

Public Works Contractors Beware: Starting July 1, 2014, Your Bid Must Include the License Number of Each Listed Subcontractor

By: David B. Kuhlman | 619.515.3261 | david.kuhlman@procopio.com

With some exceptions, contracts for public works construction projects in California must be competitively bid and awarded to the lowest responsive and responsible bidder. Generally speaking, a bid is "responsive" only if it promises to do what the public entity's bid instructions require and fully complies with those instructions. As any contractor who has submitted a bid to a public entity is doubtlessly aware, the bid will be closely scrutinized not only by the public entity but also by other bidders for any irregularities. A bid irregularity, in turn, can lead to the rejection of the bid as non-responsive, either by the public entity acting on its own initiative or in response to a bid protest submitted by a competing bidder. In light of the considerable time and resources required to prepare a bid, the typical contractor can ill-afford to overlook any of the competitive bidding rules and requirements.

One such requirement that is historically a fertile ground for bid protests and bid rejection relates to the listing of subcontractors. The Subletting and Subcontracting Fair Practices Act (the "Act"), found at sections 4100-4114 of the Public Contract Code, requires prime contractors to list in their bids each subcontractor that the prime contractor intends to use for any item of work valued in excess of one-half of one percent (0.5%) of the prime contractor's total bid price (the "listing threshold"). The purpose of the Act is to prevent the practices of "bid shopping" (general contractors pressuring other subcontractors to submit lower bids than the listed subcontractors) and "bid peddling" (unlisted subcontractors trying to undercut known bids of listed subcontractors in order to procure the job). To combat these practices, the Act requires the prime contractor to list its intended subcontractors and to use those listed subcontractors for the work unless the prime contractor obtains permission from the public entity for a substitution, which is granted only for limited reasons.

Currently under the Act, the public entity must require all prime bidders to include in their bids the name of the subcontractor, the location of the subcontractor's place of business, and the portion of the work to be performed by the subcontractor. Nothing prohibits the public entity from requiring prime bidders to provide additional information about the subcontractor, such as the dollar value of the work and/or the subcontractor's license number. If the public entity requires such additional information the bidder must provide it in the manner and within the time required by the bid instructions, or risk having its bid rejected as non-responsive. The public entity may require this additional information to be provided with the original bid or may allow it to be provided up to 24 hours after the bid opening. However, the only subcontractor listing information the Act currently requires to be included with the bid is the name, location of business, and portion of the work.

Under a change to the Act that becomes effective July 1, 2014, public entities must require not only the name, location of business, and portion of the work for each listed subcontractor to be included in the bid, but also the subcontractor's license number. In other words, the license number is no longer optional information and no longer may be provided up to 24 hours after the bid opening. The failure of a bidder to provide the license number in the subcontractor listing submitted with its bid will render the bid non-responsive.

Although the information contained herein is provided by professionals at Procopio, the content and information should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.

The revised Act provides some relief to a prime bidder who inadvertently lists an incorrect license number by allowing that bidder to submit the correct license number within 24 hours after bid opening. As long as the corrected license number corresponds to the subcontractor's name and location of business submitted with the bid, the error in the bid will not be grounds for filing a bid protest or considering the bid nonresponsive.

In light of this change to the Act, prime contractors should set aside enough time on bid day (or before, if possible) to conduct the necessary due diligence on subcontractors from which they have received sub-bids. The license number on the subcontractor's written proposal should be cross-referenced to the number published by the Contractors State License Board ("CSLB") on its website (<https://www.cslb.ca.gov>), which also contains the name and location of business corresponding with that license number. Any discrepancies between the information listed on the CSLB website and the information provided by the subcontractor should immediately be addressed and resolved directly with the subcontractor to help avoid what could be a very costly mistake on the prime contractor's subcontractor listing sheet.

For more than 30 years, David B. Kuhlman's practice has focused on serving the construction industry, representing owners, developers, builders and design professionals in every phase of private and public construction, from initial planning through dispute resolution. He practices extensively on the transactional side, where he has structured, negotiated, and drafted design and construction contracts for large projects throughout California and in the southwestern United States.