



MWD

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

8-17

July 7, 1998

To: Board of Directors (Engineering and Operations Committee--Action)
(Committee on Communications and Legislation--Action)

From: *for* General Manager
General Counsel

Edward J. Meany
W. Lynn Snyder
Wayne Lee Bonds

Submitted by: Gary M. Snyder
tan

Subject: Assembly Bill 2739 (Mazzoni) Defining the Term "Responsible Bidder" for Award of Public Contracts

RECOMMENDATION(S)

Support Assembly Bill 2739 (Mazzoni) which amends the Public Contract Code to authorize public agencies to pre-qualify prospective bidders based upon a standard questionnaire and financial statement.

EXECUTIVE SUMMARY

Public agencies in California, including the Metropolitan Water District of Southern California (Metropolitan), are subject to the Public Contract Code and required to award construction contracts to the lowest responsible bidder.

Assembly Bill 2739 (Mazzoni) would amend the Public Contract Code to authorize public agencies, including Metropolitan, to require each prospective bidder to submit a standardized questionnaire and financial statement which would be used by the public agency to pre-qualify bidders. Bidders which do not meet the minimum qualifications established by the agency, based upon objective criteria, would be precluded from bidding on projects.

DETAILED REPORT

Current state law requires public agencies in California, including Metropolitan, to award construction contracts to the lowest responsible bidder. The definition of a "responsible bidder" in the law does not include specific objective criteria and is based in large part on case law. Rejection of a bidder as "not responsible" can in many cases lead to litigation.

Assembly Bill 2739 (Mazzoni) seeks to provide public agencies with more flexibility to establish objective criteria for the determination of responsible bidders. It would amend the Public Contract Code to authorize public agencies to require each prospective bidder to complete and submit to the agency a standardized questionnaire and financial statement. The agency would be required to establish a process for the prequalification of prospective bidders based upon objective criteria and to establish an appeal process for bidders deemed to be not responsible.

The bill defines a responsible bidder as *“a bidder who has demonstrated the attributes of trustworthiness, as well as quality, fitness, and capacity to perform satisfactorily the public works contract.”*

There is some opposition to the bill from parties who have concerns with the definition of “responsible bidder” contained in the bill, particularly with the word “trustworthiness”, and who are concerned that this process may undermine the open bidding laws by limiting the contractors who may bid on projects.

A copy of the bill as amended on June 24, 1998 and the Senate and Assembly Committee reports are attached for your review as Attachments 1, 2 and 3 respectively.

It is recommended that your Board support AB 2739 on the basis that it provides Metropolitan with the flexibility to establish a process to pre-qualify prospective bidders.

MS:ey
#11168

Attachments (3)

BILL NUMBER: AB 2739 AMENDED
BILL TEXT

Attachment 1 to 8-17
Legal Department
July 7, 1998

AMENDED IN SENATE JUNE 24, 1998
AMENDED IN ASSEMBLY APRIL 29, 1998

INTRODUCED BY Assembly Member Mazzoni

FEBRUARY 23, 1998

An act to add Section 1103 to, and to add Chapter 1.1 (commencing with Section 1200) to Part 1 of Division 2 of, the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

AB 2739, as amended, Mazzoni. Public contracts: responsible bidder.

Existing law defines the terms "public entity" and "public works contract" for the purposes of specified provisions of the Public Contract Code.

This bill would define the term "responsible bidder" for these purposes, and would authorize a public entity to require each prospective bidder for a contract to complete and submit to the entity a standardized questionnaire and financial statement. This bill would require any public entity requiring standard questionnaires and financial statements to adopt and apply a uniform system of rating bidders on the basis of standard questionnaires and financial statements.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature hereby finds and declares that the establishment by public agencies of a uniform system to evaluate the ability, competency, and integrity of bidders on public works projects is in the public interest, will result in the construction of public works projects of the highest quality for the lowest costs, and is in furtherance of the objectives stated in Section 100 of the Public Contract Code.

SEC. 2. Section 1103 is added to the Public Contract Code, to read:

1103. "Responsible bidder," as used in this part, means a bidder who has demonstrated the attributes of trustworthiness, as well as quality, fitness, and capacity to perform satisfactorily the public works contract.

SEC. 3. Chapter 1.1 (commencing with Section 1200) is added to Part 1 of Division 2 of the Public Contract Code, to read:

CHAPTER 1.1. UNIFORM RATING OF BIDDERS

~~1200. A public entity may adopt and apply a uniform system of rating bidders on the basis of standard questionnaires and financial statements in regard to public works contracts for which a bidder is qualified to bid.~~

1200. (a) A public entity may require that each prospective bidder for a contract, as described under Section 1101, complete and submit to the entity a standardized questionnaire and financial statement in a form specified by the entity, including a complete

statement of the prospective bidder's financial ability and experience in performing public works. The questionnaire and financial statement shall be verified under oath by the bidder in the manner in which civil pleadings in civil actions are verified. The questionnaires and financial statements shall not be public records and shall not be open to public inspection.

(b) Any public entity requiring prospective bidders to complete and submit questionnaires and financial statements, as described in subdivision (a), shall adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements, in order to determine both the minimum requirements permitted for qualification to bid, and the size of the contracts upon which each bidder shall be deemed qualified to bid. The uniform system of rating prospective bidders shall be based on objective criteria.

(c) A public entity may establish a process for prequalifying prospective bidders pursuant to this section on a quarterly basis and shall authorize that prequalification to be considered valid for up to one calendar year following the date of initial prequalification.

(d) A public entity may establish an appeal process pursuant to this section whereby prospective bidders may appeal their prequalification rating.

Attachment 2 to 8-17
Legal Department
July 7, 1998

2739

Bill No: AB

SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION
Senator Ralph C. Dills, Chair
1997-98 Regular Session
Staff Analysis

AB 2739 Author: Mazzone
As Amended: June 24, 1998
Hearing Date: June 30, 1998
Consultant: Art Terzakis

SUBJECT
Public Contracts

DESCRIPTION

AB 2739 defines the term "responsible bidder" for purposes of the Public Contract Code and adds a new Chapter entitled, "Uniform Rating of Bidders" to the Code. Specifically, this measure:

1. Declares that the establishment of a uniform system to evaluate the ability, competency, and integrity of bidders on public works projects is in the public interest, will result in the construction of projects of the highest quality for the lowest costs, and is in furtherance of the objectives of the Public Contract Code.
2. Defines "responsible bidder" as a bidder who has demonstrated the attributes of trustworthiness, as well as quality, fitness and capacity to perform satisfactorily the public works contract.
3. Authorizes a public entity to require each prospective bidder for a contract to complete and submit to the entity a standardized questionnaire and financial statement.
4. Stipulates that any public entity requiring prospective bidders to submit standard questionnaires and financial

statements must adopt and apply a uniform system of rating bidders, in order to determine minimum requirements for qualification to bid.

5. Authorizes public entities to establish a process for prequalifying prospective bidders and permits entities to also establish an appeals process for prospective bidders to appeal their prequalification rating.

EXISTING LAW

Existing law declares that the objectives of the Public Contract Code are as follows: (a) to clarify the law with respect to competitive bidding; (b) to ensure full compliance with competitive bidding statutes as a means of protecting the public from misuse of public funds; (c) to provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition; and, (d) to eliminate favoritism, fraud, and corruption in the awarding of public contracts.

Generally, state and local agencies are required to let contracts in excess of specified amounts to the "lowest responsible bidder," but the law does not provide a statutory definition of "responsible."

Existing provisions of the Public Contract Code (Section 20111.5) grant school districts the authority to establish a process to prequalify bidders through the use of a standardized questionnaire and financial statement.

BACKGROUND

According to the author's office, this measure is intended to provide statutory clarity and to give awarding agencies the authority to pre-qualify contractors on the basis of a uniform system of rating qualified bidders that incorporates standard questionnaires and financial statements.

Proponents emphasize that "public agencies often fall victim to incompetent or unscrupulous contractors because the agency has failed to evaluate a contractor's abilities and past history." Proponents believe that this measure will "help insure that only qualified and competent contractors are awarded public works contracts."

Opponents have expressed concern with the definition of "responsible bidder" and argue that "allowing public agencies to devise their own prequalification process to limit the contractors which may bid on projects undermines the state's open bidding laws and sets the stage for favoritism in the selection of public works contractors."

Opponents also contend that contractors have encountered numerous problems with school districts that have chosen to prequalify contractors through the use of a standard questionnaire. Opponents point out that each time a

contractor wants to bid on a school project, he or she must go through a prequalification process tailored specifically to that school district.

Based on their experience with school districts, opponents believe that "agencies will not be consistent in developing evaluation criteria unless that criteria is specific and limited in its application."

SUPPORT: As of June 25, 1998:

California Association Sheet Metal & Air Conditioning Contractors
California Chapter of the National Electrical Contractors Association
California Legislative Conference of the Plumbing, Heating/Piping Industry
California State Association of Electrical Workers
California State Council of Carpenters
California State Pipe Trades Council
Central Basin Municipal Water District
Mechanical Contractors Association of Southern California
State Building and Construction Trades Council
Western States Council of Sheet Metal Workers

OPPOSE: As of June 25, 1998:

Associated General Contractors of California
Associated General Contractors of San Diego
California Business Properties Association

FISCAL COMMITTEE: No.

Attachment 3 to 8-17
Legal Department
July 7, 1998

AB 2739
Page 1

Date of Hearing: May 5, 1998

ASSEMBLY COMMITTEE ON CONSUMER PROTECTION,
GOVERNMENTAL EFFICIENCY, AND ECONOMIC DEVELOPMENT
Susan Davis, Chair

AB 2739 (Mazzoni) - As Amended: April 29, 1998

SUBJECT : Authorizes public entities to adopt and apply a uniform system of rating public contract bidders

SUMMARY : Defines the term "responsible bidder" for public contract purposes, and authorizes public entities to adopt and apply a uniform system of rating bidders utilizing standard questionnaires and financial statements. Specifically, this bill :

- 1) Defines the term "responsible bidder" in the Public Contract Code as "a bidder who has demonstrated the attributes of trustworthiness, as well as quality, fitness, and capacity to perform satisfactorily the public works contract."
- 2) Authorizes a public entity to adopt and apply a uniform system of rating bidders on the basis of standard questionnaires and financial statements in regard to public works contracts for which a bidder is qualified to bid.
- 3) Finds and declares that the Legislature believes the establishment of a uniform system to evaluate the ability, competency, and integrity of bidders on public works projects is "in the public interest, will result in the construction of public works projects of the highest quality for the lowest costs, and is in furtherance of the objectives" of the Public Contract Code.

EXISTING LAW :

- 1) States that the objective of the Public Contract Code is to provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition, and to eliminate favoritism, fraud, and corruption in the awarding of public contracts, among other provisions.
- 2) Defines public entity, as specified.
- 3) Defines public works contract as "an agreement for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind."
- 4) States generally that public contracts be awarded to the "lowest responsible bidder", but does not provide a statutory definition of "responsible".
- 5) Does not authorize public entities to adopt and apply a uniform system of rating bidders on the basis of standard

AB 2739
Page 2

questionnaires and financial statements for contracts that a bidder is qualified to bid on.

FISCAL EFFECT : Unknown. This bill is keyed as nonfiscal and will not be sent to the Assembly Appropriations Committee.

COMMENTS :

1) Author's Intent

The author's office indicates that AB 2739 is intended to provide statutory clarity where there currently is none, and to authorize public entities on a voluntary basis to utilize a uniform system of rating qualified bidders.

Supporters assert that the approach taken in the bill will lead to public entities assuring that they will receive the "greatest value at the lowest possible cost for their construction dollar," and that "only qualified and competent contractors are awarded public works contracts."

2) What is "Responsible" ?

While current law does not provide a specific definition for what a "responsible" bidder is, case law has generally fleshed out this definition over time, largely by exception. Generally, lowest responsible bidder has been defined as "the lowest bidder whose offer responds in quality, fitness, and capacity to the particular requirements of the proposed work" (background information provided to the committee referencing 2 Dillon, Municipal Corporations Section 811, 5th ed 1991).

A legal summary of this issue used in a January 1998 workshop for school district contracts states "A determination of whether a bidder is "responsible" is a question of fact within the exercise of reasonable discretion by the governing board ("Board"). However, prior to awarding a competitively bid contract to [a party] other than the lowest monetary bidder, the Board must notify the low monetary bidder of any evidence reflecting upon its responsibility received from others or adduced by independent investigation and afford that bidder an opportunity to rebut such adverse evidence and to present evidence to the Board that it is qualified to perform the contract. Due process does not require, however, that the Board conduct a quasi-judicial proceeding prior to rejecting the lowest monetary bidder as not responsible."

The author and supporters should explain to the committee their definition, how it may differ from current definitions emanating from case law, and what impact these differences may have on the public contracting process. For example the phrase "the attributes of trustworthiness" used in the bill may simply itself be defined over time by case law.

3) Who Develops the Uniform System? Should it be Uniform ?

AB 2739
Page 3

The bill authorizes, but does not require, a public entity to adopt and apply a uniform system to rate qualified bidders. This system would be limited to standard questionnaires and financial statements.

If the system is to be uniform, should there be a single entity or group of entities developing the system? Otherwise, it appears as if each public entity may well utilize quite different information in building their system, which may work against the stated purpose of the measure.

However, given the wide range of projects which are governed by the public contract code, is a uniform system possible? Additionally, if a point system is used in evaluating bidders to determine responsibility, might such a system be more effective if different factors were weighed differently depending on the nature of the contract in question?

The author and supporters should provide some clarity to the committee regarding this situation. The author may wish amend the bill accordingly.

REGISTERED SUPPORT / OPPOSITION :

Support

Ca. Assn. Sheet Metal & Air Conditioning Contractors Natl. Assn.
(CAL SMACNA)
California Chapter of the National Electrical Contractors
Association (NECA)
Calif. Legislative Conference of the Plumbing, Heating & Piping
Industry (CLC)
California State Association of Electrical Workers
California State Council of Carpenters
California State Pipe Trades Council
Mechanical Contractors Association of Southern California
State Building and Construction Trades Council
Western States Council of Sheet Metal Workers

Opposition

None on file

Analysis prepared by : Robert Herrell / aconpro / (916) 319-2089