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# ASSOCIATION OF CHIEF BUSINESS OFFICIALS (ACBO) 2018 FALL CONFERENCE

## Public Records Act Requests and Bid Protests from Unsuccessful Bidders

10/23/2018


*PRESENTED BY:*

Christopher Fallon & Charlie Ng




**Public Records Act Requests and Bid Protests from Unsuccessful Bidders**  
Association of Chief Business Officials (ACBO) Fall Conference | October 23, 2018  
*Presented By: Christopher Fallon & Charlie Ng*

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**Topics Covered**



- Bid Protests
  - Award to “Responsible” Bidder with Lowest “Responsive” Bid
- Best Practices for Public Records Act (“PRA”) Requests from Unsuccessful Bidders
  - Duties regarding Bidder Trade Secrets

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**Competitive Bidding**



- Must Bid “Public Project” Contracts
  - \$15,000 or more for construction, renovation, improvements, demolition, repair work, painting.
- Must Bid Non-Construction Contracts over \$90,200 (2018 threshold amount)
  - Equipment, materials, or supplies
  - Services, except construction services
  - Repairs, incl. maintenance

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**Bids and Contract Award** 

Bids are irrevocable offers

- Bid bond (10%) may be submitted with public project bid. Forfeited if low bidder refuses to enter into contract.
- Low bid may be withdrawn only for typographical or arithmetical errors – not errors in judgment (PCC § 5103)
- After bid opening, District must either:
  - Award contract to “**Responsible**” bidder who submitted the Lowest “**Responsive**” bid
  - OR
  - Reject all bids

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**Bid Protests** 

- What is a Bid Protest?
- Prepare For Protests
  - Understand the Bidding Process
  - Contract and Bid Documents
  - Plans and Specifications
  - Pre-Bid Requirements and Walk-Through

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**“Responsibility”** 

Responsible bidder:

- Focuses on the **bidder** (not the bid)
- Trustworthiness
- Quality, fitness, capacity and experience to satisfactorily perform the work
- Complex matter often dependent on info from outside the bidding process and requiring exercise of subtle judgment

*Public Contract Code § 1103  
Great West v. Irvine USD (2010) 187 Cal.App.4th 1425, 1451*

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**Responsibility Determination** 

- Public body has discretion to determine which bidders are responsible.
- Determination that bidder is not responsible requires due process hearing:
  1. Notice of evidence against bidder
  2. Opportunity for bidder to rebut evidence
  3. Permit bidder to present evidence of qualifications

*Boydston v. Napa Sanitation (1990) 222 Cal.App.3d 1362*

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**“Responsiveness”** 

Responsive bid:

- Focuses on the **bid** (not the bidder)
- A bid is responsive if it promises to do what the bidding instructions demand
- Can be determined from the face of the bid
- Minimal due process afforded – no right to a hearing (*Ghilotti v. Richmond (1996) 45 Cal.App.4th 897*)

*Great West v. Irvine USD (2010) 187 Cal.App.4th 1425, 1452*

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**District’s Duty to Follow Own Rules** 

“This court has no power to direct the award of a public contract to any individual. We can, however, direct an agency to follow its own rules when it has a ministerial duty to do so or when it has abused its discretion.”

*Pozar v. Dept. of Trans. (1983) 145 Cal.App.3d 269, 271*

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**Bid Protest – Liability?** 

“Statutory immunities provided by [the Government Code] preclude any liability on [the government and government employees] even if, as alleged, the director abused his discretion when he awarded the contract to plaintiffs’ competitor.”

*Rubino v. Lolli* (1970) 10 Cal.App.3d 1059, 1063

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**Requests for Proposer’s Documents** 

- For low bid awards opened in public, unsuccessful bidder entitled to copy of public bid.
- For non-low bid awards or competitive selection awards not opened in public, unsuccessful proposer can obtain proposals via the Public Records Act request.

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**Public Records Act** 

- The California Public Records Act (PRA) – Government Code section 6250 et seq.
- Public policy favors disclosure
- The PRA recognizes privacy interests in certain records
- Provides numerous exemptions to disclosure

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**Public Records Act** 

(b) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person...

Cal. Gov't Code § 6253

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**What is a Public Record?** 

(e) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics...

Cal. Gov't Code § 6252

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**Initial Response** 

- A public entity is required to provide an initial response within 10 days which should indicate:
  - Whether the request seeks disclosable records
  - The estimated date and time records will be available

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**Production of Records and Bid Documents** 

- Produce records in a reasonable time given the amount of records and difficulty locating the records.
- District should wait to produce responsive documents until completion of negotiations.
- If estimated time of production changes from the estimated time in the initial response letter, District should notify the requestor of the new estimated date.

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**Exemptions to the PRA** 

- Exemptions to the PRA are contained in Cal. Gov't Code § 6254.
- The most relevant exemption for vendors submitting proposals are trade secrets.
- Districts should redact trade secrets from proposals before producing.

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**Trade Secrets** 

- Trade secrets are exempt from the PRA.
- Trade secrets include information, including formulas, patterns, compilations, programs, devices, methods, techniques, processes that:
  - Derive independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
  - Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy

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**Examples of Trade Secrets** 

- Specialized formulas, processes, methods or procedures;
- Cost and pricing information;
- Customer lists.

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**Best Practices with Vendors** 

- Some vendors flag information as confidential. This information should be reviewed.
- District needs to determine whether information is exempt as a trade secret.
- If District thinks the vendor overreached in their proposed redactions, ask vendor to provide a legal justification for the redaction.

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**Best Practices with Vendors** 

- Public entities should send vendors a copy of the proposed redactions before producing.
- If there is a disagreement over redactions that cannot be resolved, the public entity should allow the vendor time to seek legal protection for the documents and should follow resulting court orders.

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**Case Study** 

- Better Software Company submitted a proposal to provide the District payroll software services.
- After learning that Best Software Company's bid was selected, Better Software Company filed a PRA request for all documents the District received related to the RFP.

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**Case Study** 

- The District notices that Best Software Company watermarked the entire proposal as confidential even the pages that only talk about basic facts like what type of software the company provides which is also described on their public website.
- Another proposer, Good Software Company, did not mark any part of the proposal as confidential.
- The information in the proposals is largely the same. What should the District do?

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**Multiple PRA Requests** 

- Remember that if a vendor does a PRA request that includes their own documents, these documents should be redacted too.
- Once a public agency releases information in a public records request, that information must be released to future requestors.

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**Cover Letter to Requestor** 

- District should provide the basis for any documents that were withheld or were redacted.
- District should also indicate if there were no responsive records.
- District is not required to create a responsive record that does not exist.

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**Legal Action to Compel Disclosure** 

- Requestor may file an action to compel District to disclose the records.
- District must show court why the records should not be disclosed.
- The court *shall* award costs and reasonable attorney's fees to prevailing plaintiff:
  - Paid by the District, rather than the individual official who denied access to the records
  - District may be entitled to attorney fees/costs for clearly frivolous action

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**Contract Provisions** 

- Vendor contracts may include confidentiality provisions.
- District cannot contract to avoid the PRA and should look out for these clauses.
- If District has already signed a contract limiting disclosure, responsive documents are not protected from disclosure under the catch-all.

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**Questions?** 

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