The Competitive Process for Awarding Purchasing and Construction Contracts: When it’s Required; and, When it’s Not. What’s the Difference?

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Overview

Types of Competitive Processes

Traditional Competitive Bidding

Alternative Contracting Options – Purchasing

Alternative Contracting Options – Construction
COMPETITIVE PROCESS: PURCHASING

Competitive Bidding: Purchasing

• Purchases must be bid if they are over the bid limit.
Bid Limits

- Public Contract Code Section 20651(a)
- $87,800 (as adjusted) for:
  - Equipment, materials, or supplies to be furnished, sold, or leased to the District.
  - Services, except construction services.
  - Repairs, including maintenance as defined in Section 20656, that are not a public project, as defined in Section 22002(c).

Best Value Consideration...as Basis of Contract Award. Allowed by Public Contract Code Section 20651.7(a)

For purchases of materials, equipment, supplies and services:
- For the purposes of bid evaluation and selection pursuant to subdivision (a) of Section 20651.
- When a community college district determines that it can expect long-term savings through the use of life-cycle cost methodology, the use of more sustainable goods and materials, and reduced administrative costs.
- District may provide for the selection of the lowest responsible bidder on the basis of best value pursuant to policies and procedures adopted by the governing board in accordance with this section.
Common Bid Exceptions: Purchasing

- Professional Services, Insurance Services, Special Services (in financial, economic, accounting, engineering, legal, and administrative matters). (Pub. Contract Code § 20651(c); Gov. Code, § 53060.)
- Surplus Property from the Federal government. (Ed. Code, § 81653.)
- Supplementary textbooks, library books, educational films, audiovisual materials, test materials, workbooks, instructional computer software packages, periodicals. (Ed. Code, § 81651.)
- Perishable Foodstuffs and Seasonal Commodities (Pub. Contract Code § 20660)
- Electronic data-processing systems and supporting software: may contract with 1 of 3 lowest bidders. (Education Code § 81645)

Common Bid Exceptions: Purchasing

  - Limited to procurement of personal property.
  - Not available for procuring services, installation, or construction.
  - Labor or installation may be permissible only if “incidental to” the overall purchase.
  - Best interest finding required.
- California Multiple Award Schedules (CMAS, Pub. Contract Code §§ 10290-10299, 12100):
  - Purchase of goods and services, including IT, through the Procurement Division of the Department of General Services.
- Joint Powers Authorities (Gov. Code, §§ 6500, et seq.)
Common Bid Exceptions: Purchasing

- Private architectural, landscape architectural, engineering, environmental, land surveying, or construction management services, services by a design professional.
  (Gov. Code, §§ 4525, et seq.; Gov. Code, §§ 4529.10, et seq.)

- May use a “competitive process.”

Competitive Bidding: Process

- Publish notice in a newspaper twice a week for two weeks
- District must award to lowest responsive and responsible bidder
- Best practices:
  – Include a bid protest procedure in the bid documents
  – Hold bid opening early enough to allow time for handling of bid protest and potential re-bid
  – Observe all applicable procedures
  – Option to reject all bids
What Is “Responsiveness”? 

- A bid is responsive if it promises to do what the bidding instructions require
- This can usually be determined from the face of the bid without outside investigation or information
- Examples:
  - Failure to sign
  - Failure to observe maximum subcontractor percentage

What is “Responsiveness”? (Cont.)

- Can the District waive the irregularity?
  - District may only waive it when it is immaterial
  - No obligation to waive it

- Example:
  - Failure to submit an unsigned page of a bid bond was immaterial and could be waived
What Is “Responsibility”?

• The attribute of trustworthiness, as well as quality, fitness, capacity and experience to satisfactorily perform the contract
• Focuses on the bidder, not the bid
• Example:
  – A bidder that previously constructed a building for owner that had substantial defects could be declared non-responsible
  – A bidder whose bid was unrealistic and contained inaccuracies could be declared non-responsible
• Due process hearing

What is “Responsibility”? (Cont.)

• A low bidder may challenge an agency’s decision that the low bidder is not responsible, and a public hearing is required
• No published court decision allows another bidder to protest an agency’s decision that the low bidder is responsible, much less have a public hearing
• Even if previously qualified through a prequalification process, a District could declare a contractor to be non-responsible
• A District may not reject a low bidder for being less responsible than the second lowest bidder
Construction Delivery Methods

- Design-Bid-Build (PCC § 20651(b))
- Lease-leaseback (Ed. Code § 81335)
- Design-Build (Ed. Code § 81700-81708)
Construction Delivery Methods

• Single Prime
  – Owner has one contract with a contractor, and the contractor enters numerous subcontracts with trade contractors

• Multiple Prime
  – Owner enters numerous contracts with trade contractors

Construction Delivery Methods

• Construction management (agency)
• Construction management at-risk?
• Piggyback contracts?
Competitive Bidding: Overview

• Public Projects
  – Public Contract Code Section 20651(b): $15,000 is the bid limit for districts that are not governed by the Uniform Public Construction Cost Account Act (“CUPCCAA”).
  – The bid limit is NOT adjusted annually.

Public Projects vs. Maintenance: Which bid limit applies?

• “Public Project” includes the following:
  – Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.
  – Painting or repainting of any publicly owned, leased, or operated facility.
• “Maintenance” work is defined to include the following:
  – Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.
  – Minor repainting.
  – Resurfacing of streets and highways at less than one inch.
  – Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.
  – Work performed to keep, operate, and maintain publicly owned water, power, or waste disposal systems, including, but not limited to, dams, reservoirs, power plants, and electrical transmission lines of 230,000 volts and higher.
### Publication of Notice to Secure Bids or Proposals

- Publication of Notice (EC §81641)
- Required Notice Contents
  - Work to be done
  - Materials/supplies required
  - Time and place where bids/proposals will be opened
  - “May” post notice on District website or an electronic portal

### Contractor Registration

**Labor Code §§ 1725.5, 1771.1**

- Registration of contractors
  - All contractors and subcontractors must register with the DIR before bidding on, and before entering, contracts for public works
  - Owner must reject any bid from, and may not award to, an unregistered contractor
  - If a listed subcontractor is not registered, it can register within 24 hours and pay a penalty fee
  - DIR maintains on-line list of registered contractors
  - For any awarded contract, the owner must give notice to the DIR within 5 days
Prequalification

Optional per PCC 20651.5(a)

• Governing board of any district may require ... a standardized questionnaire and financial statement ... including prospective bidder's financial ability and public works experience.
  – Verified under oath.
  – Responses and financial statements are not public records and not open to public inspection.
• District shall adopt and apply uniform system of rating.
• District shall provide a standardized proposal form that each bidder shall use. Bids not presented on the required forms shall be deemed non-responsive and rejected.
• Bidders must submit their prequalification documents at least five days before bid opening. Bids won’t be accepted from contractors not prequalified at least one day before bid opening.

Exceptions to Bidding

• CUPCCAA
• Day Labor / Force Account
• Design-build
• Energy conservation contracts
• Emergency projects
• Lease-leaseback
• Public policy (Graydon)
### California Uniform Public Construction Cost Accounting Act ("CUPCCAA")

- District maintains a list of qualified contractors according to categories of work, per the Commission’s procedures. (PCC 22034(a))
- $45,000 or less: no bid required; District employees can perform work by “force account” or District can award by negotiated contract or purchase order.
  - No publication, posting, ad or trade journal notice required.
- $45,000.01 to $175,000: Informal bidding required to District’s established list of contractors
- $175,001 and up: Formal bidding to District’s established list of contractors.
- Notices regarding informal bids – must be mailed to all contractors on the list for the category of work being bid, or all trade journals, or both (PCC 22034(b)); mailing shall be completed “at least” ten (10) days before bids are due. (PCC 22034(c))
- Notices regarding formal bids – must be published “at least” fourteen (14) days before bid opening (PCC 22037) – only one public requirement; notices must be given to all trade journals listed in PCC 22036 “at least” fifteen days before bid opening.

### Bid Alternative: Day Labor / Force Account

- Public Contract Code § 20655(a)
- Limitations:
  - Districts with 15,000 or more FTE Students
    - 750 total hours or less, or
    - No more than $21,000 for costs of materials
  - Districts with less than 15,000 FTE Students
    - 350 total hours or less
Overview of Design-Build Process

- Must prequalify all DB entities first. Use DIR Process PLUS.
- RFP process follows prequalification
- Can award to lowest bidder or on a “best value” basis
- Best value award
- Board must establish and publish objective criteria for award

Design-Build

- Community College Districts using this delivery method must establish a procedure to pre-qualify design-build entities using a “standardized questionnaire” developed by the Director of the Department of Industrial Relations (DIR). (Ed Code § 81703 (b))
- The pre-qualification questionnaire is to be completed by the design-build entity and verified under oath.
- Once the design-build entity is successfully pre-qualified, it then can submit a proposal (bid).
Design-Build (cont.)

- Education Code §§ 81700-81708
- Limitations:
  - $2,500,000 minimum project cost
  - Board must make specific findings:
    - Using DB is in best interest of District.
    - After evaluation of the traditional design, bid, and build process and the design-build process in a public meeting, the board must make written findings that use of the design-build process on the specific project under consideration will accomplish one of the following objectives: reduce comparable project costs, expedite the project’s completion, or provide features not achievable through the traditional design-bid-build method.

Design-Build (cont.)

- The board shall also review the guidelines developed pursuant to Section 81706 and shall adopt a resolution approving the use of a design-build contract prior to entering into the contract.
- Process:
  - District issues RFP with detailed specifications
  - DIR-developed prequalification process
  - Specific criteria considered in selecting entity
  - At completion, submit detailed report to Legislative Analyst
Bid Exceptions: Energy Conservation Contracts

• Government Code §§ 4217.10, et seq.; Education Code § 81660
• Must hold a public hearing and provide notice at least two weeks in advance.
• Board must make certain findings related to energy and cost savings.
• If using Proposition 39 funding, the implementing regulations prohibit use of a “sole source” process.

Bid Exceptions: Emergencies

• Emergencies (PCC 20654)
• Marshall v. Pasadena Unified School District
• Different rules apply under CUPCCAA
Lease-Leaseback

- Education Code § 81335
- Procedure:
  - District leases property to contractor for $1 per year
  - Contractor builds school facilities on the property
  - District leases property back from contractor and pays for construction in form of sublease payments
  - Use of RFP/RFQ process

Bid Exceptions: Public Policy

- “... where competitive bidding proposals work an incongruity and are unavailing as affecting the final result, or where competitive proposals do not produce any advantage, or where it is practically impossible to obtain what is required and to observe such form, competitive bidding is not applicable.”
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Kelly M. Rem is Senior Counsel in Lozano Smith’s Walnut Creek Office. Ms. Rem specializes in Facilities and Business law and Litigation. Ms. Rem has extensive experience advising clients regarding CEQA issues, including procedural requirements, deadlines and statutes of limitation, exemptions, and adequacy of environmental impact reports and other documents. She represented the California School Boards Association as amicus curiae in the matter of Berkeley Hillside Preservation v. City of Berkeley, a recent CEQA case before the California Supreme Court. She also has extensive eminent domain experience, and assists school districts with a variety of real property issues including sale and lease transactions, land use and zoning issues, and surplus property requirements. Ms. Rem is experienced in reviewing and providing advice to clients relating to various types of business contracts. She also regularly advises clients regarding school facilities fees and construction matters.

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