



Ask the Experts

Don't Let Bid Protests Hang Up Your Project

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Bid protests can be project killers, especially in cases where project funding sources have contract award deadlines. Follow these tips to prevent bid protests, and to streamline resolution when they do occur. In general, irregularities in the bidding process can be caused by either the bidder or the district, and while you cannot prevent a bidder from making a careless mistake, there are steps a district can take to minimize the likelihood of bidding errors.

Use Prequalification to Ensure Bidders are Qualified

Use prequalification to limit the pool of bidders to qualified contractors, rather than relying on experience information provided with the bid. If the district uses the bidding process to screen for qualifications, it will need to provide bidders with due process, including a responsibility hearing, in order to reject a bidder for being unqualified, whereas such procedures are not required at the prequalification stage. This issue cannot be sidestepped merely by saying a bid was non-responsive, when the true basis for rejecting the bid is non-responsibility. Failure to provide a bidder with due process when making a responsibility determination is a frequent cause of bid protests.

Be Meticulous in Preparing Your Bidding Specifications

Be sure your bid specifications only ask information that is actually needed for the project. Review bidding specifications carefully to ensure project scope items are not incorporated from old projects, and remove vague

or aspirational criteria. Contractors may omit irrelevant items, or skip over vague criteria when responding to bids, prompting other bidders to protest because the bid was non-responsive. Avoid this type of protest by carefully reviewing your bid specifications to ensure only project-critical information is being sought.

Establish Clear Bid Protest Procedures in Your Bid Documents

Clear and comprehensive bid protest procedures are the key to heading off and managing protests. Your district's protest procedures, set forth in the instructions to bidders, should limit the time to make a protest, and the manner of transmission. Districts commonly limit the time to bring a protest to five to ten days. Districts also frequently require the protest be simultaneously transmitted to other bidders who have a reasonable likelihood of being awarded the project. This allows an opportunity for the other effected bidders to bear the weight of responding to the protest. The procedures should give a deadline for the other bidders to provide a response to the protest, usually within three to five days of receipt, and then the district should allow for sufficient time, perhaps five to ten days, to provide its final decision on the matter. Stick by your protest procedures, and reject non-conforming protests.

Shift the Cost of the Protest to the Low Bidder

Districts should consider including a provision in their bid protest procedure to require that, by the act of submitting a bid, the bidder agrees to defend and indemnify the district against claims arising from alleged defects in the contractor's bid for the project, except such claims which arise from the sole or active negligence of the district.

The use of such provisions is relatively new, and they are untested by the courts. However, there is no reason yet to believe they will not be upheld. Aside from providing a potential mechanism for shifting the cost of protests, the provision may also serve as a tool for motivating the parties to resolve protests early in the process. A low bidder with a serious error in their bid may be more likely to accept the rejection of their bid if the bidder faces exposure to liability in defense of their defective bid. ■

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