

**“Best Value Contracting”
The Case for
Pre-Qualification of Bidders
on State and Local Public Contracts**

**One State's Experience:
California's AB 574**

Pre-Qualification of Bidders on Public Contracts

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(from local California Public Agency)**

I. Background

Competitive Bidding Laws

The Federal Davis Bacon Act and most states including California have “competitive bidding laws” designed to “**eliminate favoritism, fraud and corruption** in the awarding of public contracts” and “to provide all qualified bidders with a fair opportunity to enter the bidding process, thereby **stimulating competition**” and “protecting the public from misuse of public funds.” (California Public Contract Code, section 100).

Award to the “Lowest Responsible Bidder”

Such laws generally require that public construction contracts are **publicly advertised** and bids solicited and that award is made to “the **lowest responsible bidder**.”

II. Drawbacks to the Traditional Low Bid System

In California, and perhaps elsewhere, public agencies have all but ignored the essential qualifier “**responsible**” and have focused almost exclusively on the single factor “**lowest**” in the term “lowest responsible bidder.” In fact, until last year (in the legislation authorizing pre-qualification of bidders) California’s Public Contract Code did not even offer a definition of “responsible bidder.”

Public agencies routinely awarded to bidders they feared were irresponsible and incapable of performing to specified standards - because they **feared litigation** from the low bidder. Other agencies were lured by the prospect of big savings from **artificially low bidders**.

Other drawbacks to the low bid system include:

- No way of knowing in advance of award if low bidder is capable of performing the work,
- a totally unqualified contractor can simply “buy” the job merely by submitting the lowest bid,
- Low bidder may lack necessary qualifications, experiences, skilled workforce or resources for the job,
- Project costs can skyrocket due to increased contract administration necessary to insure timely completion, compliance with contract specifications, environmental health and safety, prevailing wage and other labor laws,
- Excessive change orders raise cost of artificially low bid,
- Once the contractor wins the bid, there is no incentive to do a good job - if the work complies with minimum specifications, the contractor must be paid,
- No accountability from one project to the next for past performance problems in terms of schedule, quality, law violations, responsiveness to owner’s concerns or other key criteria that do not factor into lowest bid decisions,
- Past performance difficulties or defaults simply get repeated from job to job.

III. Time for a Change

Although competitive bidding laws were originally designed to **avoid favoritism** and **stimulate competition** among qualified bidders, fair competition has been replaced by a **race to the bottom** - in both price and quality.

Acknowledging the inherent flaws in the traditional low-bid system, including the lack of fair competition; the Office of Federal Procurement recently issued the following policy statement:

“ When the government demands high quality service as a requirement for future business opportunities, as does the private sector, competition will intensify and result in higher quality service by contractors.”

IV. Benefits of Pre-qualification

- **Contractor Fitness Determined Prior to Contract Award**

Contractor responsibility can be determined in more thorough, less rushed atmosphere; less pressure to qualify the lowest bidder so the job can commence; qualified bidder can maintain status for up to one year or more.

- **Accurate Project Specifications**

Pre-qualifying bidders requires the agency to focus at the outset on the nature of the project at issue and the past experience and current ability that contractors performing the work should have.

- **Individual Project Bidding Limited to Qualified, Responsible Bidders**

Specifying qualifications at the outset lets prospective contractors know what the agency is looking for before those contractors expend a great deal of time and money reviewing specifications and preparing bids. Specifying qualifications at the outset will discourage many unqualified contractors from bidding and encourage truly qualified bidders to go through the bidding process. It will also encourage general contractors to select only those subcontractors that are truly qualified.

- **Less Litigation, Disputes, Bid Protests**

A contractor may consider challenging a determination that he is not a responsible bidder. If, however, that determination is made **before** a bid, the contractor will have **less** incentive and ability to successfully challenge the agency's action in court. There is less incentive because the contractor has not spent time and money preparing a bid, and has not been selected as the lowest bidder, only to be disqualified thereafter; there is also less likelihood that a challenge will be successful since the contractor cannot claim that it would have been awarded the work but for the disqualification.

V. Sample Pre-qualification Criteria / Elements

- **Financial Stability / Capability** (Bond ability, credit line, insurance),
- **Experience** (Including years in business, experience on similar type/size jobs, trained workforce),
- **Past Performance** (Timeliness, quality, defaults, lawsuits, liens, stop notices, consumer complaints, workers compensation claims, liquidated damages, change orders),
- **Labor Law Compliance** (Prevailing wage, apprenticeship, OSHA, EPA),
- **Management Capability** (Operational controls, qualified management, supervisory staff, on-site superintendent, training and safety initiatives, subcontracting plans),
- **References** from other Public Agencies and Private Owners

VI. Synopsis of California's Responsible Bidder Law

- Defines responsible bidder to include trustworthiness, quality, fitness, capacity and experience to satisfactorily perform the public works contract.
- Expands authority to remove a subcontractor "when the awarding authority determines that a listed subcontractor is not a responsible bidder."
- Allows awarding agencies to pre-qualify contractors by requiring the submission of a standardized questionnaire and financial statement.
- Requires the DIR (the state's Department of Labor), in consultation with interested parties, to establish model guidelines for rating bidders and draft a standardized questionnaire that may be used by awarding agencies.
- Pre-qualification questionnaires and financial statements are not public record; however, names of contractors applying for pre-qualification are subject to disclosure.
- Pre-qualification systems must be uniform and objective and can establish qualification as to size and type of projects to be bid as well as general qualifications.
- Pre-qualification may be established quarterly and shall be valid for one-year after qualification.
- Awarding agencies establishing pre-qualification must establish a timely appeal process.
- Non-qualified contractors must be given notice, upon request, of the basis for the disqualification and the opportunity to rebut.
- Specified small business shall not be subject to the financial statement requirements.