

What You Need to Know About Bid Protests

by Bernard S. Kamine

(a version of this article appeared in the ECA MAGAZINE, 2009
Directory Issue (Vol. 45, No. 2), p. 37)

When work is plentiful, and only 3 or 4 contractors bid each project, the second low bidder just moves on to the next job opportunity. But when work is scarce, with 25 or more bidders for each contract, then the second low bidder, and even the third or fourth low bidders, are likely to look for ways to get the award. In such tough times, every contractor needs to know how to challenge the low bid and how to defend against a challenge to its bid. Here are five critical points of that knowledge.

FIRST, you need to find out whether competitive bidding is required for the contract. If not, the award will go to the bidder who best knows the members of the awarding authority, or has the best lobbyist. An award must go to the lowest responsible bidder only if a statute or city charter requires it. Otherwise the public agency can enter into contracts with whomever it likes, just as any private owner can. Competitive bidding is required by statutes on most state, county, city and school district public works projects. Most city charters also require it. But there are exceptions, for example: small projects, design-build projects, projects for some districts (*Associated Builders and Contractors, Golden Gate Chapter v. Contra Costa Water District* (1995) 37 Cal. App. 4th 466, 470-71, 43 Cal. Rptr. 2d 600), projects for the state legislature (*Zumbrun Law Firm v. California Legislature* (2008) 165 Cal. App. 4th 1603, 1617-17, 82 Cal. Rptr. 3d 525) and projects for private companies that look like public agencies (e.g., water

- 1 -

KAMINE LAW PC

REPRESENTING CONTRACTORS, SUPPLIERS, SURETIES AND OWNERS SINCE 1976.

Phone: 213/972-0119. Fax: 213/972-0005. Website: www.KAMINECONSTRUCTIONLAW.com

DISCLAIMER: This article is offered without charge; please pass it on to others who may find it useful. Providing this article in no way creates an attorney-client relationship between any reader and Kamine Law PC or the author(s).

WARNING: Changes in the law may affect the accuracy of this article, and the information here may not be applicable to your particular situation. You should contact an attorney before using this information.

companies). However, even for those exceptions, if the bidding documents promise that the contract will be awarded to the lowest responsible bidder, that promise can be enforced.

SECOND, you need to find out whether there are mandatory bid protest procedures or time limitations. Many public agencies now have such procedures or limitations; they should be described in the bidding documents, but they may be lurking in the municipal code or some obscure agency regulations. Unless those procedures and limitations are unconstitutional or severely interfere with the proper functioning of competitive bidding, they can be enforced. A late protest, or one that fails to provide required information, is likely to be rejected.

THIRD, you need to look at more than just the low bid. If you submitted the low bid, but award to you is being protested, you want to uncover all of the defects in the protester's bid and point them out to the agency. Then, since both bids have problems, the agency is more likely to waive the waivable defects in your bid and award the contract to you. If you submitted the second low bid, and you are protesting award to the low bidder, you must scour your own bid for defects, to avoid getting egg on your face, or worse, getting blind-sided by a protest from the third low bidder.

Getting a timely look at the bids is sometimes difficult. Bids for public works projects are public records; they are the basis for public contracts. Besides, competitive bidding laws, and often the invitation for bids, require the bids to be publicly opened and read immediately after the bid deadline. Therefore, all members of the public (including bidders and their attorneys) are entitled to reasonable and timely access to those public records. However, in an effort to avoid bid protests, or questions about agency procedures

or bid evaluations, some bureaucrats illegally try to keep the bids under wraps until the agency staff makes its award recommendation – or even until after award of the contract. Such conduct deprives bidders of their right to timely challenge agency staff recommendations by bid protests. If the agency staff will not allow timely inspection and copying of bids, you should immediately request access pursuant to the California Public Records Act (Government Code § 6250, et seq.). However, even that may not be effective. Sometimes the contract is scheduled to be awarded before the agency would be required to respond to your request to see the public records. So, you should be prepared to take your complaint about being denied timely access to the bids to the elected officials who govern the agency, and sometimes even to the local press. When doing so, point out that bid protests are the only effective mechanism to assure that the agency is complying with competitive bidding requirements, and not engaging in favoritism, corruption, fraud, extravagance or uncompetitive bidding practices (Public Contract Code § 100).

FOURTH, you need to know why bids are subject to protest. There are two general bases for a protest: (1) The low bid is not responsive to the invitation for bids; it does not provide what the bidding documents asked for in the manner required by those documents. (2) The low bidder is not responsible; the bidder lacks “the attribute of trustworthiness, as well as quality, fitness, capacity and experience to satisfactorily perform [this particular] public works contract” (Public Contract Code § 1103).

The most common basis for a protest, and the easiest to demonstrate, is a defect in a bid that makes it non-responsive. A simple comparison of the bid to the requirements in the bidding documents will demonstrate most responsiveness problems. Some typical

responsiveness issues: The bid is not submitted by the bid deadline; most agencies are prohibited from even opening late bids (Government Code § 53068; Public Contract Code § 10168). The bid does not include an enforceable bid bond or other proper bid security. The bid amount is not certain, and cannot be made certain by rules of interpretation set forth in the bidding documents. The bid fails to cover everything required by the bidding documents. The bid fails to provide all of the information or documents required to be submitted in the bid package. The bid contains modifications or qualifications not permitted by the bidding documents.

Some responsiveness defects are fatal flaws; they preclude the agency from awarding a contract to the bidder. For example, if a bid fails to promise the construction services that the bidding documents seek, then there is a fatal flaw in the bid, and it must be rejected (*National Coach Corp. v. State Board of Control* (1982) 137 Cal. App. 3d 750, 756, 187 Cal. Rptr. 261). The legislature has declared some bid defects to be fatal flaws. For example, statutes barring agencies from even opening late bids necessarily make tardiness a fatal flaw. Another example, Business & Professions Code section 7028.15(e) provides: “Unless [(1) the bidder is exempt from the Contractors State License Law, (2) the contract is for a federally funded local agency project, or (3) the bidder is a joint venture], a bid submitted to a public agency by a contractor who is not licensed in accordance with this chapter shall be considered nonresponsive and shall be rejected by the public agency.” (Aside: Proper licensure is really an issue of the responsibility of the bidder – its fitness or capacity to satisfactorily perform – not the responsiveness of the bid.) If the bidder has no contractor’s license on bid day, the statute requires rejection of the bid. The bid probably also must be rejected if the

contract requires a particular license, but the bidder does not have that license at bid time. The statute may require a bid to be rejected if the contract requires a specialty license for some of the work, but the bidder neither has that specialty license, nor lists a subcontractor to do that work. However, if the bidder does list a subcontractor for the specialty work, the bid cannot be rejected as non-responsive even though the subcontractor is not properly licensed at bid time; instead, the agency can only reject the bidder as being not responsible, after the required due process hearing (*D.H. Williams Construction, Inc. v. Clovis Unified School District* (2007) 146 Cal. App. 4th 757, 53 Cal. Rptr. 3d 345).

On the other hand, some responsiveness defects can be waived by an agency, and the contract can be awarded despite those defects. Only technical or minor defects in a bid can be waived. Moreover, even when a defect is technical or minor, there are limits to what can be waived: The defect “cannot have [1] affected the amount of the bid or [2] given a bidder an advantage or benefit not allowed other bidders” (*Konica Business Machines v. Regents of University of California* (1988) 206 Cal. App. 3d 449, 454, 253 Cal. Rptr. 591). These are 2 distinct tests. If either is met, the defect cannot be waived and the defective bid must be rejected. A late bid (not already barred by a statute) is an example that usually meets both tests. Subcontractors and suppliers typically submit price cuts until seconds before the bid deadline (*Saliba-Kringlen Corp v. Allen Engineering Co.* (1971) 15 Cal. App. 3d 95, 99, 92 Cal. Rptr. 799). Tardiness in submitting a bid allows a bidder to receive and use later last-minute cuts; that gives the bidder an advantage not allowed to bidders who timely submitted their bids. Using those late cuts also likely affects the amount of the bid. An example of an advantage not

allowed other bidders arises from the failure to provide proper bid security with the bid. That failure gives the bidder an option to walk away from its bid without penalty, which bidders who provided adequate bid security cannot do.

Even if a defect in a bid is waivable, the agency does not have to waive the defect. If the agency wants to accept the bid, it will waive the waivable defect; if it does not want to accept the bid, it will refuse to waive the defect. Whether to waive a defect is totally within the agency's discretion; the agency cannot be compelled to waive a defect (*MCM Construction, Inc. v. City and County of San Francisco* (1988) 66 Cal. App. 4th 359, 373-74, 78 Cal. Rptr. 2d 44).

The less common basis for a protest is a challenge to the responsibility of a bidder. A lack of bidder responsibility is harder to demonstrate than a defect making a bid non-responsive; it often requires inquiries beyond the four corners of the bid. Before a bidder can be rejected as not responsible, it must get a due process hearing where it can contest evidence offered to show it is not responsible and can provide its own evidence of responsibility (*City of Inglewood—Los Angeles County Civic Center Authority v. Superior Court* (1972) 7 Cal. 3d 861, 871, 103 Cal. Rptr. 689, 500 P.2d 60). Responsibility is a pass-fail test, not a test of the relative superiority of one bidder over another (*City of Inglewood*, 7 Cal. 3d at 867 & n. 5). The bidding documents will establish, either directly or by implication, the minimum level of quality, fitness, capacity and experience necessary to satisfactorily perform the particular public works contract. If a bidder does not meet those minimum requirements, the bidder is not responsible for this particular job and should not be awarded the contract. In addition, a bidder's history may raise

questions about its trustworthiness or ability to perform the contract, and those, too, can make the bidder non-responsible for the particular job.

FIFTH, you need to understand the costs and risks of a bid protest. Sending a protest letter is relatively inexpensive, even when you get your lawyer involved. However, regardless of the merits of the protest, the agency almost always has the right to reject all bids and to re-bid the project. Courts say this right should be exercised sparingly. Rejecting all bids penalizes the lowest responsible bidder by depriving it of a contract it should have been awarded. Rejecting all bids comes after the bidding process has disclosed the bids – and, therefore, the bidders’ analyses of the job. Bidders’ prices (especially unit prices) show where they figured out unique, or less expensive, ways to do the work, or where they discovered special problems with the job. Lists of subcontractors reveals who would be used (and their prices if that is part of the subcontractor listing requirement). As was explained over 60 years ago, in *Massman Construction Co. v. U.S.* (1945) 102 Ct.Cl. 699, 718, 60 F.Supp. 635, cert. den. 325 U.S. 866, 89 L.Ed 1985, 65 S.Ct. 1403: “To have a set of bids discarded after they are opened and each bidder has learned his competitor’s price is a serious matter, and it should not be permitted except for cogent reasons.”

Finally, if the agency decides to award the contract to the wrong bidder, court review must be pursued immediately. The cost of that review will eat into the profit expected from the job, and, if it is successful, you still run the risk that the agency will reject all bids and rebid the job.

With this knowledge, all bidders in these tough times should be able to make, or deal with, bid protests.