PUBLIC CONTRACTING: KEY TIPS FOR REVIEWING PUBLIC WORKS CONTRACTS

Cal Cities, City Attorneys’ Track, Fall 2022 by
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Agenda

- Public Works Contract Review
- Key Questions
- Special Situations
- Checklist
- Questions?

Public Works Contract Review

LEGAL, ENFORCEABLE CONTRACT

AVOID TYPICAL PITFALLS

FACILITATE PROJECT SUCCESS
Preparation for Contract Review

• Focus on
  • Correct Procedures Followed
  • Substantive Requirements Met
• Review Entire Bid Package, Before Publication and Release to Contractors
• Early communication and regular coordination with Public Works Director and key staff

Key Questions to Build Contract

• Applicable Law
• “Public Project” Status
• Contracting Entity
• Bidding Thresholds
• Project Funding Special Rules
• Environmental Review
• Approved Capital Improvements Plan
Applicable Law?

“Where the statute prescribes the only mode by which the power to contract shall be exercised, the mode is the measure of the power.”

Cities’ power to contract is constrained by:
- State law – Public Contracts Code, Government Code
- City Charter for Charter Cities
- Municipal Code for all Cities
- Special Rules per Funding Sources

Public Project?

Default:
- “Erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement” (Public Contract Code § 1101)

Uniform Public Construction Cost Accounting Act – “public project” means:
- “(1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.
- (2) Painting or repainting of any publicly owned, leased, or operated facility.” (Public Contract Code § 22002)

PCC – Definition for Cities - “public project” means:
- “(a) A project for the erection, improvement, painting, or repair of public buildings and works.
- (b) Work in or about streams, bays, waterfronts, embankments, or other work for protection against overflow.
- (c) Street or sewer work except maintenance or repair.
- (d) Furnishing supplies or materials for any such project, including maintenance or repair of streets or sewers.” (Public Contract Code § 20161)
Prevailing Wages

“Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds” (Labor Code § 1720)

• Generally broader than PCC “public project”
• Requires prevailing wages if over $1000
• Includes certain private contracts using City funds
• Includes pre & post construction activities
• Exceptions may apply, see Dept. of Industrial Relations Determinations and Decisions

Contracting Agency?

City or affiliated entity?

Consider governing law & approval requirements

May be exempt from Public Contract Code, but still require prevailing wages
Competitive Bidding Process

Public Contract Code §§ 20160-20175.2

Formal Bidding
- Notice Inviting Bids/RFP
- Submission of sealed bids
- Public opening of bids
- Award contract to lowest responsible & responsive bidder
- May also reject all bids and readvertise

Uniform Public Construction Cost Accounting Act

Public Contract Code § 22000-22045

- Allows Informal Bidding:
  - PO/Force account up to $60,000
  - Informal Bidding up to $200,000
  - Formal Bidding over $200,000
- Requires City Council resolution & informal bidding ordinance
- If not – any public project over $5,000 requires formal bidding
Using the City’s Own Forces

- Allowed for any project up to $60,000 under UPCCAA
- Allowed for any project, at any value, if City:
  - Completes bidding process
  - Rejects all bids
  - Council finds by 4/5 vote that project can be more economically completed by City’s own forces
  - Requires careful accounting of costs per DIR regulations

Funding Sources?

Federal, State, or County?

Grant Terms?

Nonprofit?

P3 – Public-Private Partnership

Bond covenants?
Environmental Review?

- California Environmental Quality Act
- National Environmental Policy Act
- Resource protection laws
- Other environmental agencies & mitigation requirements

Capital Improvement Plan?

- Council Policy Decision to Undertake Project
- Planning Commission Review of Capital Improvement Plan for General Plan Consistency
Contract Review

- Complete bid package
- Internally consistent
- Accurate bid sheet
- Subcontractor Lists
- Public Contract Review checklist?

Special Situations

- Federally Funded Projects
- Design-Build
- Energy Conservation Projects
Federally Funded Projects

- Sealed bids
- Competitive proposals
- Micropurchases
- Small purchase procedures
- Noncompetitive negotiation

Federally Funded Contracts: Sealed Bids

- Default
- Typical formal bidding process
- Cities must publicly advertise and solicit bids
- Public bid opening
- Contract award to lowest responsive and responsible bidder
Federally Funded Contracts: Competitive Proposal Procurement

- Formal bidding, with qualifications-based selection, not just lowest price
- RFP must identify evaluation method and list all factors and their relative importance
- Contracts must be awarded to responsible offeror with most advantageous proposal, considering price and other factors
- For architectural & engineering professional services: City may exclude price and select most qualified service provider, subject to negotiation of fair and reasonable compensation

Federally Funded Contracts: Micropurchases

Simple acquisition by negotiation or purchase order

Up to $10,000 by default, and up to $50,000 if qualifying low-risk City ordinance
Federally Funded Contracts: Small Purchase Procedures

- Up to $250,000
- Requires price or rate quotes from several qualified sources
- Must still comply with applicable state or local small purchase dollar laws

Federally Funded Contracts: Noncompetitive Negotiation

- Under micropurchase threshold of $10,000
- Service or property only available from a single source
- Declared or extant emergency
- Written permission from awarding federal agency
- City deems competition inadequate after soliciting bids from a number of sources
Design-Build

- Design AND construction services are contracted from a single entity

- **CITIES** may only use design-build contracts for public works projects valued over $1 million

- Specific conflict-of-interest policy

  - *Valid through 1/1/2025*

**Design-Build: a 4-Step Process**

1. Project scope and estimated price
2. City issues RFQ to create shortlist of qualified bidders
3. City issues RFP to qualified bidders
4. City may use “best value” or “low bid” to award contract

NB: Requires project labor agreement or skilled and trained workforce

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Job Order Contracts

- Agreements for fixed price per unit for existing facility renovation/repair
- No specified specific project
- On-call services and goods
- **Not allowed for General Law Cities**
  - 76 Ops Cal Atty Gen 126 (1993)

Energy Conservation Contracts

- Future cost avoidance and savings from energy projects to justify upfront costs of conservation measures through savings program
- Bidding not required
- Hearing Requirement
  - 14-day notice posting requirement
  - Findings supporting conservation savings
- “Conservation measures” = energy saving equipment
Energy Conservation Contracts

Requires two findings:

(1) Energy cost savings exceeds anticipated marginal project costs

(2) Difference, if any, between the fair rental value for the real property subject to the facility ground lease and the agreed rent, is anticipated to be offset by below-market energy purchases or other benefits provided under the energy service contract.

Public Works Contract Review Checklist

1. Invitation for Bids
2. Instruction to Bidders
3. Bid Proposal and Bid Schedule
4. Agreement Form
5. Standard Specifications (Green Book or Caltrans Standard Specs?)
7. Mandatory Forms
8. Insurance Certificates
9. Bonds