
CHAPTER 8: BIDDING AND AWARD OF CONSTRUCTION CONTRACTS

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8.1 Overview

This chapter is intended to provide districts guidance in the bidding and construction contract award processes. Bidding regulations, terms and documents are discussed first. The Request for Bid and bid approval processes follow.

8.2 Bidding Regulations

California Public Contract Code (PCC), §20651 mandates that the governing board of any community college district must use the competitive bidding process to let any contracts involving an expenditure of more than \$86,000 (adjusted annually for inflation) for any of the following:

- Equipment, materials, or supplies to be furnished, sold, or leased to the district
- Services, except construction services
- Repairs, including maintenance as defined in PCC §20656

The authorizing Facilities Planning Memo can be found in the Facilities Planning Memorandum tab of the Chancellor's Office Facilities Planning Unit website.

Any such contract shall be awarded to the lowest responsible bidder or all bids must be rejected. It is unlawful to split or separate any project into smaller work orders or projects to evade this law. Public projects, as defined in subdivision (c) of PCC § 22002 are exempt from the above.

The governing board shall let any contract for a public project, as defined in subdivision (c) of PCC § 22002, involving an expenditure of \$15,000 or more to the lowest responsible bidder or reject all bids. All bids for construction work must be presented under sealed cover (see 8.3.5 for details). Per PCC §20651, the Board of Governors annually adjusts this figure to reflect changes to the Implicit Price Deflator for State and Local Government Purchases of Goods and Services for the United States (86,000 adjusted in Memo FP15-01).

Contracts may be awarded without competitive bidding in emergency circumstances for the continuance of existing classes or to avoid danger to life or property. The district's board must determine, by unanimous vote, that such an emergency contract is necessary.

In addition, competitive bidding is not required for ongoing maintenance or minor capital outlay projects as defined by PCC §20655.

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- Colleges with Full Time Equivalent Students in excess of 15,000, may contract without competitive bidding for repairs to college buildings, grounds, apparatus, or equipment, including painting or repainting, and perform maintenance as defined in PCC §20656, if the total cost of labor on the job does not exceed \$15,000 or total hours on the job does not exceed 750, whichever is greater.
 - Any college may contract without competitive bidding for repairs, alterations, additions, painting, decoration upon college buildings, repair or construction of apparatus or equipment, improvements to grounds, erecting new buildings and maintenance as defined by PCC §20656 if the total cost of labor on the job does not exceed \$7,500 or the total hours does not exceed 350, whichever is greater.

If a district board elects, by resolution, and notifies the State Controller to become subject to the Uniform Public Construction Cost Accounting Act (PCC §22000 et seq.), PCC §22032 bidding standards apply:

- Public projects of \$45,000 or less may be performed by employees of a public agency by force account, by negotiated contract, or by purchase order.
- Public projects of \$175,000 or less may be let to contract by informal procedures, as set forth in Article 3 of Chapter 2 of Part 3 of Division 2 of the Public Contract Code.
- Public projects of more than \$175,000 shall, except as otherwise provided in Article 3 of Chapter 2 of Part 3 of Division 2 of the Public Contract Code., be let to contract by formal bidding procedures.

A district choosing to be subject to the Uniform Public Construction Cost Accounting Act shall enact an informal bidding ordinance including:

- The public agency shall maintain a list of qualified contractors, identified according to categories of work. Minimum criteria for development and maintenance of the contractors list shall be determined by the commission.
- All contractors on the list for the category of work being bid or all construction trade journals specified in PCC § 22036, or both all contractors on the list for the category of work being bid and all construction trade journals specified in PCC § 22036, shall be mailed a notice inviting informal bids unless the product or service is proprietary.
- All mailing of notices to contractors and construction trade journals pursuant to PCC § 22034 subdivision (b) shall be completed not less than 10 calendar days before bids are due.

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- The notice inviting informal bids shall describe the project in general terms and how to obtain more detailed information about the project, and state the time and place for the submission of bids.
 - The governing body of the public agency may delegate the authority to award informal contracts to the public works director, general manager, purchasing agent, or other appropriate person.
 - If all bids received are in excess of \$175,000, the governing body of the public agency may, by adoption of a resolution by a four-fifths vote, award the contract, at \$187,500 or less, to the lowest responsible bidder, if it determines the cost estimate of the public agency was reasonable

A project may be exempt from competitive bidding due to the specialized nature of the service or work to be performed. The standard for the award of such contracts is based upon qualifications and a reasonable, fair price for services. For example, per California Government Code (Gov. Code), §4217.16, energy conservation projects are exempt from bidding. The district may request proposals from qualified persons and award the contract on the basis of the experience of the contractor, type of technology employed by the contractor, cost to the district, and any other relevant considerations. Projects may also be exempt from bidding where the bidding process does not meet the intent of the competitive bidding laws. If a district is considering exemptions for a project, legal counsel should be consulted.

8.3 Provisions Required in the Bid Documents

The public works reforms brought about by Senate Bill 854 (Ch. 28, Stat. 2014) made several changes to the laws governing how the Department of Industrial Relations (DIR) monitors compliance with prevailing wage requirements on public works projects (<http://www.dir.ca.gov/Public-Works/SB854.html>). Bid packages for state funded projects require the following documentation.

8.3.1 Prevailing Wage

Under the California Labor Code (CLC), §1770, the district must determine, from the Director of Industrial Relations, the classifications of workers necessary for the project and the applicable wage rates for those classifications in accordance with the standards set forth in CLC § 1773. The district also must provide bidders with notice of the prevailing wage rate requirements for the project in the bid documents.

8.3.2 Subcontractor List

In an effort to avoid bid shopping and the consequently quality control problems, the Subletting and Subcontracting Fair Practices Act, PCC §4100-4114, requires the bidder to submit a list of the subcontractors doing portions of the work. The district must require the prime contractor to submit the name, the location of the place of business, and the California contractor license number of each subcontractor who will perform work or labor or render service to the prime contractor greater than \$10,000, or more than one-half of one percent of the total value of the bid amount. The prime contractor shall list only one subcontractor for each portion of the project as is defined by the prime contractor in the bid. A subcontractor may be “removed from the list” only if they were listed by clear clerical error.

PCC §4106 requires that if a qualified subcontractor is not listed in the bid to perform a portion of the contract work, it is assumed that the prime contractor will perform the work if the prime contractor is qualified and licensed for such work. Work may be subcontracted by the prime contractor after the award of the contract only if approved by the district.

8.3.3 Securities in Lieu of Retention

The contractor has the right to substitute securities in lieu of retention withholding. Provisions and forms for this process, prescribed in PCC §22300, must be included in the bid documents.

8.3.4 Limitations on Sole Source

Public agencies, including community colleges, are prohibited from drafting specifications for bids that limit the bidding, directly or indirectly, to any one specific concern per PCC §3400. Specifications should, if the district is aware of an equal product, list at least two brands or trade names of comparable quality or utility, followed by the words “or equal” so that bidders may furnish any equal material, product or service. Specifications shall provide a period prior to and/or after the award of the contract for submission of data substantiating a request for a substitution of “an equal” item. If no time period is specified, data may be submitted any time within 35 days after the award of the contract. The exception to this occurs when:

- A material or product must match others in use

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- A unique or novel product application is required to be used in the public interest; or
 - Where the product or material is to be used in a test or experiment to determine suitability of the product for future use

In the latter case, the district board must authorize the sole source and include the basis for the decision in the specifications.

8.3.5 Bid Security; Bid Bonds

PCC §22002, requires the following:

- All bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:
- Cash
- A cashier's check made payable to the district
- A certified check made payable to the district
- A bidder's bond executed by an admitted surety insurer, made payable to the district

Upon award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

8.3.6 Payment Bond

Under California Civil Code (Civil Code), §3247, contractors awarded a contract in excess of \$25,000 by a public entity for any public work must file a payment bond with, and approved by, the officer or public entity by whom the contract was awarded. A "payment bond" is a bond with sufficient sureties for the payment in full of the claims of all claimants and that by its terms takes effect to the benefit of all claimants so as to give them rights of action to recover upon this bond any suit brought to foreclose the liens provided for in law. Providers of architectural, engineering, and land surveying services provided as part of a contract for a public works project shall not be deemed as an original contractor and shall not be required to post or file the payment bond. To approve the payment bond, the district must confirm 1) the amount of the bond; 2) types of claims subject to the bond; 3) classes of claimants benefited by the bond; and 4) that

the bond is in the form of a bond and not a deposit in lieu of a bond. There are minimum amounts for the bond listed in the law.

8.3.7 Contractor's License

PCC §3300, requires:

Any public agency, as defined in PCC §1100, the University of California and the California State University, shall specify the classification of the contractor's license which a contractor shall possess at the time a contract is awarded. The specification shall be included in any plans prepared for a public project and in any notice inviting bids required pursuant to this code.

This requirement shall apply only with regards to contractors who contract directly with the public agency.

It is recommended that the district verifies the license status of the apparently successful bidder before awarding the contract.

8.3.8 Non-Collusion Affidavit

PCC §7106 requires every bid on every public works contract of a public entity to include a non-collusion declaration under penalty of perjury. The current wording required by the State of California is included in Appendix N.

8.3.9 Workers' Compensation

A certificate of Workers' Compensation Insurance is required by CLC §3700.

8.3.10 Drug-Free Workplace

Gov. Code §8355 has been applied to state-funded community college contracts for capital outlay projects. The statute requires that any organization or person awarded a contract shall certify that it will provide a drug-free workplace by doing all of the following:

Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's or organization's workplace and specifying the actions that will be taken against employees for violations of the prohibition including:

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- Establishing a drug-free awareness program to inform employees about all of the following:
 - The dangers of drug abuse in the workplace
 - The person's or organization's policy of maintaining a drug-free workplace
 - Any available drug counseling, rehabilitation, and employee assistance programs.
 - The penalties that may be imposed upon employees for drug abuse violations
 - Requiring that each employee engaged in the performance of the contract or grant be given a copy of the statement required by subdivision (a) Gov. Code § 8355 and that, as a condition of employment on the contract or grant, the employee agrees to abide by the terms of the statement.

8.3.11 Performance Bond and Insurance

Although not required by law, it is prudent practice for the district to require the contractor to provide a performance bond. Builder's risk insurance including, where appropriate, earthquake insurance may be required by the bonding company.

8.3.12 Minority, Women and Disabled Veteran Business Enterprise (M/W/DVBE) Participation

Notwithstanding any other provision of law, contracts awarded by any state agency, department, officer, or other state governmental entity for construction, professional services (except those subject to Chapter 6 (commencing with Section 16850) of Part 3 of Division 4 of Title 2 of the Government Code), materials, supplies, equipment, alteration, repair, or improvement shall have statewide participation goals of not less than 15% for minority business enterprises, 10% for women business enterprises and 3% for disabled veterans business enterprises. This statutory requirement is implemented by PCC §10115 (c). Neither the statute nor the regulations impose an absolute requirement that contracts awarded by a district meet the M/W/DVBE participation goals. The statute, regulations and applicable law prohibit the application of strict numerical set asides unless there has been a prior factual finding of discriminatory practices. Accordingly, the failure of a bidder to have met the participation goals will not by itself render the bidder non-responsive so long as there is a show of good faith efforts by the bidder to meet the participation goals.

Aside from Ed. Code §71028, if a district decides to apply participation goals for award of a contract, the provisions of PCC §2000 are also applicable. PCC §2000 defines good faith efforts and what constitutes compliance with the participation goals of M/W/DVBE. In addition, if a district decides to require participation goals for award of a contract, the bid documents for the project must conform with the requirements of PCC §2001 which requires that the bid documents issued by the district include provisions for the bidders to identify M/W/DVBE subcontractors and for application of the Subletting and Subcontracting Fair Practices Act (PCC §4100 et. seq.).

When the district decides to apply participation goals for award of a contract, the district will have to include in the bid documents 1) appropriate instructions for compliance with the participation goals, 2) standards for determining good faith efforts, 3) definitions of M/W/DVBEs, and 4) a process for certification of status as an M/W/DVBE.

If participation goals are required and the apparent low bidder has not met the participation goals for any one of the classes of M/W/DVBEs, award to that bidder can be made only if there is a determination that the bidder exercised good faith efforts to meet the participation goals. This determination is by necessity, factually intensive and entails subjective factors. Due to the factual and subjective nature of this determination, the existence or absence of good faith efforts is often fertile grounds for bid protest. Limiting the disruptive impact of bid protest relating to the issue of participation goals requires that the district have issued thorough, comprehensive, and unambiguous guidelines for establishing good faith efforts. In addition, to the greatest extent possible, review of the good faith efforts must be on as many objectively definable criteria as possible.

8.4 The Bid Package

Before going to bid, the bid package format including any add/deduct alternatives must be approved by the Chancellor's Office and the Department of Finance. All of the following phases of the project should be complete and free of errors with all of the appropriate code approvals: programming, schematic design, design development, preliminary plans and construction documents.

Commonly used (boilerplate) contract language must be updated and added to the construction contract and provided to the architect as early as possible during the construction documents phase for proper coordination. The district must reconcile the

contract language with the project specifications and reconcile it with the specification provisions prepared by the architect or engineer.

8.4.1 Bid Documents

The bid documents should include:

- Invitation to bid
- Instructions for bidders
- Contract
 - General Terms and Conditions
 - Supplementary General Terms and Conditions
 - Special Conditions
 - Schedule of Drawings
- Specifications
 - Division 1 General Requirements
 - Divisions 2-16 Technical Requirements
- Drawings
- Data for the Contractor
 - Geotechnical or other site studies
 - Structural tests & inspections (DSA, form SS103-1)
 - Other pertinent data

The bid documents may contain standard language and forms, but those standards must be checked for applicability to the project. The general conditions, specifications, and drawings must be coordinated with each other to eliminate any conflicts.

8.4.2 Invitation to Bid

The invitation to bid is advertised once in each of two consecutive weeks in a general circulation newspaper in the area of the project. The first advertisement must be at least 15 days before the bid opening. The advertisement includes the project, location, owner, architect, person to receive bids, place and time for receipt of bids, type of bid opening, project scope, type of construction, type of contract, time and place for

examining and obtaining bid documents, statement of affirmative action and bonding requirements.

8.4.3 Instructions for Bidders

The Instructions for Bidders give the bidder all the information on the bid process:

- 1) Bid Preparation: the proposal, bid security, contractor qualifications, subcontractor listing, affirmative action forms, non-collusion affidavit.
- 2) Project Information: obtaining bid documents, pre-bid meetings, job walks, submission of questions, and addenda.
- 3) Bid Procedures: interpretation of documents, submission of bids, bid opening, bid evaluation, responsive and responsible bidder, withdrawal of bids, rejection of bids, bid protest, award procedure.
- 4) Other Information: financial, legal, procedural or construction items that the district considers crucial and wants to be certain the contractor has considered them in preparation of the bid proposal.

8.4.4 Contract

The contract documents include the contract, the terms and conditions of the contract, the DSA approved drawings and specifications (see Chapter 7.12.2 for more details). The general terms and conditions cover general requirements and procedures that do not change and are used by the district from project to project. The supplementary conditions cover project specific information, dated information such as wage rates, and other additions to the general terms and conditions. The schedule of drawings names each drawing with a title and date, thereby incorporating it into the contract. The specifications cover the general construction requirements and technical specifications.

The content of the drawings and specifications were discussed earlier in the chapter on construction documents.

8.4.5 Terms and Conditions of the Contract

The terms and conditions of the contract should be checked against the specifications to eliminate redundancy and conflicts. The contract should be clear, comprehensible, to the point and must be complete and fair to prevent unfair documents which assign undue burden or risk to the contractor that could increase the price and construction claims. The terms and conditions should protect the owner from an inexperienced,

unethical or litigious contractor while setting forth a smooth, workable process for the experienced contractor.

The general terms and conditions set forth:

- The responsibilities of the owner, contractor, architect, inspector and construction manager, if applicable
- All the normal procedures during construction for meetings, construction schedule, quality control, corrections, clarifications, submittals, changes, payments, reporting, records, protection of persons and property, etc.
- All the safeguards in case of problems, such as insurance, bonds, dispute and legal resolution, termination, delays, warranties, clean up, etc.
- All the close-out procedures such as punch lists, occupancy procedures, liens, record documents, commissioning, etc.

8.4.6 Bid Alternates

The districts may include either additive or deductive alternates in the bid package as approved by the Chancellor's Office and DOF. The dollar value of the alternates should not vary beyond 10 percent of the bid estimate for the total project. The extent of the alternates should be carefully delineated in the drawings and specifications. Alternates should be carefully checked for coordination with the general terms and conditions and specifications.

Owner Allowances alternatives are *not* acceptable for state funded projects. Contact your FPU Specialist for further details.

The bid form must list the alternates. The instructions to bidders should indicate that the district reserves the right to accept none, all, or any combination of the alternates in its determination of the lowest bidder.

8.5 Request for Approval to Proceed to Bid

Districts should submit one copy of each of the following to the Chancellor's Office to request approval to proceed to bid:

- A signed letter on district letterhead requesting approval of working drawings, proceed to bid authority and, if applicable, explanations of any scope or cost changes made to the project since it was approved by State Public Works Board (PWB) — this letter must certify that the project is:

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- Within scope as approved by the Legislature
 - Within cost as approved by the Legislature, and
 - CEQA requirements have been met
 - JCAF 31 with a side-by-side comparison and justification of changes from the Preliminary Plan approved JCAF 31
 - Contrasts space differences between the preliminary plan and working drawings
 - Current Summary of Costs (JCAF 32) and Construction Schedule located on the base of the JCAF 32
 - Current Quantities and Unit Costs (architect's detailed cost estimate)
 - Division of State Architect stamped final drawings and project specifications
 - 2 copies (11" x 17") of the site plan, architectural floor plans, and elevations
 - Bid Form
 - Bid alternates must be clearly identified on the drawings and in the specifications
 - Funding sources and related scope must be clearly stated (i.e., state vs. district funds)
 - Alternative bidding methodology or multiple prime bidding must be discussed with the Chancellor's Office in advance

The Chancellor's Office reviews the district's submittal and prepares the items listed below:

- Compelling justification and analysis for a scope or cost change if either varies from the approved descriptions or amounts — any potential scope or cost changes should have been discussed with Chancellor's Office staff prior to inclusion in working drawings
- If the project is not within scope and/or cost, the district will need to allow an additional six weeks for review and possible PWB action (refer to Section 8.7 for details)
- DF14D requesting Approval of Working Drawings and Proceed to Bid
- Cost history for the project
- Other related documents as needed (i.e., Twenty-Day Letter)

The letter requesting approval to proceed to bid should notify the state if the district is seeking authority to use a different bidding method, e.g., single contract to a general contractor (“Prime Contractor” method) or multiple primes. The letter should also notify the state if the district is including deductive or additive alternates in the bid specifications.

The construction schedule located at the bottom of the JCAF 32 should be updated for the following dates by completing a change request in FUSION:

- Advertise Bid for Construction
- Award Construction Contract
- Advertise Bid for Equipment (may request at 50% completion of construction)
- Project Completion

The bid form should explain deductive alternates and additive alternates being bid with the project. Additive or deductive alternates may only be used by the district with approval by the Chancellor’s Office and DOF prior to bidding. The bid form should explain the method of bidding if the district intends to combine projects or use phased, multiple primes, or other alternative bidding methods.

The Chancellor’s Office will review the request and, if it concurs with the request, will submit the DF14D to the DOF to request approval of the working drawings and proceed to bid. If the Chancellor’s Office does not concur with the request, Chancellor’s Office staff will notify the district. The signed DF14D authorizes the district to proceed to bid and affirms the project’s scope, funding, additive and deductive alternates and bid method (see Appendix P for more information on DF 14Ds).

The Chancellor’s Office will review the scope, cost, code approvals, alternates and documents for general content, quality, and completion. If the scope and cost are within budget and consistent with the preliminary plans as approved, but the code approvals or documents appear to be incomplete, the Chancellor’s Office will notify the district to request updated documents. If the scope and cost are within budget but indicate significant design changes from the approved preliminary plans, the Chancellor’s Office will evaluate the changes and decide whether separate approval of the changes is required before granting approval of the working drawings and proceed to bid. For further details contact your FPU Specialist.

The control language in the Governor’s Budget enactment bill states that proceed to bid approval must occur before June 30th of the fiscal year of appropriation. Districts need to keep this deadline in mind when timing their submittal for approval. Otherwise, the funds for the construction phase will automatically revert per the control language.

Once DOF approves the working drawings and authority to proceed to bid via a signed DF14D, the Chancellor’s Office will notify the district. Subject to local action, the signed DF14D authorizes the district to proceed to bid. The district should make every effort to go to bid within 60 days after receiving approval to proceed to bid. The district is responsible to put the project out to bid during the life of the appropriation and should be intimately familiar with the availability of state funds for the project.

The district should not commence with bidding prior to the receipt of the signed DF14D providing such authority. Proceeding to bid prior to receipt of the signed DF14D may be construed as “out of process” and result in the loss of the project. DOF can require the district to repay any/all funds received when a project is determined to be out of process.

8.5.1 Recognized Deficits

“Recognized deficits,” (cost increases above the original estimate necessitating that additional funding may be needed prior to bidding to build a project as designed) should be discussed with the Chancellor’s Office prior to the request for approval to proceed to bid. When the bid estimate exceeds the budget, the Chancellor’s Office policy is to require the district to value engineer the project to bring it within the appropriation amount. Any change in the project conditions should be explained in the analysis. The district should submit a side-by-side comparison of the original estimate and current cost estimate with explanations for the differences.

A decision may be made to proceed and bid a project with a recognized deficit, provided there are appropriate deductive alternates or additional local funding to apply to the project in the event the bid exceeds the budget appropriation.

8.6 Bid Process

The steps in competitive bidding are:

- 1) Preparation of the bid documents**
- 2) Notice inviting bids**

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- 3) Pre-bid meeting, job walk, responses to pre-bid questions and addenda
 - 4) Bid opening and evaluation
 - 5) Award

Preparation of bid documents is covered in Chapter 7 with additional comments in Chapter 9 on construction management.

8.6.1 Pre-Qualifying Bidders

The district should consult its legal counsel on the applicability of pre-qualifying bidders. There are a number of disadvantages to pre-qualifying bidders because it may be illegal for community colleges. The district has to be extremely careful about being consistent setting up formal criteria, forms, and processes. If a bidder is disqualified, it can appeal which is time consuming and may hold up the project.

All bidders must receive the same communications from the district. The district may not, directly or indirectly, do anything to limit the bidding.

8.6.2 Notice Inviting Bids; Opening and Reading of Bids

In accordance with Ed. Code §81641, a district must publish the notice calling for bids or proposals in newspapers of general circulation where the district is located at least once a week for two weeks prior to bid opening. Trade publications are not considered newspapers of general circulation. A reasonable time must be allotted between notice and bid opening for an adequate number of contractors to respond to all the requirements of the Instructions to Bidders.

The bid proposals are publicly opened and read at the time and place stated in the notice calling for bids. No bids may be accepted after that time.

8.6.3 Bid Announcement Meeting, Job Walk and Addenda

There should be a meeting to help the bidders with the instructions and to provide further clarification of expectations.

There should be a mandatory job walk to allow the bidders to view the site in detail. If such a walk is afforded bidders, districts should be wary of any bidder that bids sight unseen.

Districts may elect to use a process, with deadlines, whereby bidders submit written questions about the project. The architect responds to the questions by issuing a formal written addendum to the request for bids.

8.6.4 Bid Opening and Evaluation

A community college is required by PCC §20651(b):

The governing board shall let any contract for a public project, as defined in subdivision (c) of PCC §22002, involving an expenditure of \$15,000 or more to the lowest responsible bidder who shall give security as the board requires or else reject all bids.

The bid opening must be public at the place and time of the notice. No bidder can bid after the opening.

An exception is provided under Ed. Code §81645 for data processing or telecommunications systems where the district board may contract with a party who has submitted one of the three lowest responsible competitive bids or proposals.

The architect and project manager should help evaluate the bids with the district. If the apparent low bidder is considered responsive, responsible and is within the budget, then the district can proceed to obtain permission from the Chancellor's Office for award of contract. On state-funded projects, the project manager and/or construction manager is not typically hired until after contract award.

8.6.5 Responsible Bidder

Award of a contract can only be made to a "responsible" bidder. Responsibility entails a number of factors and considerations ranging from financial capacity to quality or workmanship on prior projects. In considering the responsibility of bidder, it must be kept in mind that a district cannot rank bidders and their relative responsibility. The California Supreme Court has made clear that responsibility is not a relative concept; that is unless a bidder is deemed non-responsible, a district cannot award to a "more" responsible bidder. When there is determination made that the apparent low bidder is not responsible, the district must notify the bidder of the determination, the basis of the determination, and the bidder must be afforded due process rights by presentation of evidence of responsibility at a hearing. Findings of non-responsibility are typically based on subjective considerations; with the legal obligation imposed on districts to afford the

non-responsible bidder due process rights and a hearing. Almost inevitably, the bidding process will be disrupted.

Legal counsel should be consulted if a district desires to find a bidder not responsible.

8.6.6 Responsiveness of Bidder

California courts have consistently held that the concept of responsiveness does not extend to every requirement of the call for bids. Generally, a bid proposal is deemed responsive if it meets the “material terms” of the call for bids. If there is a finding of non-responsiveness, the bidder must be notified of the basis of the finding and afforded an opportunity to rebut the finding. Unlike the finding of non-responsibility, California courts have held that the bidder is not entitled to due process and a hearing on the finding of non-responsiveness.

Legal counsel should be consulted if a district desires to find a bidder non-responsive. There is much case law that must be considered in these situations.

8.6.7 Bid Withdrawals and Protests

Under PCC §5100 — 5107, the bidder may withdraw its bid if it has made a mistake in completing the bid proposal. The bidder must notify the public agency of the mistake, specifying in detail how the mistake occurred, in writing, within five days of the bid opening. The public agency must make a factual determination that the nature of the mistake justifies granting consent. The agency may either proceed to award to the next lowest bidder or reject all bids and rebid the project. The bidder that withdrew may not participate in the rebid of the project. Changes after bid opening will not be accepted.

The project must be rebid if the three lowest bidders withdraw or are considered not responsive or not responsible. The Chancellor’s Office must be notified so they can inform DOF of the issue.

Bidders may protest the award of a contract on any number of bases. When a bid protest is filed by any bidder, legal counsel should immediately be contacted by the district for advice and recommendations for disposition of the bid protest. Districts should consider the inclusion in the Instructions for Bidders provisions addressing the process for filing, review, and disposition of bid protests. This provision should be structured so that the process is clearly defined at the district level. If the district disposition of bid protest is not satisfactory to the protesting bidder, the bidder is entitled

to seek judicial relief. A protest can be time consuming and may cause project delay with inflationary cost increases generally borne by the district; hence, a district should make every effort to follow correct and appropriate bid procedures.

NOTE: Districts are cautioned that case law includes a judgment wherein all bids were thrown out and the project had to be rebid when additive or deductive alternatives were selected out of sequence to maximize the use of funds. The court interpreted that having knowledge of who the bidders are when selecting alternates can provide an opportunity for preferential selection of contractors contrary to the provisions of law.

To comply with the court's interpretation, district may prioritize their alternatives prior to opening the bid and select them in sequence until funds are fully obligated or select the additive and deductive alternates to apply to the project prior to having knowledge of the identity of each bidder. (see *FTR International, Inc. v. City of Pasadena* (1997), 97 D. R. R. 3603)

8.7 Request for Approval of Bid Award

The district should post-qualify bidders upon receipt of bids for the project, evaluate bids and bid submittals, and submit two copies of the following documents to the Chancellor's Office to request permission for approval of bid award and to have the DOF encumber and release construction funds:

- A signed letter on district letterhead the lowest qualified bidder and the preferred bid alternates, if any
- Bid tabulation listing all the base bids and bid alternates, if applicable
- A copy of the bid the district intends to award and a list of subcontractors
- Board of Trustees approved action item selecting lowest qualified bidder (**must state "subject to state approval and availability of funds"**)
- Revised JCAF 32, if cost changes due to bid award
 - District will need to complete a "cost" change request in FUSION to update the JCAF 32

If the district does not select the lowest qualified bidder, written justification must be submitted to the Chancellor's Office, along with the above listed information. If the selected bid is within budget, the Chancellor's Office will complete a DF14D requesting approval to award bid from DOF. When multiple prime or trade contracting methods are

used, the district must submit a copy of each trade's bid which the district intends to award.

If the selected bid is higher than the appropriation, the district must submit an analysis of the reasons the bid proposal exceeds the pre-bid estimate to the Chancellor's Office. The analysis should include:

- A letter detailing the district's recommendation for addressing the cost overage, i.e., taking deductive alternate(s), reducing the project cost (including the proposal to reengineer the project), and/or increasing local funding
- Bid tabulation listing all the base bids including all bid alternates
- A copy of the bid the district intends to award
- Board of Trustees approved action item selecting lowest qualified bidder (must state "**subject to state approval and availability of funds**")

Districts must assume that project augmentations with state funds will not be possible regardless of the reasons for high bids; and, every effort must be made to maintain project costs within the appropriation (available funds) or provide other sources of funds.

If the selected bid is below the appropriation for state funded projects, the district should not seek to use the excess funds for other purposes related to the approved project; state regulations require that excess funds must be reverted, if not part of the authorized scope.

Districts should ensure that proposed bids are effective for at least 90 days to allow sufficient time to process the bid approval before bids expire. In the event that augmentations and/or possible DOF action may be necessary this minimum time period should be increased to at least 120 days.

8.7.1 Bid Augmentations

Authority does exist, when there is a compelling need to do so, for the DOF and the PWB to augment capital outlay projects as set out in Gov. Code §13332.11. However, the **Chancellor's Office has a long-standing policy of not augmenting** capital outlay appropriations given the districts' responsibility to maintain projects within the approved cost and to broaden the number of projects that can be supported by the limited state funds.

Districts should value engineer a project to bring the projected costs within budget prior to the bidding stage (see costing estimating in Chapter 7, Section 7.6 for detail) and make every effort to obtain accurate pre-bid estimates.

Augmentations may be considered if significant modifications to the existing working drawings were required by a reviewing agency and bid results reflect such increases. Before requesting an augmentation due to cost increases, the district will be expected to have reengineered and/or value engineered the project at least once to reduce costs and make full use of deductive alternates.

Districts must be familiar with bid times and other factors affecting processing time and consider these when developing pre-bid cost estimates. Districts are also expected to coordinate the development of the project with all parties (faculty, administration etc.) prior to advancing the project to the working drawings stage. Augmentations will not be considered for the following:

- Delays in placing the project out to bid or during construction
 - Due to the need for further design development
 - In anticipation of a better bid market resulting in lost purchasing power over time
- Delays in scheduling caused by regulatory agencies
- Inaccurate estimating — bid results that substantially vary from the pre-bid cost estimates
- District or architect initiated changes to the project
- Building a project with a modified scope by including additive alternates (or not applying deductive alternates) as agreed at the proceed to bid stage

After a district analyzes the bids and its activities leading up to the receipt of bids and determines that the project warrants an augmentation, it should submit **three copies** of the following to the Chancellor's Office in the same manner as a Final Project Proposal:

- A bid tabulation comparing the authorized funds with all bids after application of **all** deductive alternates
- A request for augmentation with:
 - a final cost estimate at the current CCCI based on receipt of bids,
 - a complete narrative description justifying the need for such augmentation

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- Explanation of the efforts made to value engineer the project and reduce costs
 - Calculation of the amount to be requested after applying all deductive alternates and eliminating all change orders not resulting from unanticipated site conditions or increased regulatory requirements

All augmentations are seen as a “change in cost” requiring formal notification to the PWB and possibly the Legislature. As a result, additional time is needed to process a request to accept a bid when it includes an augmentation request (see Section 8.7.2 for detail). Each request is subject to approval by the Chancellor’s Office, DOF and the PWB. In certain circumstances, augmentation requests may need Legislature approval or a special appropriation. The Chancellor’s Office considers many factors when determining whether to support an augmentation request. If approved by the Chancellor’s Office, the request will be forwarded to DOF for review and approval. The Chancellor’s Office and DOF will take into consideration whether the appropriation is still active, whether sufficient uncommitted funds remain in the bonding authority, the timing of the request, and the district’s justification.

8.7.2 Twenty-Day Letter

A “Twenty-Day Letter” to the Joint Legislative Budget Committee presents the justification for a project cost or scope change and is prepared by the Chancellor’s Office when a project:

- Requires an augmentation of state funds of at least 10 but less than 20 percent of the construction cost
- Requests the state to recognize a change in Legislative authorized scope, or
- Seeks to recognize a 10 percent or greater increase in project cost funded through non-state sources

When a Twenty-Day Letter is required for a preliminary plan change, districts must submit preliminary plans for approval at least 70 days before the anticipated PWB meeting. This allows for the normal 45-day processing time for preliminary plan approval plus 25 days to process the Twenty-Day Letter. In order to meet state funding deadlines, preliminary plans must be approved, and funds for working drawings released by the PWB no later than June 30 of the appropriation fiscal year; districts must plan accordingly.

A request for approval of bid award with cost increases requires a Twenty-Day Letter; the bids need to be active for a minimum 120 days to process the Twenty-Day Letter.

8.8 Optional Bidding Methods

The most common method to bid state-funded capital outlay projects is the “Prime Contractor” method wherein a district contracts with one general contractor for the entire construction project. The general contractor, in turn, may use numerous subcontractors to complete the project. However, districts are increasing their use of other bidding methods. Alternative delivery methods that may be bid by the community colleges under current state regulations are:

- Multiple prime contracts
- Phased bids
- Combined bids
- Design-Build (requires a successful design-build record and prior Chancellor’s Office approval, refer to Section 8.8.4 and Chapter 6, Section 6.5.2.2 for detail)

These and any other alternative methods must be approved by the Chancellor’s Office and DOF prior to approval to proceed to bid and should be discussed at final project proposal submission (see refer to Chapter 5 for detail).

8.8.1 Multiple Prime Contracting

This method requires the district to hire a construction manager who bids out the project in a series of packages. As a result, there is not one prime contractor but several that must be carefully coordinated by the construction manager. On state-funded projects, the project manager and/or construction manager is not typically hired until after contract award. The process eliminates the general contractor in favor of a construction manager. The multiple prime contracting delivery method has several advantages, including but not limited to:

- The selection of a construction manager in lieu of a general contractor is based upon qualification rather than low bids, thereby reducing the possibility of getting an inexperienced or litigious contractor
- Subcontractors can be required to carry performance bonds and insurance

Some of the disadvantages of multiple prime contracting are:

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- The process requires increased management and controls due to the number of prime contracts. This can escalate costs and require special contract conditions, advertising, etc.
 - The construction manager cannot guarantee cost or time performance
 - Each contract may require separate action by the district's Board
 - Each contract has a 10 percent limit on changes
 - If one of the contractors fails to perform, it may be difficult to prevent delays for the other contractors
 - Subcontractors may not know how to act as prime contractors

8.8.2 Phased Bids

A district may decide to do phased bidding when it is not feasible to use a single contractor for all aspects of the project.

All phased bids must be approved by the Chancellor's Office and DOF. Phased bids rely on extremely accurate cost estimates and should ensure that early bids are not cost prohibitive which may increase the total project cost and exceed the previously authorized budget. Each of the phased bids should address the insurance requirement for that scope of work.

8.8.3 Combined Bids

Districts may, with *prior approval* from the Chancellor's Office and DOF, combine a project with another when significant cost savings are identified and justified. Districts should submit justification (e.g., cost savings, economies of scale analysis) to the Chancellor's Office. The project must be bid, however, in a manner that allows DOF to track the finances of each project separately. The district must either require a breakdown of the bid by project, or develop an accurate assessment of the percentage of the bid which will apply to each project.

8.8.4 Design-Build

The district may, with prior approval from the Chancellor's Office, use the Design-Build option for state-funded projects (refer to Chapter 6, Section 6.5.2.2 for detail). The Chancellor's Office will only consider this option for districts that have previously completed a successful locally-funded Design-Build project. Design-Build is a method of

capital project delivery that combines the design and construction functions and vests the responsibility for such functions with one entity — the Design-Builder. A Design-Build entity includes an architect and contractor, so only one contract exists between the district and the Design-Build entity. *Find Design-Build Guidelines at:*

http://extranet.cccco.edu/Portals/1/CFFP/Facilities/Reference_Materials/Guidelines/CC_DB_Guidelines.doc.