Questions from the "Chat" Window

From Michael Cobden:
Q: Where can I find out more information on changing subcontractors after the bid has been awarded? Are there some general rules I should know about?
A: For substitution requirements and procedures see Public Contract Code §§4107 and 4107.5. For further discussion, see webinar handout, pp. 12-14.

From Brian Libow:
Q: Unlicensed subcontractor. Are you saying that whether it's a question of responsiveness or responsibility depends on the bidder's intent? We can't determine that. So should we treat this issue as non-responsive or non-responsible?
A: Responsiveness pertains to the bid. Responsibility pertains to the bidder. If it is alleged that the bidder included false or misleading information in its bid, that raises an issue of responsibility. See *D.H. Williams Construction v. Clovis Unified School District* (2007) 146 Cal.App.4th 757.

From Brian Libow:
Q: What might happen if the city refuses to waive an immaterial deviation, but has waived similar deviations in the past?
A: Treating similar situations differently could raise a question of favoritism, but it is nearly impossible to establish favoritism, especially if the City has a valid reason for the different treatment. A City is never required to waive a deviation, even if it is immaterial.

From Katherine Harasz:
Q: Do you have case cite or statutory reference for the assertion that bidders are conclusively presumed to know an agency's authority?
A: See *Bear River Sand & Gravel Corp. v. County of Placer* (1953) 118 Cal.App.2d 684 and *Miller v. McKinnon* (1942) 20 Cal.2d 83.

From Richard Pio Roda:
Q: What if the amount in the bid bond is blank?
A: It does not provide the requisite bid security and the bid must be rejected as non-responsive.

From Richard Pio Roda:
Q: Does the Menefee case apply if the bid bond is not signed?
A: No; the *Menefee* analysis was based upon a valid, binding bid bond. Also, failure to have a properly signed bid bond would be separate grounds for finding a bid materially non-responsive.

From Brian Libow:
Q: Bidder claiming mistake can't participate further, even if city rebids the item. Is that in the statute?
A: Yes: Public Contract Code §5105.

From Matt Horn:
Q: What is the basis for prohibiting bidder claiming a mistake from a later rebid of the project?
A: Public Contract Code §5105.

From Brian Libow:
Q: In bid alternate scenario, how should we define subcontractor percentages? I'd think it should be based on the awarded contract. Can we define it differently in the specs?
A: We recommend instructing bidders to list subcontractors that will perform at least one-half of one percent of the base bid, because you may not end up awarding more than the base bid. We also recommend that bidders state the "portion" of work as the type of work rather than a percentage, which can be confusing in the bid alternates scenario.

From Sheryl Schaffner:
Q: Can presenters discuss "how much process is due" to a bidder deemed non-responsible? I.e., hearing before City Manager, appealable to City Council ok? (With basic opportunity to see negative and provide rebuttal evidence)
A: This is a perennial question since there is no black letter law specifying who must serve as the fact-finder. Clearly the elective body may serve as the hearing body. See, e.g., *Boydston v. Napa Sanitation District* (1990) 222 Cal.App.3d 1362, 1369. Following existing municipal code requirements for hearings and appeals may be helpful. Some cities hire a third party neutral as a hearing officer. You are correct that the critical issue is providing the bidder full notice of the claims and evidence against it, and a meaningful opportunity to respond. Bottom line: make sure there is no appearance of partiality if anyone other than the Council will serve as the "decider."

From Matt Horn:
Q: Can Pre-qualification screen out entirely on the basis of experience?
A: Yes, assuming the experience requirements are reasonable and applied objectively.

From Melanie Donnelly:
Q: How do you determine what financial information will be required as part of the prequalification? Who analyzes it?
A: Public Contract Code §20101 governs local agency prequalification, and provides that public entities may require prospective bidders to complete questionnaires and submit financial statements. The statute does not specify who reviews the information; cities are afforded discretion to establish their own process, subject to the requirements of §20101.

From Matt Horn:
Q: Can pre-qualification be done for a group of projects or must it be done for each individual project?
A: It may be done on a per project basis or on a quarterly basis, and can be good for one calendar year. See Public Contract Code §20101.

From Brian Poulsen:

Q: Are small public works projects (<$30K) subject to bid requirements? Are there other requirements or procedures a public agency must comply with in order to avoid publically bidding small projects?

A: Public Contract Code §20162 requires public bidding for public works projects in excess of $5,000. For slightly higher thresholds see Public Contract Code §§22030-22045.

From Felicia Liberman:

Q: Should the bid protest procedures be included in the bid docs for every project or is it alright that they may be codified in the municipal code?

A: There is no black letter law governing this question, but we recommend including the procedures in the bid documents to ensure adequate notice to bidders who are accustomed to finding them there.

From Ann Danforth:

Q: What about pre-bid activities that can allegedly give a bidder an advantage? We have a project where the architect consulted with a contractor before the bid documents were prepared. The architect says that the ultimate documents didn't use any of the information from the contractor and wants to let the contractor bid on the project. A couple of council members also want the contractor to be able to bid. Is there any scenario under which this contractor can bid?

A: These facts could certainly raise an inference that this contractor was privy to knowledge not available to other bidders. A challenge to the procurement is particularly likely if the plans and specifications include some requirement that would give the consulted contractor some advantage, such as specifying a product brand name (even if "or equal" is allowed) where that contractor has some advantage over other bidders in securing the brand name product. Nonetheless, unless this contractor is affirmatively disqualified from bidding (e.g., via prequalification or a responsibility hearing), we don't see that you can prevent the contractor from submitting a bid. The architect did the City no favors by tainting the process.

From Amy Greyson:

Q: As a follow-up to the question regarding the appeal procedures on pre-qualification involving confidential information, what provision of the Brown Act would provide the basis to go into closed session?

A: Good point: we don't think there is an available Brown Act exception for this hypothetical. If a prospective bidder is going to appeal a prequalification determination based upon confidential information and the hearing is before the City Council, that bidder may simply have to choose to reveal the pertinent portion(s) of that information. Jennifer believes that the better process, which arguably is required due to the provision that the materials are not public records, is to have the appeal hearing conducted by a designated individual in a proceeding not subject to the Brown Act, with a recommended decision made to the City Council which does not disclose confidential information.

From Scott Porter:

Q: If a bidder has a history of requesting too many change orders, is that sufficient to allow the city to declare the [bidder] to be non-responsive. Does it matter how the information was obtained -- such as via calls to references.

A: No. Responsiveness pertains only to the bid itself. Concerns about the bidder raise an issue of responsibility. A determination of non-responsibility must be based on substantial evidence, and is not limited to information provided in the bid itself, but could be based on calls to references (or even others not identified as references).

Questions from the "Q&A" Window

From Kathy Jenson

Q: Invitation required bidders to hold certain license. Low bidder did not not have required license. City notified low bidder its bid was non-responsive. Low bidder's response was that "parent" corp. holds the required license. Is that acceptable?

A: Probably not, unless the bidder is a division of a single corporation, and not a true subsidiary (separate corporation).

From Jacob Gould

Q: Can you point out the authority for no participation of a mistaken bidder on a re-bid project?

A: Public Contract Code §5105.

From Debra Margolis

Q: Who should be the hearing officer if holding a hearing regarding responsibility of a bidder?

A: This is a perennial question since there is no black letter law specifying who must serve as the fact-finder. Clearly the elective body may serve as the hearing body. See, e.g., *Boydston v. Napa Sanitation District* (1990) 222 Cal.App.3d 1362, 1369. Following existing municipal code requirements for hearings and appeals may be helpful. Some cities hire a third party neutral as a hearing officer. Bottom line: make sure there is no appearance of partiality if anyone other than the Council will serve as the "decider."

From Jennifer Bell

Q: What is the source of the requirement that bidders are anonymous when alternates are evaluated?

A: That is an optional basis for award: see Public Contract Code §20103.8(d).

From Mary McHugh

Q: In hard times, the City wants to encourage savings by the use of volunteers - what is the best method to include volunteer components in an IFB? If project is going to be exclusively done by volunteers, is it exempt from public bidding?

A: Using volunteers raises a number of legal issues, including labor law and liability issues that extend beyond the purview of this webinar.

From Peter Brown

Q: How are appeals conducted for prequalification when the submitted information are not public records and thus cannot be made "public?" Hold hearing in closed setting?

A: We are unaware of a Brown Act exception that would allow an appeals hearing before the City Council to be done in closed session. If a prospective bidder is going to appeal a prequalification determination based upon confidential information, that bidder may simply have to choose to reveal the pertinent portion(s) of that information. Jennifer believes that the appropriate process is to have the appeal hearing conducted by a designated individual in a proceeding not subject to the Brown Act, with a recommended decision made to the City Council which does not disclose confidential information.

From Brian Poulsen

Q: Are small public works projects (<$30K) subject to bid requirements? Are there other requirements or procedures a public agency must comply with in order to avoid publically bidding small projects?

A: Public Contract Code §20162 requires public bidding for public works projects in excess of $5,000. For slightly higher thresholds see Public Contract Code §§22030-22045.

From David Kendig

Q: On pre-qualification, does the agency have wide discretion to establish the uniform, objective rating criteria that will be applied? If so, can't pre-qualification be used indirectly as a tool to eliminate "problem bidders" the client doesn't trust?

A: We do not recommend tailoring prequalification to either favor or disfavor particular contractors.

From Mary McHugh

Q: So, when rejecting bids, if the City staff created an evaluation matrix/check list, this would be disclosable, correct?

A: Yes.

From John Nagel

Q: What is meant by "materially" non-responsive?

A: A deviation is considered "material" – meaning it cannot be waived, if it affords the bidder an advantage not available to other bidders or affords it the opportunity to withdraw its bid without forfeiting its bid security. See *MCM Construction Inc. v. City and County of San* Francisco (1998) 66 Cal.App.4th 359, 370-371.

From Michele Collins

Q: Once in a while we get a bid so low we question bidders understanding of project. We don't want to use a company that doesn't understand project and we will question the bidder. Can we say they are non-responsive? What is legal way to handle this?

A: In this circumstance, we recommend immediately asking the bidder whether it made a mistake in its bid and intends to request withdrawal. If the bidder will not admit mistake and withdraw its bid, you may be faced with a question of responsibility – whether it can perform the project for the price bid. We also recommend reviewing the plans and specifications to determine whether the bidder may be trying to take advantage of some ambiguity (leading to a later change request). If you suspect a future claim of ambiguity and request for change order, the best option may be to reject all bids and re-bid the project with a clarification. A low price—even a remarkably low price—does not render a bid non-responsive.

From Mark Lewis

Q: If you have a low bidder who has requested to be relieved of their bid due to what they insist is an error. If it is determined not to be an error and they are still the low bidder, how do you compel them to work if they insist on not cashing bid bond?

A: If they refuse to perform they forfeit their security, regardless of their insistence. Public Contract Code §20172 However, the bidder may bring an action under Public Contract Code §5101 to recover the amount forfeited.

From Tara Taguchi

Q: Can it be appropriate to keep some bid documents confidential until after notice to award is made? How much should be disclosed and when?

A: Generally all bids submitted for a public works bid are public documents and should be made available immediately after opening. Different rules may apply for service procurements under an RFP process, but that is outside the purview of this webinar.

From Mark Lewis

Q: Does a contractor or subcontractor have to have the required license at the time of bid submittal or at the time of contract award?

A: If no federal funds are involved, the contractor must have the required license at the time of bid. B&P Code §7028.5. For further discussion see the Municipal Law Handbook §7.37. Unless you have established other requirements in the solicitation document or by municipal law, a subcontractor generally need not be licensed until time of award. See *D.H. Williams Construction v. Clovis Unified School District* (2007) 146 Cal.App.4th 757.

From Robert Krimmer

Q: Can you please address "or equal provisions" and requirements under Section 3400? Can failure to list more than one manufacturer in bid invitation be corrected by addendum?

A: Yes.

From Amy Greyson

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A: Good point: we don't think there is an available Brown Act exception for this hypothetical. If a prospective bidder is going to appeal a prequalification determination based upon confidential information and the hearing is before the City Council, that bidder may simply have to choose to reveal the pertinent portion(s) of that information. Jennifer believes that the better process, which arguably is required due to the provision that the materials are not public records, is to have the appeal hearing conducted by a designated individual in a proceeding not subject to the Brown Act, with a recommended decision made to the City Council which does not disclose confidential information.

From Robert Krimmer

Q: If agency's bid package provides a single manufacturer with an "or equal" provision and follows that with detailed specs - may bidder submit bid based another manufacturer that will meet specs without deviation without compliance with substitution require.

A: The response will depend on the specific bid document provisions governing submission of "or equal" products. In general, when "or equal" provisions are used and the "equal" is not assessed prior to the bid due date, a bidder may submit its bid based on the alternate product, but is required to provide the specified brand product if the alternate is not accepted as equal.

From Scott Porter

Q: If a bidder has a history of requesting too many change orders, is that sufficient to allow the city to declare the to be non-responsive. Does it matter how the information was obtained -- such as via calls to references

A: No. Responsiveness pertains only to the bid itself. Concerns about the bidder raise an issue of responsibility. A determination of non-responsibility must be based on substantial evidence, and is not limited to information provided in the bid itself, but could be based on calls to references (or even others not identified as references).

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