

## STATE BID PROTESTS:

Randall L. Erickson  
Crowell & Moring LLP

### I. BID PROTESTS (GENERALLY: focusing on California case law)

- A. Public entities (states, counties, cities, districts, etc.) usually promulgate their own rules and procedures pertaining to bid protests, and it is necessary to understand and comply with the applicable rules and procedures. However, there are some general principles that usually apply to all procurements.
- B. Three Important Principles
  - 1. Principle Number One: The public entity has the right to reject all bids.
  - 2. Principle Number Two: The public entity is required to follow its own rules when it has a ministerial duty to do so. See Pozar v. Dept. Of Transportation, 145 Cal.App.3d 269 (1983) (holding that CalTrans was required to follow its published procedure for resolving discrepancies in bid figures).
  - 3. Principle Number Three: Competitive bidding is usually required, meaning that the public entity must award the contract to the lowest responsible and responsive bidder. See, e.g., Public Contract Code sections 10180 (State of California), 10501 (University of California), 20111(school districts), 20121 (counties), 20162 (cities), 20192 (municipal utility districts), etc.
- C. Purpose of Competitive Bidding
  - 1. The purpose of statutes, charters, or ordinances requiring competitive bidding is “to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable, and they are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest”. See Domar Electric, Inc. v. City of Los Angeles, 9 Cal. 4th 161, 174 (1994).



C. Preference for California Contractors


1. The Public Contract Code provides that a state agency awarding construction contracts must grant to California contractors a reciprocal preference against out-of-state contractors equal to the amount of any preference in favor of its resident contractors allowed by the state or country where the out-of-state bidder resides. Public Contract Code § 6107 was amended effective January 1, 1997 to require a non-resident contractor, at bid time, to disclose to the awarding authority any and all bid preferences provided to resident contractors by the state or country in which the non-resident bidder has its principal place of business. See Public Contracts Code section 6107 (State of California).

D. Responsibility

1. A bidder is responsible if it can perform the contract as promised. Thus, the concept of responsibility focuses on the contractor's trustworthiness, quality, fitness and capacity to satisfactorily perform. See City Of Inglewood-Los Angeles Civic Center Auth. v. Superior Court, 7 Cal.3d 861 (1972).

E. Responsiveness

1. Most bid protests focus on the issue of responsiveness.
2. "A basic rule of competitive bidding is that bids must conform to the specifications, and that if a bid does not so conform, it may not be accepted. However, it is further well established that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders." See Ghilotti Construction Co. v. City Of Richmond, 45 Cal.App.4th 897 (1996), quoting 47 Ops.Cal.Atty. Gen. 129.
3. The determination of whether a bid deviation is material or inconsequential is a question of fact. Some factors include:
  - i. Could the deviation affect the price of the bid;
  - ii. Did the deviation give the bidder an advantage not allowed other bidders;


- 
- iii. Was the deviation a vehicle for favoritism;
  - iv. Did the deviation impair the public entity's ability to make bid comparisons; and
  - v. Did the deviation permit the contractor to withdraw its bid, without forfeiting its bid bond, under Public Contract Code section 5103.

4. However, a public entity is not required to waive a nonmaterial bid deviation, and can demand strict compliance with the bidding documents. See MCM v. City & County Of San Francisco, 66 Cal.App.4th 359, 373 (1998) ("An agency has discretion to waive immaterial deviations from bid specifications and accept the bid under certain conditions. The point of discretion is that the agency may properly act in either direction. It may waive or refuse to waive such deviations."); see also Ghilotti Construction, 45 Cal.App.4th at 897.

- a. Successful bidder's deviation from bid specifications in submitting name of one contractor in wrong envelope was inconsequential deviation that did not affect price or give competitive advantage, and thus deviation could be waived. See MCM, 66 Cal.App.4th at 374.

But some courts in other states have held that a public entity must waive deviations that are really minor. See, e.g., Chris Berg, Inc. v. State Of Alaska, 680 P.2d 93 (Alaska 1984) (mistakenly entering price information on the wrong line); Foley Bros. V. Marshall, 123 N.W.2d 387 (Minn. 1963) (failure to submit a non-collusion affidavit); Centric Corp. v. Barbarossa & Sons, Inc., 521 P.2d 874 (Wyo. 1974) (failure to submit an affirmative action plan).

5. It is extremely difficult to reverse the decision of the public entity, so a contractor should do everything reasonably possible to win at the public entity level. The procedure to reverse a public entity's decision is to bring a mandamus action in state court. The legal standard in a mandamus action is not whether the public entity was right or wrong, but whether or not the public entity's actions were arbitrary, capricious, entirely lacking in evidentiary support or inconsistent with proper procedure. There is a presumption that the public entity's




actions were proper. See Ghilotti Construction, supra see also Washington Mechanical Contractors, Inc. v. United States Dep't of the Navy, 612 F. Supp. 1243 (N.D.Ca. 1984) (A showing of clear illegality is an appropriate standard to impose on an aggrieved bidder who seeks judicial relief.).

## **II. BID PROTESTS PROCEDURES (CALIFORNIA)**

### **A. State Contracting for Public Works Projects**

1. Public notice of project must be given by publication once a week for at least two weeks. The department making the award must adopt a uniform system of rating bidders on the basis of the questionnaires and financial statements they submit for prequalification. Cal. Pub. Cont. Code §§ 10140, 10160, 10163.
2. All bids must be presented under sealed cover and accompanied by ten percent of the bid amount. On the day named in the public notice, the department making the award must publicly open the bids and award the bid to the lowest bidder. Cal. Pub. Cont. Code §§ 10167, 10180.
3. If the director of the department making the award deems acceptance of the lowest responsible bid is not in the best interests of the state, he may reject all bids. Cal. Pub. Cont. Code § 10185.
4. Traditional mandamus under Cal. Code Civ. Proc. § 1085 (vice administrative mandamus under Cal. Code Civ. Proc. § 1094.5) is the remedy to prevent award to other than the lowest responsible bidder. See Ghilotti Constr., 45 Cal. App. 4th at 897. However, disappointed bidders first must comply with the administrative protest procedures in the bid instructions. Failure to do so waives any right to challenge the bid by mandamus. MCM Constr., Inc., 66 Cal. App. 4th at 378-83.
5. Upon petition for a writ of mandate, the trial court reviews the agency's proceedings for abuse of discretion. In doing so, the court has to determine whether the agency's actions were arbitrary, capricious, entirely lacking in evidentiary support, or inconsistent with proper procedure. There is a presumption that the agency's actions were supported by substantial evidence,




and the protestant has the burden of proving otherwise. See Ghilotti Constr., 45 Cal. App. 4th at 903.

**B. State Procurement of Goods, Telecommunications and Electronic Data Processing**

**1. Goods Except Telecommunications and Electronic Data Processing**


- a. Subject to certain exceptions, contracts for over \$10,000 in goods must be entered into with the lowest responsible bidder meeting specifications. Cal. Pub. Cont. Code § 10301.
- b. Disappointed bidders may properly protest only upon the ground that they were the lowest responsible bidder meeting the specifications. See Cal. Pub. Cont. Code § 10306; Cal. Code Reg. tit II, § 872.7(b)(1).
- c. Disappointed bidders may protest by filing with the State Board of Control (“SBC”) a written protest within 24 hours of notice of intent to award. Cal. Pub. Cont. Code § 10306; Cal. Code Reg. tit II, § 872.1(a).
- d. If protest is timely filed, the contract will not be awarded until either the protest has been withdrawn or the SBC has made a final decision on the protest. Cal. Pub. Cont. Code § 10306.
- e. Procurement Division (“PD”) of the Department of General Services (“DGS”) submits the notice of protest, a bid protest summary and relevant bid documents to the SBC within 3 working days of receiving a protest. See Cal. Code Reg. tit II, §§ 872.2, 872.4. PD makes relevant bid documents available for inspection within three working days of receiving a written request from a party to the protest if the request is made within five calendar days after receipt of the detailed statement of protest. Cal. Code. Reg. tit II, § 872.5.
- f. Within 10 calendar days after filing a protest, the protesting vendor must file with the SBC a full and complete statement of the relevant law and facts supporting that the protestant is the lowest responsible



bidder meeting specifications. Cal. Pub. Cont. Code § 10306; Cal. Code Reg. tit II, § 872.7(a), (c).


- g. After reviewing the detailed statement of protest and responses of the parties, the Executive Officer (“EO”) must either schedule the protest for further hearing or recommend that the SBC dismiss the protest. If a further hearing is scheduled, the EO must assign the protest to a Hearing Officer (“HO”) and give written notice to the parties of the hearing. Cal. Code Reg. tit II, §§ 872.10, 872.11.
- h. At a hearing, the protestant bears the burden of proof. See National Coach Corp. v. Board of Control, 137 Cal. App. 3d 750, 757 (1982). The protestant must prove by a preponderance of the evidence that it is the lowest responsible bidder meeting specifications.
- i. The HO or EO decides whether the hearing will be limited to submission of written materials, or whether oral evidence will be permitted. Cal. Code Reg. tit II, § 873.3.
- j. The SBC may dismiss the protest if the detailed statement of protest is not timely filed, if the detailed statement of protest fails to set forth law and facts supporting that the protestant was the lowest responsible bidder meeting specifications, if the SBC does not have jurisdiction over the protest, or if the protest is entirely without merit. Cal. Code Reg. tit II, §§ 872.2, 872.7, 872.10.
- k. The decision of the SBC is reviewable by administrative mandamus under Cal. Code Civ. Proc. 1094.5. See National Coach, 137 Cal. App. 3d at 755.
- l. Upon a petition for administrative mandamus, the trial court reviews the SBC decision to determine whether the SBC acted in excess of its jurisdiction, whether there was a fair hearing, and whether there was a prejudicial abuse of discretion. See Cal. Code Civ. Proc. § 1094.5(b)-(c); NBS Imaging Sys., Inc. v. State Board of Control, 60 Cal. App. 4<sup>th</sup> 328, 335 (1997); *reh’g denied, review denied* (1998).




- 
- m. In addition, any person acting on behalf of the state, may bring a civil action seeking a determination by the Superior Court that a contract has been entered in violation of the applicable contracting statutes for procurement of materials, supplies, equipment and services. If the action results in a final determination that the contract has been entered into in violation of the applicable statutes, the contract shall be void. Cal. Pub. Cont. Code § 10421.

**2. Telecommunications and Electronic Data Processing**

- a. Bidders must timely protest defects in the request for proposal (“RFP”) to DGS. If not, bidders may not subsequently raise the issue in a bid protest. Digital Biometrics, Inc. v. Anthony, 13 Cal.App.4<sup>th</sup> 1145 (1993).
- b. Contract awards are based on the proposal that provides the most “value-effective” solution to the state’s requirements. See Cal. Pub. Cont. Code § 12102(a)-(b).
- c. Disappointed bidders may properly protest the intended contract award only upon the ground that they would have been eligible for the award of the contract if the agency had scored his or her proposal correctly or if the agency had correctly followed the procedures specified in the Public Contract Code. See Cal. Pub. Cont. Code § 12102(h); Digital Biometrics, 13 Cal. App. 4<sup>th</sup> at 1152-55. If a disappointed bidder’s bid does not comply with the RFP requirements, he may not protest that his bid should have been selected. Digital Biometrics, 13 Cal. App. 4<sup>th</sup> at 1156.
- d. Disappointed bidders may protest by filing with the awarding agency and the PD of the DGS a written protest no later than five working days after the issuance of an intent to award. Cal. Pub. Cont. Code § 12102(h); Cal. Code Reg. tit II, § 872.1(b).
- e. If a protest is timely filed, the contract shall not be awarded until either the protest has been withdrawn or the SBC has decided the matter. See Cal. Pub. Cont. Code § 12102(h).


- 
- f. Within 10 calendar days after filing a protest, the protestant must file with the SBC a full and complete statement of the relevant law and facts supporting that the protestant's bid should have been selected. Cal. Pub. Cont. Code § 12102(h); Cal. Code. Reg. tit II, § 872.7(a), (c); Digital Biometrics, 13 Cal.App.4<sup>th</sup> at 1152-55.
  - g. PD of DGS submits the notice of protest, a written bid protest summary and relevant bid documents to the SBC. See Cal. Code Reg. tit II, §§ 872.2, 872.4. PD makes the relevant bid documents available for inspection within three working days if a party makes a request within five calendar days after receipt of the detailed statement of protest. Cal. Code. Reg. tit II, § 872.5.
  - h. After reviewing the detailed statement of protest and responses of the parties, the EO either schedules the protest for further hearing or recommends that the SBC dismiss the protest. If a further hearing is scheduled, the EO must assign the protest to an HO and give written notice to the parties of the hearing. Cal. Code Reg. tit II, §§ 872.10, 872.11.
  - i. At a hearing, the protestant bears the burden of proof. See National Coach, 137 Cal.App.3d at 757. The protestant must prove by a preponderance of the evidence that it is the lowest responsible bidder meeting specifications in order for the protest to be granted.
  - j. The HO or EO decides whether the hearing will be limited to submission of written materials, or whether oral evidence will be permitted. Cal. Code Reg. tit II, § 873.3.
  - k. The SBC may dismiss the protest if the detailed statement of protest is not timely filed, if the detailed statement of protest fails to set forth law and facts supporting that the protestant's bid should have been selected in accordance with the selection criteria in the solicitation document, if the SBC does not have jurisdiction over the protest, or if the protest is entirely without merit (see Digital Biometrics, 13 Cal.App.4<sup>th</sup> at 1150).



- 
- l. The decision of the SBC is reviewable in administrative mandamus. National Coach, 137 Cal.App.3d at 755.
  - m. Upon a petition for administrative mandamus, the trial court reviews the SBC decision to determine whether the SBC acted in excess of its jurisdiction, whether there was a fair hearing, and whether there was a prejudicial abuse of discretion. See Cal. Code Civ. Proc. § 1094.5(b)-(c); NBS, 60 Cal.App.4<sup>th</sup> at 335. The trial court may not grant relief based on a legal theory not presented during the administrative proceedings. NBS, 60 Cal.App.4<sup>th</sup> at 337.

**C. State Procurement of Services or Consultant Services**

1. For Invitations to Bid (“IFBs”), disappointed bidders may properly protest only upon the ground that they were the lowest responsible bidder meeting the specifications. See Cal. Pub. Cont. Code §§ 10343, 10376; State Contracting Manual § 6.02.A.1.
2. For RFPs, disappointed bidders may properly protest only upon the ground that they would have been eligible for the award of the contract if the agency had scored his or her proposal correctly or if the agency had correctly followed the procedures specified in the Public Contract Code. See Cal. Pub. Cont. Code §§ 10345, 10378; State Contracting Manual § 6.02.A.2.
3. Bid protest is made by filing a written protest with the awarding agency and the PD of the DGS within five working days after notice of proposed award. See Cal. Pub. Cont. Code §§ 10343; 10345, 10376, 10378.
4. If protest is timely filed, the contract shall not be awarded until either the protest has been withdrawn or the DGS has decided the matter. See Cal. Pub. Cont. Code §§ 10343; 10345, 10376, 10378.
5. Within five days after filing the protest, the protesting bidder must file with DGS a full and complete written statement specifying the grounds for the protest. See Cal. Pub. Cont. Code §§ 10343; 10345, 10376, 10378.

- 
6. Following receipt of a protest, the DGS determines whether the protest is to be resolved by written submission of material or by public hearing and gives the parties notice. Cal. Code Reg. tit II, § 1195.2.
  7. If DGS finds that a protest is clearly insufficient on its face, entirely without merit, or outside the scope of the jurisdiction of the DGS, it may make final disposition of the protest forthwith. Cal. Code Reg. tit II, § 1195.2
  8. DGS will make its decision on any protest within 30 calendar days after submission for decision. Cal. Code. Reg. tit II, § 1195.5.

### **III. BID PROTESTS ON STATE OF FLORIDA PROCUREMENTS<sup>1</sup>**

- A. The Process for Filing a Protest After Award Requires a Disappointed Bidder to Follow a Number of Procedures
  1. The process begins with the State agency providing a notice of intended award to all bidders. The notice informs bidders that failure to file a protest within 72 hours after notification constitutes a waiver of any protest thereafter.
  2. A notice of protest must then be filed within the 72-hour period.

---

<sup>1</sup> The statutory authorities for the procedures described in this section are found in Sections 120.57 of the Florida Statutes; Chapter 28-110 of the Florida Uniform Rules of Procedure; and the Florida Rules of Appellate Procedure.




the


- a. The notice may be deemed premature if it is filed prior to commencement of the 72-hour period.
- b. A bid protest bond must be filed with the notice of protest.
3. A formal protest, or petition, must then be filed within 10 days after the notice of protest is filed. The formal protest states with particularity the facts and law upon which the protest is based.
4. Once the formal protest is filed, the agency must stay or suspend the contract award process until the protest is resolved and a final agency action is reached. The agency may override the stay "in order to avoid an immediate and serious danger to the public health, safety, or welfare."
5. The Agency Must Try to Resolve the Protest

The agency is required to try to resolve the protest through a negotiation process within 7 working days after the formal written protest is filed.

6. The Next Step is Referral for an Administrative Hearing
  - a. If the protest is not resolved by mutual agreement, and there are material issues of fact in dispute, the agency refers the protest to the Division of Administrative Hearings ("DOAH"). An administrative law judge at DOAH will then conduct a de novo hearing proceeding.
  - b. If at any time during the hearing, a genuine issue of material fact no longer exists, any party may move for the administrative law judge to relinquish jurisdiction back to the agency.
  - c. The standard of review at DOAH is whether the agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. The protester has the burden of proof.
7. The Proceedings at DOAH are on a Fast Track and are Favorable for a Protester

- 
- a. The hearing must commence within 30 days after the protest is referred to DOAH. Parties obtain the relevant documents through a public records request which the agency is required to respond to expeditiously.
  - b. Prior to the commencement of the hearing, the parties are entitled to the full range of discovery. Interrogatories, requests for production of documents and, most importantly, depositions are permitted. In this sense, the discovery process in Florida is reminiscent of the bid protest process that formerly was in place for ADP procurements in the federal arena at the General Services Administration Board of Contract Appeals ("GSBCA").
  - c. The protester is permitted to file an amended protest if it learns of new grounds during the discovery process.
  - d. The hearing can consume as many days as the parties believe will be necessary to present their respective positions. Witnesses are presented for both direct examination and cross-examination.
  - e. Once the hearing has concluded, the administrative law judge is required to issue a recommended order within 30 days after the hearing or 30 days after the hearing transcript is received by the administrative law judge, whichever is later. Each party then has ten days to submit written exceptions to the recommended order.
  - f. The matter is then referred back to the agency for a final order within 30 days after the recommended order is entered. The agency is not required to follow the administrative law judge's order.

8. A Protester Who Loses at the Administrative Level May Subsequently Seek Judicial Review



The Circuit Court of Appeals has jurisdiction to review the final administrative action. The scope of review by the Circuit Court is a record review. An appeal must be filed within 30 days after the agency issues its final order and the appeal must be accompanied with a bond.

#### **IV. BID PROTESTS ON STATE OF NEW YORK PROCUREMENTS**

##### **A.. Introduction**


New York has laws and forums that generally correspond to federal procurement. However, they are less well developed.

##### **B. General Municipal Law**

1. Section 100-a provides that the purpose of the law is to "assure the prudent and economical use of public monies for the benefit of all the inhabitants of the state and to facilitate the acquisition of facilities and commodities of maximum quality at the lowest possible price." N.Y. Gen. Mun. Law § 100-a.
2. Section 103 is the principal provision. It requires awards to be made to the lowest responsible bidder. By court decision, this has been held not to apply to professional services contracts and other contracts in which the quality of performance is important. N.Y. Gen. Mun. Law § 103.

##### **C. State Finance Law**

1. Any contract over \$10,000 in amount must be reviewed and approved by the Comptroller. N.Y. Fin. Law § 112.2(a). The Comptroller reviews proposed procurements for "improvidence" and consistency with the letter and spirit of the procurement laws. See City of New York, 87 N.Y.2d 982, 985 (1996); Konski Engineers, P.C. v. Levitt, 415 N.Y.S.2d 509 (3d Dept. 1979), *affid on the basis of the appellate court's memorandum*, 49 N.Y.2d 850 (1980). The Comptroller will entertain bid protests by interested parties, but the procedures are informal and there is no hearing right and no published decision.
2. Whenever competitive bidding is required, the contracting authority must obtain a non-collusive bidding certification from the bidder in order for the bid to be considered and for award to be made to the bidder. N.Y. Fin. Law § 139-d.

- 
3. Section 163 of the Finance Law governs services contracts, and there are other laws that deal with other types of contracts.

D. Court Action

1. Disappointed bidders have standing and may bring an action in the appropriate Supreme Court. Eg., AEP Resources Serv. Co. v. Long Island Power Auth., 686 N.Y.S.2d 664 (1999).
2. Taxpayers have standing under State Finance Law § 123-b to enjoin wrongful expenditures or unlawful action by an officer or employee of the state. The taxpayer does not have to show any particular injury or special aggrievement. See Transactive Corp. v. New York State Dept. Of Social Servs., 92 N.Y.2d 579 (1998).

**INTERESTING BID PROTEST ISSUES & HOW  
DIFFERENT JURISDICTIONS HAVE RESPONDED<sup>2</sup>**

A. Tortious Interference in Bidding

1. In a deeply contentious case regarding a bid pursuant to the Virginia Procurement Act, the Supreme Court of Virginia ruled that a protesting bidder is not protected from liability for claims of business torts. The court unanimously ruled that a party protesting an award may face liability for its statements made as part of a bid protest. Therefore, a bid protest is not a quasi-judicial proceeding where statements receive absolute privilege. See Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc., 259 Va. 92 (2000).


B. Consequences of Noncompliance with Statutory Requirements

1. Some courts will allow the contractor who has already performed under a contract that should have been competitively bid but was not

---

<sup>2</sup> Some issues not mentioned in this memo but worth noting are: (1) prequalification requirements are usually allowed so long as they are not unduly restrictive; (2) bid security is usually required with any bid. If the bid security is given in a different form than that specified in the RFP it will generally be accepted, but if the amount is less than that specified in the RFP, it will be considered a material deviation and the bid will be rejected; (3) there are exceptions to the competitive bidding laws such as the professional services exception.





to recover in quantum meruit on a theory of unjust enrichment. See Earthmovers of Fairbanks, Inc. v. State, 765 P.2d 1360 (Alaska 1988); A.V. Smith Constr. Co. v. Maryland Casualty Co., 450 So. 2d 39 (La. Ct. App. 1984); Blum v. City of Hillsboro, 49 Wis. 2d 667 (1971).


2. Other courts, however, adhere strictly to the principle that a contract let in violation of competitive bidding requirements is void and unenforceable, even though the result may leave the contractor out in the cold. See Hoiten v. City of Canistota, 1988 S.D. 44 (1998); Riley v. City of Hannibal, 712 S.W.2d 49 (Mo. App. 1986); D'Angelo v. Cole, 67 N.Y.2d 65 (1986).

C. Timeliness of Bid

1. The time deadlines for the submission of bids specified in the RFP generally constitute material requirements that cannot be waived. Consequently, if the bid arrives late at the place of opening, it will most likely be rejected as nonresponsive. For example, in George A. Nole & Son, Inc v. Bd. Of Edu., a bid submitted two minutes after the opening deadline was rejected as nonresponsive. George A. Nole & Son, Inc. v. Bd. Of Edu., 514 N.Y.S.2d 274 (1987).
2. Some courts, however, have relaxed the rule when the circumstances were unusual and there was no suggestion of fraud or collusion. See Turner Constr. Co. v. N.J. Transit Corp., 296 N.J. Super. 530 (1997); William M. Young & Co. v. West Orange Redevelopment Agency, 125 N.J. Super. 440 (1973) (Delay allowed where the bidder's representative was delayed by unusual weather and called to inform the contracting agency of the delay).

E. Bid Specifications (Project Labor Agreements ("PLA"))


1. California courts give great deference to the contracting agency's determination that a PLA does not violate competitive bidding laws. Court will make the determination on a case-by-case basis by looking at whether the requirement is "arbitrary, capricious, entirely lacking in evidentiary support, or procedurally unfair." See Associated Builders and Contractors, Inc. v. San Francisco Airports Comm'n, 21 Cal. 4th 352 (1999).
  - a. In Associated Builder, no bidder was disqualified from submitting bids. Provided the contractor submits a responsive bid, i.e., agrees to abide by the terms of the PLA, its bid stands on an equal footing with all others. The PLA includes provisions designed to prevent strikes, slowdowns and other work stoppages, and to ensure contractors a steady and reliable source of skilled labor for the project. The Commission could



---

properly find that these provisions serve the goals of the competitive bidding laws. Therefore, the PLA is valid under California competitive bidding laws.

2. In Ohio the law is similar to that in California. The federal court of appeals concluded the county did not abuse its discretion by determining the “best” bidder would be one willing to ratify a project labor agreement designed to secure labor harmony on the project, such a requirement being consistent with Ohio competitive bidding policy. See Enertech Elec., Inc. v. Mahoning County Com’rs, 85 F.3d 257 (6th Cir. 1996); see also State ex rel. v. Jefferson Cty. Bd., 106 Ohio App.3d 176 (1995).
3. In Minnesota, the court upheld a city’s decision to include a PLA in the specifications for the construction of a civic center. A non-union contractor objected to the PLA and sued the city for declaratory and injunctive relief. The trial court denied the contractor’s request, and subsequently, the Court of Appeals declined to reverse the trial court, holding that a city’s decision how to exercise its power to award contracts is entrusted to the city’s discretion and that a court should be wary to interfere. See Queen City Constr., Inc. v. City of Rochester, 604 N.W.2d 368 (Minn. App. 1999).
4. In Connecticut, the courts have held that a PLA is within the city’s discretion and unsuccessful bidders lack standing to challenge the award of a public contract except where “fraud, corruption or acts undermining the objective and integrity of the bidding process existed.” Connecticut Assoc. Builders & Contractors v. City of Hartford, 251 Conn. 169, 178-179 (1999).
5. In Pennsylvania, courts have also held that inclusion of a PLA in bid specifications were within the discretion of the authority. The Pennsylvania court found that the PLAs do not unduly favor union contractors. The PLA does not require any contract to become a “union” contractor, but “requires any persons or entity as a condition of being engaged to perform work on the project to agree to be bound by the same rules and restrictions as all other similarly engaged.” A. Pickett Constr. v. Luzerne County Convention Ctr. Auth., 738 A..2d 20, 26 (Pa. Commw. 1999).
6. New York, however, has some different rules pertaining to PLAs. Although the New York high court has observed that project labor agreements are neither absolutely prohibited nor absolutely permitted in public construction contracts under New York procurement law, they evidently employed a standard of review that placed the burden on the agency to demonstrate the appropriateness of the PLA as a bid specification, rather than on the party challenging the specification to



show the agency acted arbitrarily and capriciously in adopting the requirement (California Law). See N.Y. State Chapter v. Thruway Authority, 88 N.Y.2d 56 (1996).

7. In New Jersey, the New Jersey Supreme Court has made it clear that project labor agreements are not per se illegal under the laws of the state, although it appeared to conclude such agreements may be required only in exceptional circumstances.” Therefore, New Jersey seems to employ a standard of review of administrative agency quasi-legislative decision making that is much less deferential than California. Tormee Const. V. Mercer County Imp., 143 N.J. 143, 149-151 (1995).

#### D. Listing Requirements

1. Several jurisdictions take the position that the potential for bid shopping that is inherent in either a multiple listing or a listing of none gives the non-complying bidder a competitive advantage over other bidders and requires rejection of the non-complying bid. See Dugan Constr. Co. v. Sussex County, C.A. No. 14098, 1995 Del. Ch. LEXIS 32 (1995); E.M. Watkins & Co. v. Board of Regents, 414 So. 2d 583 (Fla. Dist. Ct. App.) *appeal denied*, 421 So. 2d 67 (Fla. 1982); Holman Erection Co. Orville E. Madson & Sons, 330 N.W.2d 693 (Minn. 1983); Le Cesse Bros Contracting v. Town Board of Williamson, 403 N.Y.S.2d 950 (1978), *aff'd*, 415 N.Y.S.2d 413 (1979); Ray Bell Constr. Co. v. School Dist., 331 S.C. 19 (1988); Land Constr. Co. v. Snohomish County, 40 Wash. App. 480 (1985).
2. Other jurisdictions that do not decry bid shopping, either by judicial fiat or by statute, generally treat the issue of listing requirements as a matter of responsibility which can be addressed after the bid opening. See ZAV Contractors, Inc., No. P. 76 (D.C. B.C.A. 1988); Roofers, Inc., MSBCA 1284 Md. B.C.A. (July 11, 1986).

#### E. Rejection of Bids and Post-Bid Negotiations

1. Where a contracting authority has rejected all bids, some states allow negotiation with the lowest bidder to lower its price so long as the scope of the contract does not change. See Acme Bus Corp. v. Bd. Of Edu., 91 N.Y.2d 151 (1997); Transactive Corp. v. New York State Dep't of Soc. Servs., 665 N.Y.S.2d 701 (N.Y. App. Div. 1997); Prete Enters. v. Bartlett, NO. CV95 0374293, 1995 Conn. Super. LEXIS 1996 (Conn. Super. Ct. July 10, 1995).
2. Absent legislation, however, most states take the position that post-bid negotiations are contrary to the public policy underpinnings of competitive bidding and are not permitted. See, e.g. Lovering-Johnson, Inc. v. City of Prior Lake, 558 N.W.2d 499 (Minn. App. 1997); Hanson Excavating Co. v.

Cowlitz Co., 28 Wash. App. 123 (1981); NVC Computer Sales v. City of Phila., 695 A.2d 933 (Pa. Commw. 1997).

3. In Mississippi, the high court held that where a bidder was allowed to increase his bid after the bid opening and was still awarded the contract as the lowest bidder, the award would be in violation of Mississippi law. The court noted that permitting the withdrawal, but not the amendment, of an erroneous bid is consistent with general principles of contract law that mandate rescission rather than reformation as the proper remedy for unilateral mistakes. See Hemphill Constr. Co., Inc. v. City of Laurel, 760 So. 2d 760 (Miss. 2000).

#### F. Disappointed Bidder Standing to Challenge a Government Contract Award

##### 1. Suits Brought by Out-of-State Disappointed Bidders


- a. Most states follow the rule that where a disappointed bidder is not a taxpayer within that state, they may only bring a bid protest suit where fraudulent, collusive, or dishonest circumstances are involved. See Healthamerica Corp. v. Humana Health Plan, Inc., 697 S.W.2d 946, 948 (Ky. 1985) (noting that for purposes of standing, an unsuccessful bidder lacks a sufficient legal interest in a contract entered into by the government with a competitor); Gannett Co. v. Delaware, No. CIV.A. 12815, 1993 WL 19714, \*1 (Del. Ch. Jan. 11, 1993) (Denying standing to a disappointed bidder and relying on the notion that competitive bidding laws and practices are primarily intended to protect the taxpaying public and not individual bidders)

##### 2. Suits Brought by Disappointed Taxpayers within the State

- a. Most states allow suits by taxpaying members of the public to challenge an improperly awarded government contract. See Gannett Co. v. Delaware, No. CIV.A. 12815, 1993 WL 19714, \*1 (Del. Ch. Jan. 11, 1993); Federal Elec. Corp. v. Fasi, 527 P.2d 1284 (Haw. 1974); American Totalisator Co. v. Seligman, 414 A.2d 1037 (Pa. 1980); Pioneer Co. v. Hutchinson, 220 S.E.2d 894 (W. Va. 1975), *overruled on other grounds*.

##### 3. A Few States Allow Suits by Non-taxpaying Disappointed Bidders

- a. The Tennessee court stated that “unsuccessful bidders are most likely to have an incentive to bring suit to compel agencies to comply with the requirements controlling government contracts.” See Metro. Air Research Testing Auth. V. Metro. Gov’t, 842 S.W.2d 611 (Tenn. Ct. App. 1992). This assertion is logical in that a taxpaying member of the general public may have a legal interest in the expenditure of government funds




sufficient to support standing, but such an individual ordinarily has neither the time, nor the inclination, nor the resources to challenge a government contract awarded to an improper bidder or in violation of competitive bidding requirements. See id. at 611; see also Walt Bennett Ford, Inc. v. Pulaski County Special Sch. Dist., 624 S.W.2d 426 (Ark. 1981) (Overruling a long line of cases to allow a disappointed bidder on a public school bus contract to sue for alleged wrongs occurring within the competitive bidding process. Under Arkansas law, a disappointed contractor bidding for a government project may assert a cause of action based upon any impropriety in the contractual awarding process); Cardinal Glass Co. v. Board of Educ., 447 N.E.2d 546 (Ill. App. Ct. 1983) (Illinois court recognizing disappointed bidders have standing).

4. Recognition of a Constitutional or Property Interest Sufficient to Support Standing
  - a. Jurisdictions that have allowed standing to unsuccessful bidders for the unconstitutional deprivation of a property interest.
    1. Three Rivers Cablevision, Inc. v. City of Pittsburgh, 502 F. Supp. 1118 (W.D.Pa. 1980)—the court noted that a significant property interest deserving judicial protection can arise from state statutory competitive bidding “schemes and customs which create legitimate claims or entitlement to the benefits which they confer.” Assuming there is a competitive bidding procedure, with which an unsuccessful bidder has complied and a successful bidder has not, then there exists an arbitrary and therefore wrongful governmental deprivation of a recognized proprietary interest (created by state bidding law). This results in an actionable injury under 42 U.S.C. § 1983 and its due process protections. See Cablevision, 502 F. Supp. at 1118; see also Haughton Elevator Div. V. Louisiana, 367 So.2d 1161, 1165 (La. 1979); ISC Distribs., Inc. v. Trevor, 903 P.2d 170, 173 (Mont. 1995).

#### G. Remedies

1. A disappointed bidder may seek a temporary injunction while the merits of the bid protest are being determined. Before the court can order a temporary injunction, the complaining party generally must establish: (1) a likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) a substantial likelihood of success on the merits; and (4) public interest considerations. See Naegele






---

Outdoor Adver. Co. v. City of Jacksonville, 659 So. 2d 1046, 1047 (Fla. 1995).

2. If a disappointed bidder makes it past the standing barrier and also establishes that the authority's actions were improper, he/she is entitled to relief. Very few courts have gone so far as to mandate the authority to make the award to the successful protestor. Courts are traditionally reluctant to direct an award because it interferes with the authority's discretionary right to reject all bids. See Kuhn Constr. Co. v. State, 366 A.2d 1209 (Del. Ch. 1976); Gtech Corporation v. State of Florida Dept. of the Lottery, 737 So. 2d 615 (Fla. App. 1999) ("the remedy for a violation of contract procurement procedures is within the discretion of the agency. Consequently, the court reviews the department's decision by the abuse of discretion standard under [Florida law]"); Miami-Dade County v. Church & Tower, Inc., 715 So. 2d 1084, 1089 (Fla. App. 1998); Electronics Unlimited, Inc. v. Village of Burnsville, 289 Minn. 118 (1971). Usually, the end result of litigation will be reimbursement of the protestor's bid preparation costs and, occasionally, attorney's fees (Paul Sardella Constr. Co. v. Braintree Housing Auth., 371 Mass. 235 (1976); Telephone Assocs., Inc. v. St. Louis County Bd., 364 N.W.2d 378 (Minn. 1985); Marbucco Corp. v. Manchester, 137 N.H. 629 (1993)), the cancellation of the proceeding, and the opportunity for the disappointed bidder to bid again for the contract if it is rebid.
3. But there is no judicial mandate to rebid a contract whenever an awarded contract is invalidated. See Gannett Outdoor Co. v. City of Atlantic City, 249 N.J. Super. 217, 221 (App. Div. 1991) (holding that a municipality may reject bids where only one bid is submitted, where the price is too great, or where the [\*\*\*12] municipality decides to abandon the project); Marvec Constr Corp. v. Township of Belleville, 254 N.J. Super. 282 (Law Div. 1992); (finding that a decision to rebid was appropriate where there was a \$ 15,000 difference between the nonconforming bid and the lowest conforming bid).
4. A lowest responsible bidder that is wrongfully denied a public contract has a cause of action for monetary damages against the public entity for bid preparation costs under a theory of promissory estoppel. Lost profits, however, are not available. See Conway Corp. v. Constr. Eng'rs, Inc., 300 Ark. 225 (1989); Kajima/Ray Wilson v. Los Angeles County Metro., 23 Cal. 4th 305 (2000); Neilsen & Co. v. Cassia & Twin Falls County Joint Class A Sch. Dist. 151, 103 Idaho 317 (1982); Sutter Brothers Constr. Co. v. City of Leavenworth, 238 Kan. 85 (1985); Tel. Assoc. v. St. Louis County Bd., 364 N.W.2d 378 (Minn. 1985); Stride Contracting Corp. v. Bd. Of Contract & Supply, 581 N.Y.S.2d 446 (1992).




- 
- 
5. In Connecticut, the court has ruled that a wrongfully rejected bidder has no claim for money damages, and that its sole remedy is to seek injunctive relief to prevent award of the contract. See Lawrence Brunoli, Inc. v. Town of Branford, 247 Conn. 407 (1999). In Brunoli, the court stated, “if ... an unsuccessful bidder is permitted to assert a claim for money damages, rather than injunctive relief against awarding the contract to the successful bidder, the taxpayers of the municipality would be subject to paying once to have the work performed by the successful bidder and, if the unsuccessful bidder were successful, again for money damages above and beyond the cost of the project. Such extra costs are clearly not in the public interest.” Id. at 413-414.

#### H. Design-Build Contracts

1. One problem that arises in these contracts is that design-builders are contractors who are neither licensed nor authorized to provide design services. Therefore, an important issue is whether the design-builder is “providing” or “procuring” design services.
  - a. In 1997, a New York appellate court held that where a licensed design professional performs all of the design services, the effectiveness of the regulatory licensing scheme is maintained, even if the design professional is not specifically named in the design-build agreement. See SKR Design Group, Inc. v. Yonehama, Inc., 660 N.Y.S.2d 119 (1st Dep’t 1997).
  - b. In Kansas City Community Ctr. V. Heritage Indus. Inc., 972 F.2d 185 (8th Cir. 1992), a design-build contract was held to be illegal under Missouri law where the design-builder lacked a license to practice architecture or engineering. The federal district court ruled that Heritage could not enforce the contract, and that the Heritage must pay KCCC restitution damages for fees paid.
2. Another issue is whether design-build runs afoul to state and local laws.
  - a. In Ohio, the court upheld a design-build process used by the City, noting that:

... the use of design-build bidding constitutes competitive bidding. Competitive bidding provides for ‘open and honest competition in bidding for public contracts and [renders] the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms.’ Contractors under the design-build bidding process compete with each other



in terms of price and design. Factors such as quality, service, performance and record are also part of the competitive process. The city's discretion in awarding a contract to the best design and cost is similar to the discretion provided under general state law to accept the 'lowest and best bidder.' See Greater Cincinnati Plumbing Contractors' Assoc. v. The City of Blue Ash, 106 Ohio App.3d 608 (1995).

3. In California, Public Contracts Code Sections 20209.5 to 20209.14 were recently added authorizing public agencies to use design-build contracting for the construction of transit systems. Further, Public Contracts Code Section 20133 was added to authorize the Counties of Alameda, Contra Costa, Sacramento, Santa Clara, Salinas, Sonoma, and Tulare to award contracts on a design-build basis.
4. In Washington, the Revised Code of Washington Section 39.10.050 allows the awarding of design-build contracts by certain public agencies if the requirements as set out in the section are met. However, the code provision is only effective until July 1, 2001.