

IMPORTANT NEW LAWS REGARDING PREQUALIFICATION ON CALIFORNIA PUBLIC WORKS PROJECTS

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Legislation recently enacted in California threatens to impose substantial burdens on contractors submitting bids to local public agencies. The new law may also allow the prequalification process to be used to bar contractors considered by public entities to be unwelcome or undesirable from submitting bids to these entities on California public works projects. This legislation represents a significant departure from existing prequalification law and substantially expands the scope and potential impact of the prequalification process.

The legislation, Assembly Bill 574, was signed by the Governor in October 1999, and includes the following elements;

1. Provides a statutory definition of “responsible bidder” on a “public works contract;”
2. Appears to require any local public entity that prequalifies bidders to utilize a single standardized questionnaire;
3. Allows the use of prequalification to limit bidders according not only to the “size” but also the “type” of project and the “minimum requirements” needed to be allowed to submit a bid on a project;
4. Requires the public entity to establish a process that allows bidders to dispute their proposed prequalification; and
5. Modifies the Subcontractor Listing Law to allow an awarding authority to consent to substitution of a listed subcontractor when the awarding authority determines that a listed

subcontractor is not a responsible subcontractor.

1. PREQUALIFICATION INFORMATION

The most significant aspect of the new legislation is the addition of Public Contract Code § 20101, which creates a prequalification system for contractors. § 20101 falls within the Local Agency Public Construction Act, and therefore applies to all local public works, including contracts let by counties, school districts and cities.

a. Prior Statutory Law

Before reviewing specific aspects of § 20101, it is helpful to summarize pre-existing California statutory law on public works prequalification. Public Contract Code § 10160, applicable to contracts on State property, allows (and on contracts in excess of \$300,000 requires) the awarding agency to require prospective bidders to answer a questionnaire including “a complete statement of the prospective bidder’s financial ability and experience in performing public works.” Under § 10163 the awarding authority is empowered to “adopt and apply a uniform system of rating bidders ... in respect to the size of the contracts upon which each bidder is qualified to bid.” § 10161 allows the State to require information on the past safety record of the bidder, and to refuse to prequalify a bidder with an unsatisfactory safety record. § 10162 empowers the State to reject a bid where a bidder had been “disqualified, removed or otherwise prevented from bidding on, or completing” a public works project “because of a violation of law or a safety regulation.”

Public Contract Code § 10285 *et seq.*, enacted in 1985, permits suspension of a bidder from public works contracts where the contractor or certain of its personnel have been convicted of violating state or federal laws “in connection with the bidding upon, award of, or performance of, any public works contract.” Public Contract Code § 10303 requires the State department to adopt and apply uniform standards of rating bidders, on the basis of questionnaires, “with respect to contracts upon which each bidder is qualified to bid” and to publish lists of qualified bidders. The fact that a bidder is not on such a list does not preclude the bidder from submitting a bid on a given project.

Public Contract Code § 10760 *et seq.* Applies to contracts let by the Trustees of the California State University and Public Contract Code § 20111.5, enacted in 1986, applies to contracts in excess of \$15,000 let by school districts. These statutes track the scope of § 10163 in utilizing questionnaires and financial statements to determine the size of contracts on which contractors are allowed to bid. All three of these statutory schemes provide that the questionnaires and financial statements are not public records and are not open to public inspection.

This group of statutes was fairly non-controversial. The statutes applied to most State contracts and contracts let by school districts, and their primary use was to limit the size of the contracts on which contractors could submit bids. However, a “size” restriction already existed, even in the absence of these statutes, based on the requirements for bid, performance and payment bonds. Beyond this, a contractor could be found unqualified or not responsible based on a bad safety record, a violation of a law or a safety regulation, or a criminal conviction.

b. Specific Requirements of § 20101

New § 20101, like §§ 10760 and 20111.5, is discretionary in that the public entity

can choose not to use the questionnaires or to pre-qualify bidders. In many other respects, however, § 20101 represents a radical departure from existing California pre-qualification law.

The new law extends the pre-qualification procedure to **“minimum requirements permitted for qualification to bid, and the type and size of the contracts”** upon which the bidders are qualified to bid. Thus, while under prior law prequalification was generally limited to the “size” of the project, with debarment limited to violations of law, the new prequalification law includes the ambiguous “minimum requirements” criteria and, of course, extends to the hundreds of local public agencies across the State.

The new, ambiguous language certainly creates the possibility that local public agencies will use the prequalification process to screen out contractors the public agency deems to be undesirable, regardless of the contractors’ financial capacity or experience. For example, a public entity could establish a “minimum requirement” that a bidder have submitted no more than three Government Code Claims on public works project in the last five years, or similar requirements to prevent contractors perceived to be claims oriented from submitting bids.

New § 20101 also calls for a “standardized questionnaire” to be developed by the Department of Industrial Relations (“DIR”), in consultation with various public agencies, “the construction industry” and “other interested parties.” Although the new statute is not precise (“the standardized questionnaire that may be used by public entities”), it appears that if a local agency does choose to pre-qualify potential bidders, it must only use the standardized questionnaire developed by the DIR. This limits the flexibility of local agencies and heightens the significance of the contents of the questionnaire. On the other hand, if only one questionnaire form is used for all California counties, non-

charter cities and local agencies, this will certainly reduce the administrative burdens of the prequalification system.

The importance of the final scope and content of the standardized questionnaire cannot be overstated. If, for example, the questionnaire is similar to the questionnaire required under Public Contract Code § 14661 (applicable to design build contractors), a significant impact could be felt by many public works contractors. Among other things, § 14661 basically eliminates from the bidding process any contractor whose “members” have had “a surety company finish work on any project within the last five years,” and requires bidders to submit a declaration concerning “any construction or design claim or litigation” of a specified value “settled against any member of the design build entity over the last five years,” violations of the Contractor’s State License Law or conviction of submitting a false or fraudulent claim over the preceding five years. Naturally the AGCC will be actively involved in development of the questionnaire.

2. PREQUALIFICATION PROCEDURES

The statute provides that the DIR will develop “model guidelines” that “may be used” by the local public entity in rating bidders. However, public entities are free to apply their own evaluation criteria, as the statute requires the public entity to “adopt and apply a uniform system of rating bidders” that is to be “based on objective criteria.” Thus, the statute is somewhat inconsistent in apparently requiring the public entities to use a standardized form, but then allowing flexibility in developing the rules that will, in effect, frame the scope of the impact of the questionnaires. Depending on the evaluation and rating system used, substantially divergent results could be obtained. For example, one County may deduct ten points for each Government Code Claim filed by the bidder within the prior five years, while the next County may deduct only one point.

If the public entity chooses to prequalify bidders, it must “establish a process that will allow prospective bidders to dispute their proposed prequalification rating prior to the closing time for receipt of bids.” The public entity is required, upon request, to provide the prospective bidder with the “basis for the prospective bidder’s disqualification” and the prospective bidder must be “given the opportunity to rebut the evidence used as a basis for the disqualification and to present evidence” why the bidder should be found qualified.

At least on larger public works projects, this protest procedure may be of little aid to disqualified contractors. By the time the contractor has prevailed and established their qualifications, it will likely be too late for the contractor to prepare a proper bid, unless the contractor has continued to invest time and resources preparing a bid on a project on which it has already been disqualified, based on the expectation of overturning the finding of lack of qualifications. Nonetheless, for reasons discussed below, disqualified contractors may have no choice but to pursue the protest in order to avoid having the finding operate to bar them from submitting bids on future, similar projects.

§ 20101 also allows the public entities to establish a process for prequalifying bidders on a quarterly basis, with such prequalification remaining valid for a period of one year. As with prior prequalification law, the questionnaires and financial statements are not public records and are not open to public inspection.

There are many areas of uncertainty in the new statute. The ability to mount an effective legal challenge to the statute will depend on the factual circumstances of a given case where a contractor is disqualified. Certainly the fact that the information submitted by the bidders is to remain undisclosed to the public (and, presumably, to disqualified potential bidders) raises some due process questions.

Unless a rejected bidder can look at the other bidders' prequalification materials, the disappointed bidder can never be sure that the prequalification materials were, in fact, objectively and impartially evaluated.

3. SUBSTITUTION OF NON-RESPONSIBLE SUBCONTRACTORS

AB 574 adds Public Contract Code § 4107(a)(9) to the Subletting and Subcontracting Fair Practices Act. This new section allows a contractor to substitute a new subcontractor for a listed subcontractor "when the awarding authority determines that a listed subcontractor is not a responsible contractor." This law applies to all California public works projects.

It is difficult to conceive of the circumstances under which the new statutory language will be utilized. Pursuant to § 4104 subcontractors are to be listed in the contractor's "bid or offer." The new language would therefore appear to apply only where a pre-qualified contractor has received an award and has listed a subcontractor. At that point either the public agency or the contractor may seek to replace the subcontractor on the basis of the subcontractor not being "responsible."

It would indeed be rare for a public entity to seek to replace a listed subcontractor, as the general contractor is responsible for whatever problems may arise on the project. Further, Public Contract Code § 4107(a)(7) allowed the general contractor to substitute a new subcontractor where there was a determination that the listed subcontractor's work was "substantially unsatisfactory" or where the subcontractor was "substantially delaying or disrupting the progress of the work." Thus, prior law provided a tool for contractors to replace non-performing listed subcontractors.

The new language may have been intended, in part, to facilitate removal of subcontractors who submit what are perceived to

be inflated or false claims. General contractors have always faced the quandary, in submitting a subcontractor's pass-through claim on a public works project, of being accused of submitting a false claim by virtue of their sponsorship of the subcontractor's claim. The new law may allow the contractor an option not previously available: seeking to replace the claims oriented subcontractor.

In any event, because the practical utility and application of this new exception is not clear, prudent general contractors will add a provision to their subcontracts that provides for termination of the subcontractor where the awarding authority determines that the listed subcontractor is not a responsible subcontractor. Without such language, a contractor may find themselves in the unenviable position of having the public entity find their subcontractor to be not responsible, but with the contractor having no contractual right to terminate the non-responsible subcontractor.

4. RESPONSIBLE BIDDER

Perhaps the least controversial aspect of the new legislation is the addition of Public Contract Code § 1103, which provides:

1103. "Responsible bidder," as used in this part, means a bidder who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract.

§ 1103 also applies to all California public works contracts. The definition is sufficiently vague that it grants public entities broad discretion in setting the parameters for who is, and is not, a responsible bidder.

There are only a few reported California decisions interpreting the phrase "responsible bidder." These cases have held that public

entities have wide latitude in making a determination of responsibility. Thus, a finding of non-responsibility can be justified by a showing that a bidder's product was not satisfactory to fulfill the intended purpose of the contract (West v. Oakland (1916) 30 Cal.App. 556), because the bidder was found to have provided poor workmanship and failed to complete another project for the same owner (Raymond v. Fresno City Unified School District (1954) 123 Cal.App.2d 626) or because the bidder submitted an "unrealistic" and impractical bid (R.A.Vending Services, Inc. v. City of Los Angeles (1985) 172 Cal.App.3d 1188).

Finally, where two bidders have been determined to be "responsible," and a statute requires a contract to be awarded to the lowest responsible bidder the "contract must be awarded to the lowest bidder unless it is found that he is not responsible, i.e. not qualified to do the particular work under consideration." City of Inglewood-L.A. County Civic Center Authority v. Superior Court (1972) 7 Cal.3d 861, 867. See also Boydston v. Napa Sanitation District (1990) 222 Cal.App.3d 1362. The public entity may not make the award to one other than the lowest bidder based on the "relative superiority" of the other bid.

5. PRACTICAL CONSIDERATIONS

§ 20101 operates on two levels. It allows a public entity to prequalify bidders on a project by project basis ("each prospective bidder for a contract" is to complete the questionnaire), and it allows the public entity to prequalify bidders for given types and sizes of projects for a period of one year.

Unfortunately, for larger contractors the annual prequalification process can present a significant administrative burden, as they may submit dozens of bids to many different local agencies every year. Rather than prequalifying project by project, as a practical matter contractors should apply for annual

prequalification with the local public agencies to whom they most commonly submit bids. Because the public agencies are not required to offer annual prequalification, contractor trade associations should lobby those public agencies that choose to prequalify bidders to adopt annual prequalification.

Finally, contractors cannot take lightly a finding that they are not qualified or responsible enough to submit a bid on a given public project. Recall that the prior statutes generally allowed public entities to refuse prequalification based on lack of financial capacity ("size of project"), a violation of law or a bad safety record. Under the new statute, a contractor may be found to lack the "minimum requirements permitted for qualification" based on other, lesser factors that are not related to financial capacity. Such a finding may be required to be disclosed on future bids, leading to disqualification on future projects, not only by the entity that disqualified the contractor, but by other local public agencies. This potential cascading effect should cause contractors to be more selective on the projects on which they seek to prequalify, and to seriously consider protesting any disqualifications.

While the *potential* impact of this legislation is great, it may be that the *actual* impact will, like the prior prequalification laws, be insubstantial. Local public agencies may, like contractors, feel that the prequalification process adds further administrative burdens to an already overlegislated and overburdened public bidding process.

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