

Legal Aspects and Ramifications of Filing Frivolous Bid Protests

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The filing of bid protests seems all the more familiar in today's public works industry. Thus, it is important for contractors to be aware of the ramifications of filing bid protests which may be deemed "frivolous."

As the state and local government market has grown more competitive, states have begun implementing measures to discourage frivolous bid protests. As such, bid protests are subject to being evaluated, upon filing, to determine whether they are "frivolous." A protest is deemed frivolous if it clearly lacks any merit or is filed solely to disrupt the procurement process.

Although protests, both before and after a contract is awarded, are an important means for objectively reviewing meritorious grievances of disappointed bidders of government contracts, many state and local government projects have a limited time frame in which a particular contract needs to be completed. Forcing a review of questionable bid protests strengthens the procurement process and maintains the integrity and accountability of its counterparts. However, unless the protest is clearly frivolous, and thus subject to summary dismissal, it unnecessarily delays the awarding and commencement of the particular contract. This delay can halt the entire procurement process, until the protest is resolved. This is particularly detrimental to state and local governmental entities when the contract acquisition and commencement of work are "urgent and compelling." Even a frivolous protest, which is summarily dismissed, can cause some delay and additional workload on the public entity. Namely, it has to notify all other competitors of the protest, whereby each interested party is entitled to respond.

Protections against Filing Frivolous Bid Protests

When protesting state and local government contracts, it is required that the protestor have some legitimate interest in the procurement at issue, so as to prevent disinterested companies from disrupting the procurement process by filing frivolous protests. The California State Legislature has enacted a process imposing rigorous and trying constraints on bid protests. Namely, the Alternative Protest Pilot Project is administered by the Department of General Services.¹ Accordingly, in order to be eligible for this process, the contracting department must agree to participate in the project, whereby the Department of General Services then requires that the proposed solicitation be conducted as part of the project prior to release of the solicitation for bids. California's Alternative Protest Pilot Project requires that all protests be limited to participating bidders and further requires

¹ Public Contract Code § 12125 was recently amended by [2005 Cal. Legis. Serv. Ch. 272 \(S.B. 837\) \(WEST\)](#) and will be entitled the Alternative Protest Process.

the inclusion of one or more of the following alternative procedures:

- (1) The Alternative Protest Pilot Project shall not prevent the commencement of work in accordance with the terms of any other contract awarded pursuant to statute and a contract may be entered into pending a final decision on the protest;
- (2) The Department of General Services shall review the protest within seven days of the filing date to determine if the protest is frivolous. If determined to be frivolous, the protest shall not proceed under this chapter until the bidder posts a protest bond in an amount not less than 10 percent of the estimated contract value, as determined by the Department of General Services in the solicitation;
- (3) The Director of General Services shall issue a decision within a period not to exceed 45 days from the date the protest is filed; and
- (4) Arbitration, as defined and established by the Department of General Services, shall be the resolution tool.

In accordance with Public Contract Code § 12128, the pilot project applies to the following categories: Information technology, materials, supplies, equipment, and ancillary services. The duration of the project shall continue until it has been applied to at least 25 contracts, or until December 31, 2005, whichever occurs later. ²

Ramifications to Filing Frivolous Bid Protests

Despite whether a particular contracting department agrees to participate in the pilot project, a successful bidder, whose bid is being protested, is still entitled to pursue other legal remedies against a competitor asserting a frivolous bid protest. Such causes of action include, but are not limited to Negligent and/or Intentional Interference with Prospective Business Advantage. It should also be noted that as of July 1, 2006 the legislature has amended Public Contract Code § 6611 to prohibit an unsuccessful bidder from using the Alternative Protest Process, and would instead provide for the filing of a writ of mandate.

The Legislature has looked into the issue of requiring unsuccessful bid protestors to pay the cost of the protest proceedings. Such actions may however, have a "chilling effect" on legitimate bid protest actions. In light of the legal ramifications, any party contemplating a bid protest of a California state or local governmental agency procurement, must proceed with particular caution.

** This is an intricate area of the law. As such, if you have issues pertaining to the above, please contact an attorney or other legal advisor. For more information please feel free to contact*

² Public Contract Code § 12128, as amended by [2005 Cal. Legis. Serv. Ch. 272 \(S.B. 837\) \(WEST\)](#) shall be operative until December 31, 2011.

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