are conclusively presumed to know the law with respect to the requirements of competitive bidding. That is, even if a public employee informs a bidder that an entity is authorized to act in a certain way, if the public entity is not authorized to take those actions, the bidder is presumed to know that the entity has exceeded its authority. When a public agency attempts to enter into a contract in excess of its authority to do so, the resulting "contract" is void and unenforceable. Because the contract is void, the public entity generally has no authority to make any payment on the "contract," and any payments which have been made may be recovered.

¹ A possible exception to this statement is contained in Public Contract Code section 5110, discussed below.

The one possible exception to the principle that a contractor cannot be paid on a void contract is contained in Public Contract Code section 5110. Section 5110(a) provides that, if the award of a public works contract is protested, and

. . . the contract is later determined to be invalid due to a defect or defects in the competitive bidding process caused solely by the public entity, the contractor who entered into the contract with the public entity shall be entitled to be paid the reasonable cost, specifically excluding profit, of the labor, equipment, materials, and services furnished by the contractor prior to the date of the determination that the contract is invalid if all of the following conditions are met:

(1) The contractor proceeded with construction, alteration, repair, or improvement based upon a good faith belief that the contract was valid.

(2) The public entity has reasonably determined that the work performed is satisfactory.

(3) Contractor fraud did not occur in the obtaining or performance of the contract.

(4) The contract does not otherwise violate statutory or constitutional limitations.

Any payment to the contractor may not exceed the contractor's costs, and may not exceed the "amount of the contract less profit at the point in time the contract is determined to be invalid." Pub. Cont. Code § 5110(b).

While section 5110 may provide a "safe harbor" to a contractor acting in good faith, many questions remain as to its applicability. For example, although it applies, by its language, to a competitive bidding situation, at least one court has found, without significant analysis, that it can apply when a contract is awarded without competitive bidding based on an invalid claim of "emergency." *Marshall v. Pasadena Unified Sch. Dist.*, 119 Cal. App. 4th 1241, 1260 (2004). In addition, no court has considered whether section 5110 is constitutional, given the California Constitution's prohibition on making payment on a void contract. It also is unclear what types of defects are defects in the "process" covered by section 5110, versus other defects which do not fall within the safe harbor. For instance, while a failure to advertise as required by law likely would be a defect in the process covered by section 5110, it is unclear whether an award to a materially non-responsive bidder would be a defect in the process (identifying the lowest responsive responsible bidder) or a substantive defect in the bid caused by the bidder, not "solely" by the public entity. Thus, while it appears that section 5110 would protect, to some extent, an innocent bidder who has been paid on a void public contract, the extent of its application remains to be determined.

C. Prequalification of Bidders

In certain circumstances, a public entity may require contractors to prequalify prior to submitting bids for a construction contract. Whether or not to require prequalification is left to the agency to determine.

Cities may require prequalification pursuant to Pub. Cont. Code §§ 20101. If the agency chooses to employ the prequalification process, standard form questionnaires are issued and must be submitted by each bidder along with financial statements, both of which must be verified under oath. Not surprisingly, if an agency chooses to use the prequalification process for a particular contract, it must require all bidders to comply with the prequalification submission requirements. Questionnaires and financial statements submitted by prospective bidders are confidential and are not considered public records, nor open for public inspection.

In evaluating whether or not a prospective bidder is sufficiently qualified to bid for a particular contract, each agency must adopt and apply a uniform system of rating bidders, on the basis of the standard questionnaires and financial statements. Then, bidders who have been prequalified are eligible to obtain and submit the standard proposal forms for the subject contract.

D. Typical Contents and Requirements for an Invitation for Bids (“IFB”)

An invitation for bids (“IFB”), or “bid package” includes a variety of documents and information for the prospective bidder to consider in making its proposal. It has been said that “[t]he request for public bids ‘must be sufficiently detailed, definite and precise so as to provide a basis for full and fair competitive bidding upon a common standard and must be free of any restrictions tending to stifle competition. [Citations].’” *Konica Business Machines v. Regents of University of California*, 206 Cal. App. 3d 449, 456 (1988)(quoting *Baldwin-Lima-Hamilton Corp. v. Superior Court*, 208 Cal. App. 2d 803, 821 (1962)).

1. Typical IFB Documents

Typically, a bid package includes the following:

1. Notice Inviting Bids – sets forth the date, time, and place for the opening of bids, and describes the contract.
2. Instructions to Bidders – often identifying the contract documents to be considered, the availability of information, any scheduled prebid meetings, bid protest procedures, and any other processes to be followed for bids to be considered.

3. Payment and Performance Bond Forms
4. Bid Compliance Forms – Bid compliance forms may include the following, or additional forms required by the procuring agency:
 - a. DVBE forms – Mil. & Vet. Code §§ 999 *et seq.*
 - b. Drug Free Work Place Certification – Gov. Code § 8355
 - c. Non-collusion Affidavit – Pub. Cont. Code § 7106
 - d. Workers’ Comp. Certification – *See* Pub. Cont. Code § 10128
 - e. Assignment of Antitrust Claims – Pub. Cont. Code § 7103.5
 - f. “Social issues” certifications, such as certifications as to recycled content or certifications that the contractor does not do business in disfavored regions (*e.g.*, Darfur or Iran)
 - g. “Responsibility” certifications, such as those requiring a bidder to certify that it has not been debarred or suspended or terminated for cause
5. Proposal Form
6. Subcontractors Form – for compliance with the Subletting & Subcontracting Fair Practices Act (Pub. Cont. Code §§ 4100 *et seq.*).
7. Form of Contract
8. General and Special Conditions
9. Plans (Drawings) – May be made available electronically.
10. Form of Escrow Agreement in Lieu of Retention – Pub. Cont. Code §§ 6106.5, 10263, and 22300
11. Technical Specifications

2. Contractor is Not Responsible for Completeness of Plans

Prior to its invitation for bids, the public entity must prepare complete and accurate plans and specifications and estimates of cost, giving such directions as will enable any competent contractor to carry them out. In the event a bidder acts reasonably and is misled by incorrect plans and specifications and, as a result, submits a bid which is lower in price than would have otherwise been made, the

contractor may later recover in a contract action against the public entity. *See, e.g., Los Angeles Unified School Dist. v. Great American Ins. Co.*, 49 Cal. 4th 739 (2010); and *E. H. Morrill Co. v. State*, 65 Cal. 2d 787 (1967). This principle is codified in Public Contract Code section 1104:

No local public entity, charter city, or charter county shall require a bidder to assume responsibility for the completeness and accuracy of architectural or engineering plans and specifications on public works projects, except on clearly designated design build projects. Nothing in this section shall be construed to prohibit a local public entity, charter city, or charter county from requiring a bidder to review architectural or engineering plans and specifications prior to submission of a bid, and report any errors and omissions noted by the contractor to the architect or owner. The review by the contractor shall be confined to the contractor's capacity as a contractor, and not as a licensed design professional.

“Section 1104 prevents the public entity from placing the risk of accuracy and completeness of the plans and specifications upon the contractor.” *Thompson Pacific Construction, Inc. v. City of Sunnyvale*, 155 Cal. App. 4th 525, 553 (2007).

Notwithstanding Section 1104, a public entity is not prevented from contractually disclaiming responsibility for assumptions a contractor may draw from the presence or absence of information with respect to an invitation for bids. *Los Angeles*, 49 Cal. 4th at 752. Thus, a public entity may include an express disclaimer that the presentation of information, or a reasonable summary thereof, amounts to a warranty of the conditions that will actually be found. *Id.* While a public entity cannot affirmatively completely avoid risks associated with the accuracy and completeness of its plans and specifications, a contractor must exercise reasonable diligence when evaluating conditions and formulating its bid.

3. Prevailing Wages

Public contracts awarded by local entities require payment of prevailing wages. Thus, all such contracts must include the applicable provisions required by the Labor Code, and, with limited exception, all workers employed by contractors performing on a public works project must be paid at least the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed. Lab. Code § 1771.

In preparing a proposed contract and bid package, a public entity must “specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract.” Lab. Code § 1773.2. Alternatively, the public entity may opt to include in the call for bids, bid specifications, and contract, “a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request.” *Id.* The public entity also must post a copy of the prevailing rates at each job site. *Id.*

4. Bid Security

Bidders are required to obtain and include with their bids a bid security payable to the awarding authority. (Pub. Cont. Code §20170.) Bid security is used as an assurance that the bidder in fact will enter into the proposed construction contract in accordance with its bid if the bid is accepted by the public entity. A bidder’s security may include cash, a cashier’s check, certified check, or a bid bond in an amount equal to at least 10 percent of the amount the bid. Absent the proper bid security, a bid may not be accepted. Typically, bidders choose to submit a bid bond.

In the event a bidder fails to execute a contract in accordance with its bid, the amount of the bidder’s security is forfeited to the public entity. (Pub. Cont. Code §20172.) In such cases, the public entity may award the contract to the second lowest bidder and the amount of the security forfeited will be applied to the difference between the two contract prices. *See, e.g.,* Pub. Cont. Code § 20174 (any surplus will be refunded to the low bidder).

5. Performance and Payment Bonds

A performance bond is one provided by the contractor to guarantee the complete and faithful performance of the construction contract by the contractor. Thus, “it is generally recognized that a primary purpose of a performance bond is to protect the obligee against the risk of the principal’s default on the construction contract.” *See Cates Construction, Inc. v. Talbot Partners*, 21 Cal. 4th 28, 39-41 (1999) (performance bonds usually incorporate the contract to which they relate and are construed in conjunction with the contract - permitting recovery of damages for delay in this case). Typically, a public entity requires a performance bond equal to the amount of the contract price.

Bidders must also provide a payment bond in connection with their bid for any contract in excess of \$25,000. Civ. Code § 3247. Unlike the performance bond, which may be in an amount less than the contract price, a payment bond must be in an amount equal to the contract price. Civ. Code § 3248. The purpose

of the payment bond is to both protect the public entity from a defaulting contractor and to “provide a distinct remedy to public works subcontractors and suppliers of labor or materials to public works projects.” *Liton Gen. Eng’g Contractor v. United Pac. Ins.*, 16 Cal. App. 4th 577, 584 (1993). Because mechanic’s liens are not permitted against public property, the payment bond essentially serves as a remedy in lieu of a contractor’s mechanic’s lien right. Additionally, pursuant to Civil Code section 3248, every public works payment bond must provide “in case suit is brought upon the bond, a reasonable attorney fee, to be fixed by the court.”

6. Required Licenses

In preparing their invitation for bids, public entities must specify the classification of the contractor’s license required by the prime contractor at the time the contract is awarded. Pub. Cont. Code § 3300. “The specification shall be included in any plans prepared for a public project and in any notice inviting bids required pursuant to this code.” *Id.*

Prior to awarding a contract, the public entity must verify that the bidder is appropriately licensed to perform the work designated in the prime contract. Pub. Cont. Code § 6100. The public entity may verify the license status by either verifying through the Contractors’ State License Board that the person seeking the contract is appropriately licensed, or by requiring “the person seeking the contract to present his or her pocket license or certificate of licensure and provide a signed statement which swears, under penalty of perjury, that the pocket license or certificate of licensure presented is his or hers, is current and valid, and is in a classification appropriate to the work to be undertaken.” *Id.*

7. Listing of Subcontractors

a. Listing requirements

Public Contract Code sections 4100 through 4114 is known as the Subletting and Subcontracting Fair Practices Act (“Act”). Generally, the Act requires that each bidder for a public works contract:

- identify each subcontractor, by name and business location, who will perform contract work valued in excess of one-half of one percent of the prime contractor’s total bid and, for each subcontractor, identify the portion of the contract work to be performed; and
- unless the subcontractor is properly substituted in accordance with the Act, in fact use each subcontractor listed in the bid.

See Pub. Cont. Code § 4104.

Only one subcontractor may be listed to perform each “portion” of the prime contractor’s work on the project. Pub. Cont. Code § 4104(b). A “portion” of the work means the type or scope of work contemplated, *e.g.*, electrical, drywall, or plumbing, as defined by prime contractor in its bid. *Id.* The failure of a prime contractor to list a subcontractor to perform any portion of the work means the prime contractor itself must perform the work. Pub. Cont. Code § 4106. Not listing a subcontractor also constitutes a representation that the prime contractor is qualified to perform that scope of work. *Id.*

A prime contractor may not circumvent the Act by listing another general contractor who, in turn, intends to subcontract to others portions of the work constituting the majority of the work covered by the prime contract. After bid acceptance, a prime contractor also may not permit a subcontract to be voluntarily assigned or transferred to another subcontractor. Pub. Cont. Code § 4105. Any such attempt to circumvent the Act is considered a violation of the Act and subjects the prime contractor to the potential penalties discussed below. *Id.*

The specific policy underlying the Act is to prevent bid shopping and bid peddling. See Pub. Cont. Code § 4101. “Bid shopping” is the use of one subcontractor’s bid to coerce lower bids from other subcontractors after a contract has been awarded to the prime bidder. *Southern Cal. Acoustics Co. v. C. V. Holder, Inc.*, 71 Cal. 2d 719, 726 n.7 (1969). “Bid peddling” involves efforts by a subcontractor to undercut the price of a successful subcontractor after the prime contract has been awarded. *Id.* The Legislature has found these practices often result in poor quality of material and workmanship, and may lead to insolvencies, loss of wages to employees, and other “evils.” Pub. Cont. Code § 4101. The Act, therefore, is designed to protect the public agency, the subcontractors, and the public.

The Act protects listed subcontractors by prohibiting a prime contractor from using an unlisted subcontractor without the consent of the awarding authority, and only if certain statutory circumstances exist. Pub. Cont. Code § 4107; *E.F. Brady Co. v. M.H. Golden Co.*, 58 Cal. App. 4th 182, 189 (1997) (“The Act thus binds a contractor to its listed subcontractors, even though the parties have not yet entered into a contractual relationship”). It confers a statutory right on the listed subcontractor to perform the specified work. However, the mere listing of a subcontractor’s name by prime contractor itself does not create any contract rights between the prime and the listed subcontractor. *Southern Cal. Acoustics*, 71 Cal. 2d 719 (listing of a subcontractor in bid is not an implied acceptance of the subcontractor’s bid). Thus, even if a listed subcontractor is wrongfully substituted, the subcontractor has no claim for breach of contract.

Rather, it may have a claim for violation of statutory duty if it can allege that a substitution was wrongful or unlawful.

b. Substitution

Under the following circumstances, a prime contractor may be permitted to substitute a listed subcontractor:

- When the listed subcontractor fails or refuses to execute a written subcontract;
- When the listed subcontractor becomes bankrupt or insolvent;
- When the listed subcontractor fails or refuses to perform his or her subcontract;
- When the listed subcontractor fails or refuses to meet the bond requirements of the prime contractor;
- When the prime contractor can demonstrate that the name of the subcontractor was listed as the result of an inadvertent clerical error;
- When the listed subcontractor is not duly licensed;
- When the awarding authority (or its officer) determines that the work performed by the subcontractor is unsatisfactory and not in substantial accordance with the plans and specifications, or that the subcontractor is substantially delaying or disrupting the progress of the work.
- When the listed subcontractor is ineligible to work on a public works project as a result of Labor Code violations;
- When the awarding authority determines that a listed subcontractor is not a responsible contractor.

Pub. Cont. Code § 4107.

When one of the enumerated circumstances exists, the prime contractor may request consent to substitute, and must obtain consent from the public entity for such substitution. *Id.* Upon receiving a request to substitute a listed subcontractor, the public entity must notify the listed subcontractor, by certified or registered mail, of the substitution request. *Id.* Thereafter, the listed subcontractor has five working days within which to submit written objections to the substitution

request. *Id.* If the listed subcontractor does not timely file a written objection to the substitution request, the listed subcontractor is deemed to have consented to the substitution. *Id.* If, however, written objections are filed, the public entity must hold a hearing on the prime contractor's request for substitution. *Id.* The public entity must give written notice of any such hearing to the listed subcontractor at least five working days in advance of the hearing. *Id.*

When considering a request to substitute, the public entity must consider whether the prime contractor has established one of the circumstances set forth in section 4107, and whether the substitution is consistent with the purposes of the Act. In reviewing a request to substitute, the public entity should require the prime contractor to identify the proposed replacement subcontractor so the public entity can investigate the proposed subcontractor and confirm its qualifications to perform the identified scope of work. *E.F. Brady Co.*, 58 Cal. App. 4th at 189. Preferably, the prime contractor will request substitution and obtain consent to substitute *before* engaging a replacement subcontractor. However, this is not always practicable.

In 2008, the Court of Appeal in *Titan Elec. Corp. v. Los Angeles Unified Sch. Dist.*, 160 Cal. App. 4th 188 (2008), had an opportunity to consider a circumstance where the prime contractor engaged a replacement subcontractor prior to obtaining consent from the public entity. The Court of Appeal held that, as long as the purposes of the Act are not violated, a substitution under Public Contract Code section 4107 may be approved even if work was performed by a new subcontractor before the substitution was approved. The court concluded that "nothing in the statutory language purports to invalidate an awarding authority's consent to substitution simply because a prime contractor has allow[ed] a subcontract to be performed by a replacement subcontractor without the prior consent of the awarding authority." *Id.* at 205. The court held that a post-substitution hearing will substantially comply with the statute "so long as the procedure used actually complies with the substance of the reasonable objectives of the statute: namely, the prevention of bid peddling and bid shopping after the award of a public works contract, and the providing of an opportunity to the awarding authority to investigate the proposed replacement subcontractor before consenting to substitution."

Thus, while it still remains better practice to request and obtain consent to substitute *prior* to engaging a replacement subcontractor, an awarding authority should not deny a request merely because work may already have progressed with a replacement subcontractor.

A substitution also may be permitted where the bidder inadvertently listed the wrong subcontractor in its bid if the bidder notifies the public entity in writing within two working days after the bid opening. Pub. Cont. Code § 4107.5. The

bidder also must notify both the inadvertently listed subcontractor as well as the intended subcontractor. Pub. Cont. Code § 4107.5. In the case of such an error, the inadvertently listed subcontractor is allowed six working days, from the time of bid opening, to submit a written objection to the prime contractor's claim of inadvertent clerical error. *Id.* Failure to file a written objection is evidence of the listed subcontractor's agreement that the inadvertent clerical error was made. *Id.*

The public entity holds a hearing on the inadvertent listing but, absent compelling reasons not to allow the substitution, the public entity must consent to the substitution of the intended subcontractor if:

- within eight working days from the opening of bids, the prime contractor, the subcontractor listed in error, and the intended subcontractor each submit an affidavit to the public entity supporting that an inadvertent clerical error was made; OR
- within eight working days from the opening of bids, the prime contractor and the intended subcontractor each submit an affidavit to the public entity supporting that an inadvertent clerical error was made and the subcontractor listed in error fails to submit any objection within six working days after bid opening.

Id. However, if the listed subcontractor files a timely objection, the public entity must investigate the claims of the parties and hold a public hearing to determine the validity of those claims before making its final determination. *Id.*

8. Brand and Trade Names

California's express public policy includes encouraging contractors and manufacturers to develop and implement new and ingenious materials, products, and services that function as well as materials, products, and services that are required by a contract, but at a lower cost. Pub. Cont. Code § 3400(a). Thus, Public Contract Code section 3400 prohibits invitations for bids from limiting bidding to a specified brand name unless bidders are permitted to bid an "equal," alternative product. Specifically, section 3400(b) provides that government entities may not draft invitations for bids in connection with public works (construction) projects which either 1) limit the bidding to one entity, or 2) require a "material, product, thing, or service by specific brand or trade name unless the specification is followed by the words 'or equal' so that bidders may furnish any equal material, product, thing, or service." Section 3400 also requires an agency to name any other equal product of which it is aware that is manufactured in California. The invitation for bids must identify when a bidder can submit data supporting its assertion that the alternate product is "equal" – either before the bid, after the bid, or either before or after the bid. If the agency does not specify a

time, the supporting data may be submitted at any time in the first 35 days after the contract is awarded.

Public Contract Code section 3400(c) provides for the exceptions to section 3400(b). Section 3400(c) provides:

(c) Subdivision (b) is not applicable if the awarding authority, or its designee, makes a finding that is described in the invitation for bids or request for proposals that a particular material, product, thing, or service is designated by specific brand or trade name for any of the following purposes:

(1) In order that a field test or experiment may be made to determine the product's suitability for future use.

(2) In order to match other products in use on a particular public improvement either completed or in the course of completion.

(3) In order to obtain a necessary item that is only available from one source.

(4) In order to respond to an emergency [if specified conditions are met].

One key provision of section 3400(c) is that the government must “describe” the finding of a need to specify a brand or trade name and not to accept an equal. While the section does not require that the government have made a separate finding, setting forth its rationale and the basis for its decision, a prudent contracting agency will thoroughly consider and document its decision before invoking an exception in section 3400(c). The failure to do so may give the appearance of favoritism to the designated bidder or manufacturer.

9. Bidding Alternates

Using bid alternates can provide a public entity more flexibility in the contracting process. With such flexibility, however, comes the possibility that using an alternative process may violate the public policy behind competitive bidding - to “eliminate favoritism, fraud, and corruption in the awarding of public contracts.” (Pub. Cont. Code § 100.) The use of bid alternates, while not necessarily at odds with competitive bidding law, “offers an easy means of circumventing these requirements and must be closely scrutinized.” *Schram Construction, Inc. v. Regents of University of California*, 187 Cal. App. 4th 1040,

1061 (2010). Therefore, statutes that permit state and local agencies to use a bid alternate process require the government to establish a predetermined, published criteria for the selection of the of the bid package to be used, or a selection process where the price and bidder identities are not revealed before the bid package selection. In other words, the process must include measures specifically designed “to preserve the integrity of the bid selection and assure that ‘any contract [is let] ... to the lowest responsible bidder.’” *Schram Construction*, 187 Cal. App. 4th at 1061 (internal citation omitted).

For example, Public Contract Code section 20103.8 allows a local public entity to “require a bid for a public works contract to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted.”

Public entities must state in the invitation for bids how the bids will be evaluated, either by:

1. the lowest price on the base bid, without consideration of any alternates;
2. the lowest price on the base bid plus those alternates that were specifically identified in the invitation for bids;
3. the lowest price on the base bid plus those additive alternates and less those deductive alternates taken in an order stated in the invitation for bids, until the bid price is less than or equal to a stated funding amount; or
4. an approach in which the bidders are anonymous while the pricing is being evaluated. The public entity reviews the prices and selects the options it wants based on the pricing, and then ranks the bidders (usually identified by letter or number) based on the options selected. The bidders’ identities are then revealed when the non-cost portions of their bids are opened and evaluated.

Pub. Cont. Code § 20103.8. One of the above methodologies must be identified in the solicitation document as the basis for bid evaluation, although the public entity is not required to actually select the alternates on which it evaluates the bids after it awards the contract. If no methodology is identified, the public entity can only award the contract based on the amount of the base bid, without considering the alternates.

Bidding alternates gives the public entity flexibility to respond to budgetary concerns, the ability to make a design decision based on more complete

information, and the ability add or delete features of the project as appropriate at a pre-determined cost. In this way, public entities can gain some of the flexibility enjoyed by commercial entities to avoid committing to an entire project design before knowing the cost of the options.

10. Sharing in Savings for Cost Reductions

Public Contract Code section 7101 allows a public entity to include in its contracts a provision for the payment of extra compensation to the contractor for cost reduction changes made to the plans and specifications made pursuant to a proposal submitted by the contractor. This allows public entities to include incentives for the prime contractor to look for innovative ways to save taxpayer funds and still provide quality projects. If a cost reduction proposal is accepted by the public entity, “the extra compensation to the contractor shall be 50 percent of the net savings in construction costs as determined by the public entity.” Pub. Cont. Code § 7101.

Additionally, where the contract is a contract for the construction of highways, the Department of Transportation or local or regional transportation entity may include the incentive provision and pay the contractor “60 percent of the net savings, if the cost reduction changes significantly reduce or avoid traffic congestion during construction of the project, in the opinion of the public entity.” *Id.*

11. Trenching and Excavation Provisions

For public contracts that include elements of digging trenches or other excavations that extend deeper than four feet below the surface the public entity must include specific provisions set forth in Public Contract Code section 7104. The provisions require the contractor to notify the public entity in writing if it discovers (1) material believed to be hazardous waste; (2) subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to bidders; or (3) unknown physical conditions at the site of any unusual nature. Upon receipt of such notice, the contract must require the public entity to promptly investigate the conditions and, if the conditions do differ materially from those indicated in the bid documents, and cause change to the contractor’s costs on the project, issue a change order under the procedures described in the contract. Pub. Cont. Code § 7104.

In the event of a dispute regarding whether the conditions are materially different, or whether the contractor’s costs changed, the contract must provide that the contractor is not to be excused from its scheduled completion date, but that the contractor retains all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the parties. *Id.*

General disclaimers or provisions in conflict with Section 7104 are invalid. *See Condon-Johnson & Associates, Inc. v. Sacramento Municipal Utility Dist.*, 149 Cal. App. 4th 1384 (2007)(determining that the word “indicated” as used in section 7104 refers to the contract information provided to prospective bidders from which an inference reasonably may be drawn as to the actual subsurface conditions on the site).

Additionally, all public works contracts exceeding \$25,000, for the excavation of any trench five feet or more in depth must include a provision requiring the prime contractor to submit a detailed design for shoring, bracing, sloping, or other provisions to be made for worker safety during the excavations. Lab. Code § 6705; *see also* Lab. Code § 6707 (construction of a pipeline, sewer, sewage disposal system, boring and jacking pits, or similar trenches or open excavations, which are five feet or deeper). The plan must be submitted by the contractor and accepted by the awarding entity prior to any such excavations. *Id.* “If such plan varies from the shoring system standards, the plan shall be prepared by a registered civil or structural engineer.” *Id.*

12. Accepting Payment is Not a Waiver of Claims

Public Contract Code section 7100 allows a prime contractor to accept payment by a public entity without fear that it will have waived all claims, provided it follows proper claims procedures. The Legislature has found that “[p]rovisions in public works contracts ... which provide that acceptance of a payment otherwise due a contractor is a waiver of all claims against the public entity arising out of the work performed ... or which condition the right to payment upon submission of a release by the contractor of all claims against the public entity arising out of performance of the public work are against public policy and null and void.” Pub. Cont. Code § 7100.

13. Prohibition Against “No Damages for Delay”

A provision in a public works contract, or any subcontract thereunder, that prohibits a contractor from recovering damages for delays is invalid. Public Contract Code section 7102 expressly provides, in part:

Contract provisions in construction contracts of public agencies and subcontracts thereunder which limit the contractee’s liability to an extension of time for delay for which the contractee is responsible and which delay is unreasonable under the circumstances involved, and not within the contemplation of the parties, shall not be construed to preclude the recovery of damages by the contractor or subcontractor.

Thus, Section 7102 permits a contractor to recover damages resulting from a delay to the contract work provided the delay is “unreasonable under the circumstances involved, and not within the contemplation of the parties.” *See Howard Contracting, Inc. v. G.A. MacDonald Construction Co.*, 71 Cal. App. 4th 38 (1998). Moreover, Section 7102 prohibits public entities from requiring a contractor to waive in advance any remedy for construction delay. *Id.* (contract provision that purports to exempt public entity from liability for damages resulting from delays caused by the public entity was held unenforceable).

E. Advertising

Most public construction contracts must be competitively bid. In order to solicit bids, the public entity must publicly advertise its request for bids. (*See* Public Contract Code §20164.)

The contents of the advertisement for bids must include the time and place for the receiving and opening of sealed bids and must describe in general terms the work to be done. Pub. Cont. Code §§ 4104.5 (agency “shall specify in the bid invitation and public notice the place the bids of the prime contractors are to be received and the time by which they shall be received”).

F. Site Visits & Prebid Conference

A public agency may also hold a mandatory prebid conference with prospective bidders and/or require prospective bidders to visit the project site. If the public entity chooses to include such requirements, the notice soliciting bids must include information regarding “the time, date, and location of the mandatory prebid site visit, conference or meeting, and when and where project documents, including final plans and specifications are available.” Pub. Cont. Code § 6610. A prebid mandatory site visit, conference or meeting cannot take place until at least five calendar days after the publication of the initial notice. *Id.*

G. Addenda

After issuing its initial bid package, a public entity may issue addenda to the bid package. In the event of any addenda, the public entity often will require that the bidder acknowledge it has reviewed and considered the addenda in formulating its bid.

In the event the public entity issues material changes, additions, or deletions to the invitation for bids near the date and time initially set for bid opening, the public entity must extend the date and time for bid opening. If the agency makes any such changes, additions, or deletions within the final 72 hours

prior to bid opening, the date and time for bid opening must be extended by no less than 72 hours. Pub. Cont. Code § 4104.5.

H. Sealed Bids

As noted above, the public entity must state the date, time and place where bids must be received in order to be considered. The time period within which to submit bids is strictly construed, and any bids received after the fixed time, or any extension due to material changes, will not be accepted and must be returned unopened. *See* Pub. Cont. Code § 4104.5.

I. Bid Opening

Sealed bids are opened at or about the time designated in the bid solicitation. At that time, the results are announced and the contract ordinarily is awarded to the lowest responsible bidder whose bid is responsive to the solicitation. Alternatively, if the public entity does not believe an award of the contract is in its best interest, the entity may choose to reject all bids. (Public Contract Code §20166.) A low bidder does not have the right to have its bid accepted if the public entity chooses to reject all bids. *Judson Pacific-Murphy Corp. v. Durkee*, 144 Cal. App. 2d 377 (1956)(low bidder has no legal right to compel acceptance of bid).

J. Mistakes and Bid Protests

In order to be awarded a contract, a bid must be responsive to the solicitation requirements, *i.e.*, it must promise to do all of what the solicitation document requires. In addition, a bidder must be responsible, *i.e.*, be able to perform the quality and quantity of work required, and be trustworthy. A bid which contains a mistake may not be responsive to the solicitation document. As a result, the bidder may have the opportunity to withdraw its bid without forfeiting its bid bond. Even if the bidder does not or could not withdraw its bid, another bidder may protest the award on the ground that a mistake made the bid materially non-responsive and unavailable for award.

1. Mistakes: Withdrawal of Bid

In general, public entities require bidders to support their bids with a bond, or other security, in an amount equal to a specified percentage of the amount bid, frequently ten percent. The bond guarantees that the bidder will sign the contract and provide required labor, material and performance bonds. If the successful low bidder fails to execute the contract, the bidder forfeits its bid security and the public entity is entitled to recover the amount of the bond from the contractor and

its surety, for at least the difference between the low bidder's bid price and the price which the public entity pays to award to the second-low bidder.

Sometimes bidders make mistakes in their bids. Certain mistakes permit bidders to withdraw their bids without forfeiting their bid bonds. Public Contract Code sections 5100 through 5110 address the issue of bid mistakes. Under Section 5101, a bidder is entitled to relief from its bid due to a mistake if the awarding authority consents to allow the bidder to withdraw its bid. Even if the awarding entity will not consent, the bidder can sue for recovery of its bid security, without interest or costs; if the bidder loses the suit, it must pay the public entity's costs, including attorneys' fees. Pub. Cont. Code § 5101.

Section 5103 of the Public Contract Code establishes the grounds the bidder must establish to gain relief from the court. The bidder must establish 1) that a mistake was made, 2) that it gave notice to the awarding entity within 5 days after bids were opened, 3) the mistake made the bid materially different from what was intended, and 4) the mistake was a clerical error, not an error in judgment or carelessness. Section 5103 states:

The bidder shall establish to the satisfaction of the court that:

- (a) A mistake was made.
- (b) He or she gave the public entity written notice within five days after the opening of the bids of the mistake, specifying in the notice in detail how the mistake occurred.
- (c) The mistake made the bid materially different than he or she intended it to be.
- (d) The mistake was made in filling out the bid and not due to error in judgment or to carelessness in inspecting the site of the work, or in reading the plans or specifications.

In light of subsection (d), typographical or arithmetical errors are contemplated by these statutes and will provide grounds for relief, but errors in estimates, judgment, or mistaken submission of a bid will not. *See MCM Construction, Inc. v. City and County of San Francisco*, 66 Cal. App. 4th 359 (1998). Bidders claiming mistake should be certain to specify **in detail** how any error occurred. The failure to do so within five days of bid opening may result in an otherwise-valid claim for relief due to mistake being denied. If the public entity permits a bidder to withdraw its bid as a result of a bid mistake, the contract is awarded, if at all, to the next lowest bidder. Pub. Cont. Code § 5106.

Although section 5103 allows a bidder to withdraw its bid without forfeiture of its bid bond by meeting the criteria stated therein, it does not address withdrawal of a bid due to an error in a subcontractor's bid. In fact, section 5103 does not grant the bidder the right to withdraw its bid for a mistaken bid by a subcontractor. *Diède Construction, Inc. v. Monterey Mechanical Co.*, 125 Cal. App. 4th 380, 387 (2004). A bid based on a mistaken subcontractor bid would not be "materially different than" the bidder intended, so would not satisfy the test of section 5103. In fact, the bidder could compel the subcontractor to honor its mistaken bid, or sue for damages for failure to do so, unless the mistake in the subcontractor's bid should have been apparent to the bidder. *Id.* at 391. Thus, the relief in section 5103 is unavailable in the event of an equivalent error in a subcontractor's bid.

Finally, bidders and public entities must be aware that, under Public Contract Code section 5105, a bidder claiming a mistake is prohibited from participating in further bidding on the project. Even if the public entity rejects all bids and re-bids the project, or a substantially similar project, under a new invitation for bids, a bidder that has withdrawn its bid for mistake will be prohibited from participating in that procurement. *Colombo Construction Co. v. Panama Union School Dist.*, 136 Cal. App. 3d 868, 875-77 (1982).

2. Bid Protests

If a bidder cannot or does not withdraw its bid due to a mistake, its bid may still be challenged by another bidder seeking the award of the contract. Such a challenge would likely argue that the bid was materially non-responsive, and unavailable for award. A bidder also may protest on the ground that the low bidder is not responsible, although responsibility challenges are often more difficult, and require greater due process before a public entity may find a bidder not to be responsible.

a. Responsibility and Responsiveness

In order to be awarded a contract, the low bid must be "responsive" to the specification, and the low bidder must be a "responsible" bidder. As one court explained, a "bid is responsive if it promises to do what the bidding instructions demand. A bidder is responsible if it can perform the contract as promised." *Taylor Bus Serv., Inc. v. San Diego Bd. of Educ.*, 195 Cal. App. 3d 1331, 1341 (1987).

More specifically, responsibility "includes the attribute of trustworthiness, [but] also has reference to the quality, fitness and capacity of the low bidder to satisfactorily perform the proposed work." *City of Inglewood-Los Angeles County Civic Center Auth. v. Superior Court*, 7 Cal.3d 861, 867 (1972); *see also*

Pub. Cont. Code § 1103 (similarly defining responsibility). Before a public entity may reject a low monetary bidder as non-responsible, it must provide notice and an opportunity to be heard. The hearing need not be “a full panoply of judicial trial procedures, including pleadings, cross-examination of witnesses, and formal findings.” *City of Inglewood*, 7 Cal. 3d at 870. However, the public entity must “notify the low monetary bidder of any evidence reflecting upon his responsibility received from others or adduced as a result of independent investigation, afford him an opportunity to rebut such adverse evidence, and permit him to present evidence that he is qualified to perform the contract.” *Id.* at 871. As the *Taylor Bus* court explained:

A determination that a bidder is responsible is a complex matter dependent, often, on information received outside the bidding process and requiring, in many cases, an application of subtle judgment. Not only is the process complex, but the declaration of nonresponsibility may have an adverse impact on the professional or business reputation of the bidder. Such circumstances reasonably require the procedures defined in *City of Inglewood*.

Taylor Bus, 195 Cal. App. 3d at 1341-42. A public entity may not avoid its obligation with respect to the required responsibility hearing by claiming that an issue of responsibility is really an issue of responsiveness. *D.H. Williams Construction, Inc. v. Clovis Unified Sch. Dist.*, 146 Cal. App. 4th 757 (2007). Questions of responsibility include, for example, whether a bidder has experience with projects of the size contemplated; whether a bidder has sufficient bonding capacity; whether the proposed personnel or subcontractors have required licenses; and whether the bidder’s past actions, such as submitting false or inflated extra work claims, demonstrate a lack of trustworthiness.

Questions of responsibility and responsiveness may be related and, as such, may be confused in the evaluation process. For example, if a bidder fails to include with its bid required evidence of bonding capacity, the failure may be viewed as either an issue of responsiveness (failing to meet a requirement of the solicitation document) or responsibility (failing to demonstrate an ability to perform). As *D.H. Williams* demonstrates, an error in how the issue is defined by the evaluating agency may give rise to grounds for an appeal.

Both bidders and public entities need to be aware that evaluation of responsibility and evaluation of responsiveness are treated differently, procedurally. One key difference is that responsibility may be established by investigation and evidence external to the bid, and submitted after bids are due, such as in a hearing required by *City of Inglewood*. Responsiveness, however, is

judged based on the bid as submitted; a non-responsive bid may not be corrected or supplemented after opening. As a result, a determination as to responsiveness is viewed as less complex, and as not involving government discretion (either the bid meets the requirements or it does not). Thus, a finding of non-responsiveness requires less due process protection than does a finding of nonresponsibility. *Taylor Bus*, 195 Cal. App. 3d at 1342.

A court recently discussed the “challenging problem” of how to distinguish bid responsiveness from bidder responsibility in *Great West Contractors, Inc. v. Irvine Unified School District*, 187 Cal. App. 4th 1425 (2010). The court considered an incredible chain of events in which the low bidder was disqualified as “non-responsive” for answering that it had not operated under other licenses, when other related entities had operated under other licenses. Thus, the District claimed that Great West’s answer was false and, thus, non-responsive. The court defined the issue before it of “vital interest” to taxpayers as follows:

Assuming Great West’s position is correct, then a public entity otherwise bound to award a contract to the lowest responsible bidder can, by the simple imperial ukase of declaring a specific answer to a question required on a bid form to be “nonresponsive,” baldfacedly circumvent the public contracting law that requires the contract to be awarded to the lowest responsible bidder.

187 Cal. App. 4th at 1446. In analyzing the question before it, the court noted that “the allegation of falsity only underscores the fact that the rejection here went to nonresponsibility, not non-responsiveness.” *Id.* at 1453. The court then extensively examined caselaw finding bids either non-responsive or bidders not responsible, relying particularly on *D.H. Williams*. The court noted that the question of responsibility arises where there is literal compliance with the bid requirements, but the public entity still claims that a bid is non-responsive. *Id.* at 1456. Again citing *D.H. Williams*, the court identified five factors relating to the responsibility determination:

- (1) *The complexity of the problem and the ensuing need for subtle administrative judgment. . . .*
- (2) *The need for “‘information received outside the bidding process.’” . . .*
- (3) *Whether the problem is the sort that is susceptible to categorical hard and fast lines, or*

whether it is better handled on a “case-by-case” basis. . . .

(4) The potential for “adverse impact on the professional or business reputation of the bidder.”

. . .

(5) The potential that “innocent bidders” are subject to “arbitrary or erroneous disqualification from public works contracting.” . . .

Id. at 1456-57 (italics in original). Applying the factors, the court found that Great West’s bid had, in fact, been rejected “in legal effect” for nonresponsibility, not nonresponsiveness. *Id.* at 1457.

Issues of responsiveness involve a two part inquiry. First, the agency must consider whether the bid promises to do what the solicitation requires. A bid which contains a deviation from what the solicitation requires is non-responsive. Once the agency has determined that a bid is non-responsive, the agency must consider whether the deviation is material or immaterial. A bid which contains only an immaterial deviation may be accepted, but is not required to be accepted, at the public entity’s discretion. *MCM Construction*, 66 Cal. App. 4th at 373-74. A bid that is materially non-responsive is unavailable for award.

A bid is materially non-responsive if it gives the bidder a competitive advantage not available to other bidders. As one California court explained:

“A basic rule of competitive bidding is that bids must conform to specifications, and that if a bid does not so conform, it may not be accepted. [Citations.] However, it 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 a bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential. . . .”

Konica Business Machs. U.S.A., Inc. v. Regents of Univ. of Cal., 206 Cal. App. 3d 449, 456-57 (1988) (quoting 47 Ops.Cal.Atty.Gen. 129, 130-131 (1966)). Most clearly, a deviation which affects the bidder’s price would be a material deviation. Deviations also are material, even if they do not affect price, if they afford a bidder the ability to withdraw its bid without forfeiting its bid bond. *See Valley Crest Landscape, Inc. v. City of Davis*, 41 Cal. App. 4th 1432, 1442 (1996).

For example, where no authorized signature appears anywhere on the bid, the contractor cannot be bound to perform. If the public entity were to simply waive the requirement of a signature, it would give that contractor an unfair advantage because the contractor could decide, after bids were opened and prices disclosed, whether it actually wanted to perform at its bid price. If it did not want to perform, it could decline the contract award and would not have to forfeit its bid bond. Other bidders, who signed their bids, would not have that opportunity. Thus, the total absence of a required signature is a material deviation, and may not be waived. However, if the bid included an authorized signature at other places, such as on the bid bond, but lacked a signature on the bid form, such a deviation could be considered an immaterial deviation. If the bidder were bound by its bid, then the public entity could choose to waive the deviation and accept the bid.

b. Materiality

The case of *Valley Crest v. City of Davis*, 41 Cal. App. 4th 1432 (1996), is illustrative of a bid mistake issue. In *Valley Crest*, the City of Davis required that at least 50 percent of the work be performed by the general contractor with its own forces. The low monetary bidder indicated in its bid that 83 percent of the work would be performed by subcontractors. When the issue was brought to the bidder's attention, it claimed it made a mistake in the listing of subcontractor percentages, and it submitted a revised, "correct" percentage showing that 48 percent of the work would be performed by subcontractors. The contract was awarded to the low monetary bidder.

Valley Crest, the second low bidder, protested, arguing that the bidder had improperly revised its bid after bid opening. The City and the low monetary bidder responded by claiming the City had merely waived a minor irregularity in the bid and such was legally permissible. At trial, the superior court agreed with the City, but on appeal the appellate court reversed the determination, holding that the subcontractor percentage was a material element of the bid, and thus the low bidder could not simply revise its bid to correct this "mistake" in stating the percentages. The appellate court explained that waivers of minor irregularities are permitted only when the bidder is not given an unfair advantage by being allowed to withdraw its bid without forfeiting its bid bond. The claimed mistake in this case was the type of mistake which would have entitled the bidder to seek relief from its bid because it made the bid materially different than intended in completing its bid. The court explained, "[t]he key point is that such relief was available. Thus, [the low bidder] had a benefit not available to the other bidders; it could have backed out. Its mistake, therefore, could not be corrected by waiving an "irregularity.'" *Valley Crest*, 41 Cal. App. 4th at 1442.

In *Valley Crest*, the low bidder also was given the opportunity by the City to withdraw its bid, but declined to do so. Some courts have seized upon this fact

to hold that, absent such an “actual opportunity” to withdraw, a bid mistake does not give the bidder an unfair advantage over other bidders even if the mistake would have permitted withdrawal. *See, e.g., Ghilotti Construction Co. v. City of Richmond*, 45 Cal. App. 4th 897, 912 n.6 (1996); and *MCM Construction*, 66 Cal. App. 4th 359.

When a contractor seeks to change any portion of its bid, therefore, a public entity must carefully evaluate whether or not to waive an irregularity by characterizing it as “immaterial.” The determination can have consequences to the contractor should that characterization be legally incorrect. For instance, as described more fully above, an improperly awarded public works contract is not a contract authorized by law and would therefore be void. The “void contract rule” prohibits the public entity from making payments on contracts not authorized by law, and in some cases can operate to require the performing contractor to disgorge all of the funds received from the public entity. Thus, a public entity should be careful to identify bid irregularities correctly.

c. Bid Protest Procedures

Once a (potentially) protesting bidder has identified mistakes in its competitor’s bid, or grounds for challenging its competitor’s responsibility, the bidder may file a protest of the award to the intended awardee. Procedures for bid protests vary depending upon the public entity involved. A copy of sample bid protest procedures are attached as Appendix A to this paper. A public entity should understand its own procedures, and determine whether a protest by a bidder is timely.

3. Challenging a Decision on a Protest

If the public entity awards the contract, the award decision may be challenged in a superior court through a writ of mandate procedure. A writ of mandate effectively is an appeal of the administrative decision – whether or not a hearing was required by law – for an abuse of discretion. Because a hearing rarely is required by law on a bid protest, most writs of mandate challenging contract awards are under Code of Civil Procedure section 1085, to “compel the performance of an act which the law specifically enjoins.”

APPENDIX A

Sample Bid Protest Procedures

11. **Bid Protest.** Any bid protest must be in writing and received by the Owner at _____ before 5:00 p.m. no later than two (2) working days following bid opening (the “Bid Protest Deadline”) and must comply with the following requirements:

11.1 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.

11.2 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 and telephone number of the person representing the protesting bidder if different from the protesting bidder.

11.3 A copy of the protest and all supporting documents must also be transmitted by fax or by e-mail, 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 The protested bidder may submit a written response to the protest, provided the response is received by Owner before 5:00 p.m., within two (2) working days after the Bid Protest Deadline or after 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 and telephone number of the person representing the protested bidder if different from the protested bidder.

11.5 A copy of the protest and all supporting documents must also be transmitted by fax or by e-mail, 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

11.6 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. The bidder’s failure to comply with these procedures shall constitute a waiver of any right to further pursue a bid protest, including filing a Government Code Claim or initiation of legal proceedings.