Handling Bids and Bid Protests
The Return of the Hard Bid

• Due to the legal challenges and new restrictions on alternative project delivery methods, some districts are returning to traditional design-bid-build delivery method.

• Accordingly, this presentation will refresh the memories of people who have not used design-bid-build in a while as well as introduce the concepts for “newbies.”
Preview

• Public Contract Code, § 20111 *et seq.*
• What happens after the bids are opened?
  • Bid Withdrawal
  • Who is awarded the contract?
    • Responsiveness
    • Responsibility
  • Bid Protests
  • Challenging an Award of Contract after Bid Protests
  • Case Studies
Public Contract Code, § 20111 et seq.

• Bid thresholds
  • for purchase of equipment, materials, supplies; for services, except construction services; for repairs → $87,800
  • for construction services → $15,000

• Bid security
  • cash, cashier’s check, certified check, bidder’s bond

• Advertisement for bids
  • at least once a week for two weeks in newspaper of general circulation
What Happens After the Bids Are Opened ...
Bid Withdrawal

Public Contract Code, § 5103 provides that:

- A bidder must notify the district in writing within 5 days of the bid opening of its mistake and specify in detail how the mistake was made to withdraw its bid.
- The district must find and document the following to allow the bidder to withdraw its bid:
  - A mistake was made in filling out the bid form, characterized as a “clerical error”, and not due to error in judgment or carelessness inspecting the site or reading the plans or specs.
  - The mistake made the bid materially different from what the bidder intended.
District Options

• Allow bidder to withdraw without forfeiting bid bond
  – Award to the second lowest responsible bidder submitting a responsive bid
  – Reject all bids and rebid
  – The bidder claiming mistake may not bid again on the same project

• Do not allow bidder to withdraw
  – Contractor must sign contract within time provided in bid documents or forfeit its bid bond
Who Is Awarded the Contract?

Public Contract Code, § 20111 provides that:

• District may award contract to the Responsible Bidder Submitting the Lowest Responsive Bid; or
• Reject all bids.
Is the bid responsive?

• Does the bid promise to do what the bidding instructions require?
  – A non-responsive bid may fail to provide dollar amounts or other information plainly called for by the bid documents (i.e. blank spaces).

• Responsiveness is determined from the face of the bid.
  – Subcontractor qualifications generally are not grounds for finding a bid non-responsive.
Is the bid responsive?
I.e., Does the bid promise to do what the bidding instructions require?
Determined from the face of the bid without outside investigation or information

Yes

Award to lowest bidder

No

Reject all bids

Is the irregularity material?
I.e., Is a bidder given a substantial economic advantage or benefit not enjoyed by other bidders ("Competitive Advantage")?

Yes

Reject bid

No

District has discretion to waive irregularity

Awards bid to lowest bidder

Reject bid

Reject all bids
Is the Error Waivable?

• A non-responsive item may be waived if the irregularity is not material.
  – For example, a bidder who neglects to sign the bid may still be awarded the contract if its signature appears in other places on the bid. *(Menefee v. County of Fresno (1985) 163 Cal. App. 3d 1175.)*
Is the Error Waiveable? (cont’d.)

• Determining whether an error is material is governed by two somewhat imprecise tests:
  – A defect in a bid cannot be waived if the defect would have given the bidder the right to withdraw its bid due to mistake. 
    (Valley Crest Landscape, Inc. v. City Council (1996) 41 Cal.App.4th 1432.)
  – A defect in a bid cannot be waived if the defect affects the amount of the bid by giving the bidder an advantage not enjoyed by other bidders. 
    (Ghilotti Construction Co. v. City of Richmond (1996) 45 Cal.App.4th 897.)
Is the Error Waiveable? (cont’d.)

Bottom line: If the district waived the defect, would that bidder be given a substantial economic advantage or benefit not enjoyed by other bidders (a.k.a. “Competitive Advantage”)?
Additional considerations before waiving defects

• Waiver of a minor defect in a bid is up to the district’s discretion.
  • The district does NOT have to award the contract to a bidder whose bid contains a waiveable error.  

• Waiving irregularities can be precedent-setting.
  • If a district waives (or does not waive) a particular error in one bid, it should not make the opposite decision on another bid. This could be considered arbitrary and capricious.
New Bid Requirements & Responsiveness

• Requirement to include Subcontractor License Numbers in Bid
  • “an inadvertent error in listing the California contractor license number ...
    ... shall not be grounds for filing a bid protest or grounds for considering
    the bid nonresponsive if the corrected contractor’s license number is
    submitted to the public entity by the prime contractor within 24 hours
    after the bid opening and provided the corrected contractor’s license
    number corresponds to the submitted name and location for that
    subcontractor.”

(Public Contract Code, § 4104(a)(2).)
New Bid Requirements & Responsiveness (cont’d.)

• Interpretation of statute:
  • “Inadvertent” means unintentional, accidental, or not deliberate.
    • All blank?
  • What if corrected more than 24 hours after bid opening?
  • What if corrected contractor’s license number does not correspond to the submitted name and location for that subcontractor?

• Is this waivable?
New Bid Requirements & Responsiveness (cont’d.)

• Requirement for listed subcontractors to be registered with the Department of Industrial Relations
  • Labor Code, § 1771.1, subd. (a): generally, subcontractor is not qualified to bid, be listed, or perform the contract unless registered and qualified to perform public work pursuant to section 1725.5.
New Bid Requirements & Responsiveness (cont’d.)

• But, inadvertent errors in listing unregistered subcontractors is not grounds for a bid protest or considering a bid nonresponsive if:
  1. subcontractor is registered before bids are open, or
  2. within 24 hours of opening, the subcontractor is registered and has paid the penalty registration fee under section 1725.5, or
  3. the subcontractor is replaced by another pursuant to Public Contract Code, § 4107.
New Bid Requirements & Responsiveness (cont’d.)

• Interpretation of statute:
  • “Inadvertent” means unintentional, accidental, or not deliberate.
    • Due diligence
  • What if corrected more than 24 hours after bid opening?
  • Is it sufficient to accept the bidder’s intent to substitute the subcontractor?
    • Timing
  • Consistency with other statutes
    • Public Contract Code, § 4107.5

• Is this waivable?
Difference between Rejecting for Responsiveness vs. Responsibility

District is not required to provide a bidder due process prior to determining whether a bid is non-responsive.

(What is due process? See Responsibility below.)
Responsibility

Determining if a bidder is responsible involves judgments as to the bidder’s fitness, capacity and ability to perform. It “is a complex matter dependent, often, on information received outside the bidding process requiring, in many cases, the application of subtle judgment.”

Responsibility (cont’d.)

Before finding a bidder “not responsible,” the district must provide the rejected bidder due process.

Due process includes:

1. notifying that bidder of any evidence reflecting upon the bidder's responsibility received from others or adduced as a result of independent investigation,
2. affording the bidder an opportunity to rebut such adverse evidence, and
3. permitting the bidder to present evidence of qualification.

(City of Inglewood—L.A. County Civic Center Authority v. Superior Court (1972) 7 Cal.3d 861, 871.)
Great West Contractors, Inc. v. Irvine USD


- As a result of the new limits on the definition of non-responsiveness, the circumstances in which districts will be obligated to provide due process before rejecting bids may increase.
Is the Bid Irregularity Responsiveness Or Responsibility?

- *Great West* court identified five factors that define a bid irregularity as non-responsibility instead of non-responsiveness:
  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 better handled on a “case-by-case” basis instead of being susceptible to categorical hard and fast lines
  4. The potential for “adverse impact on the professional or business reputation of the bidder”
  5. The potential that “innocent bidders” may be subject to “arbitrary or erroneous disqualification from public works contracting”
Aftermath of *Great West*

- Bids may only be rejected for non-responsiveness if the bidder failed to provide an answer, i.e., left a blank on the bid.

- Before rejecting a bid for containing an inaccurate or misleading answer, the bidder is entitled to due process.

- Consider prequalifying bidders instead of determining qualification during bid process
  - Due process is not required if a contractor is found unqualified
Additional considerations for rejecting a bid based on Responsibility

• Has sufficient information been provided to call into question a licensed contractor’s fitness, capacity and ability to perform?

• Prequalification questionnaires (for future public works projects) require contractors to disclose whether they have been found non-responsible. Therefore, bidders are likely to fight such a finding.

• Does the district want to exercise its discretion to reject all bids and rebid?
Bid Protests

• A bidder may file a protest when it believes that another bidder is not responsible or all lower bids are non-responsive.

• The Instructions to Bidders should limit the time for filing protests.

• Bid protests should be investigated before award of the contract.
Bid Protests (cont’d.)

• Provide the apparent lowest bidder the opportunity to respond to contentions in the bid protest and the protestor the opportunity to respond in kind.

• Interested parties (i.e. bidders) should be notified of the district’s intent to award the contract, including the date, time and location of the Board meeting. This provides the district further defenses if the protest goes to court.
Other Project Delivery Methods:

- UPCCAA (Public Contract Code, § 22300 et seq.)
  - Formal Bidding (over $175,000)
  - Informal Bidding (between $45,001 and $175,000)
  - Review by Commission when interested party alleges work performed by public agency, after rejection of all bids, exceeded force account limits or has been improperly classified as maintenance
Other Project Delivery Methods (cont’d.)

- Multi-prime
  - What happens with combination bids?
- Informal Bidding (competitive selection/RFPs)
  - Not required by law
  - Is contract to be awarded to lowest bidder?
  - Can include process in Instructions to control deadlines and who may submit a protest.
Challenging Award of Contract after Bid Protest

• Protesting Bidder may file a petition for writ of mandate:
  • Protesting bidder must establish a right to be awarded the contract (i.e., it must be the next lowest responsive, responsible bidder)
  • If entitled to damages, damages are limited to:
    • Bid preparation expenses
    • Bid protest expenses
    • Unabsorbed overhead
    • Prejudgment interest
    • No lost profits

(Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority (2000) 23 Cal. 4th 305.)
THANK YOU FOR SPENDING YOUR SATURDAY MORNING WITH US!

If you have any questions, please contact:

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