



CLIENT NEWS BRIEF

November 2010

Number 56

2010 IN PUBLIC CONSTRUCTION LAW: DEVELOPMENTS FROM THE COURTS

Two court decisions in 2010 shed light on the many complexities school districts face in awarding contracts by public bidding. In the first, the California Supreme Court ruled that contractors may now recover costs for material information a public entity fails to provide contractors that makes the plans and specifications misleading. In the second, an appellate court ruled that a school district had to give a contractor a hearing prior to determining that the contractor's responses to a bid solicitation were false or misleading.

Failing to Disclose Material Information

It has long been the law that a contractor can recover costs of extra work and other expenses when a public entity issues incorrect plans and specifications and the contractor then bids lower than it would have, had the information been correct. Recently, the California Supreme Court considered whether a contractor may also recover costs and expenses from a public entity when the plans and specifications were correct, but misleading, because the public entity failed to disclose information in its possession. (*Los Angeles Unified School District v. Great American Insurance Company et al.* (2010) 49 Cal.4th 739.) In this case, a replacement contractor alleged among other things, that the district failed to disclose a consultant's report that would have alerted the contractor to defects in the existing stucco work. The court ruled that a contractor can recover costs and expenses if the public entity knew but failed, even unintentionally, to disclose information that made the plans and specifications misleading, which then led to a materially lower bid or later caused a material increase in the cost of performance.

However, the court also placed several limitations on when a contractor could claim these costs and expenses. For example, the contractor cannot recover if: 1) the information the public entity provided to the contractor did not mislead the contractor; or 2) that information put the contractor on notice to ask, or look, for further facts; or 3) a reasonable contractor should or would have discovered the information on its own. Furthermore, the public entity had to have had the information in its possession and to have known that the contractor had no knowledge of, nor reason to obtain the information, and the public entity still did not provide the information to the contractor. Future court cases will clarify how these limitations are applied. Until then, public entities should be very diligent in disclosing information in their possession that could materially affect the bid price or the cost of performance, thereby minimizing the risk of claims for additional costs or expenses.

Handling Bid Protests

Given the relative scarcity of private sector construction projects, more contractors are now competing for school district new construction and modernization projects. The competition is sometimes fierce, leading to more bid protests. Bids are traditionally assessed by a public agency according to two factors: first, whether the bid is responsive to the call for bids; and second, whether the bidder is responsible (in terms of trustworthiness, quality, experience, and the like). When a bid is

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not responsive, school districts may reject the bid with minimal process, even if it is the lowest priced bid. However, when a district questions whether a low bidder is responsible, the bidder is entitled to more due process, including a hearing, before the bidder and its bid can be rejected and the contract awarded to the next-lowest bidder.

While it has been generally understood that responsiveness depends on the information supplied in the bid, and responsibility on matters outside of the bid, a recent court decision blurred that line, concluding that even some matters in the bid fall into the responsibility category and so require that the bidder be afforded a hearing. In Great West Contractors, Inc. v. Irvine Unified School District (Sep. 30, 2010, WL 3398893 (non pub.opn.)), the Court of Appeal for California's Fourth Appellate District considered whether a bid was responsive when the bidder answered all the questions in the bid documents, but some answers relating to the bidder's licensing history were, in the opinion of District staff, incorrect or false. The court found that the bid was responsive because the bidder literally complied with the call for bids by answering all of the questions, even if some of those answers were incorrect or false. The court further found that because the determination that the bid contained incorrect or false information required research beyond the face of the bid documents, the issue was one of responsibility rather than responsiveness. As a result, the school district was obligated to give the contractor a hearing on the issues.

The impact this case will have on bid protests is as yet uncertain because the decision has been appealed to the California Supreme Court. The case is, however, part of a growing trend of courts to afford bidding contractors more rights and school boards less discretion. It points to the need for careful consideration of whether issues in a bid review or raised in a bid protest allow a bid to be rejected on its face. Particular care may be needed when dealing with a bid that appears to contain false, incorrect, or misleading information.

If you have any questions regarding issues of disclosure of information relating to plans and specifications, responsiveness and responsibility in bidding, or other questions on bidding issues in general, please do not hesitate to contact any of our [seven](#) offices located statewide, or consult our [website](#).

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