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Legal Briefs

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No License? No Problem!

Court Limits Public Agencies' Ability to Reject Bids Listing Unlicensed Subcontractors

By Aaron P. Silberman
Rogers Joseph O'Donnell / San Francisco

If your company submits bids on public works in California, then you need to know about the recent court decision in *D.H. Williams Construction, Inc. v. Clovis Unified School District*, 146 Cal. App. 4th 757 (Jan. 10, 2007). In short, this case says that a bid that lists an unlicensed subcontractor may not be rejected as *nonresponsive*, unless the solicitation explicitly requires that subcontractors are licensed when the bid is submitted. While the public owner may disqualify a bidder that lists an unlicensed subcontractor as *non-responsible*, that is, unable to perform the work, it may only do so after giving the bidder notice and an opportunity to explain why it can perform.

The *D.H. Williams* court explains the distinction between the terms "responsive" and "responsibility." While responsiveness goes to the contents of the bid, responsibility goes to the qualities of the bidder. More specifically, responsiveness means "whether the bid 'promises to do what the bidding instructions demand'". Responsibility, in contrast, is a proposer's "fitness, quality, and capability to perform the proposed work satisfactorily." While responsiveness can be determined from the face of the bid, responsibility often cannot. In most instances, whether a bid is responsive is based on an analysis of the solicitation and the bid and is not dependent on disputed facts. For that reason, a hearing may be necessary on some issues of responsibility, but it is not required on questions of responsiveness.

What does this mean for public works contractors? Mostly, it means that the times at which contractors must be licensed for public works jobs will often be different

for prime contractors and subcontractors. Here's how it breaks down:

The prime contractor (bidder) must be licensed when it submits its bid. The *D.H. Williams* decision does not change the rule in California that forbids "any person to submit a bid to a public agency in order to engage in the business or act in the capacity of a contractor within this state without having a license therefor." Nor does it change the duty of public owners to reject bids by unlicensed contractors: "a bid submitted to a public agency by a contractor who is not licensed in accordance with this chapter shall be considered nonresponsive and shall be rejected by the public agency." Bus. & Prof. Code § 7028.15.

Subcontractors may or may not need to be licensed when the prime submits its bid. This is the primary impact of the *D.H. Williams* decision. In most cases, public owners do not expressly require in their solicitations that all subcontractors listed in the bids be licensed at bid submission. In those cases, if the public agency were to learn during bid evaluations that a prime bidder listed an unlicensed subcontractor, it would not be able to reject that bid as nonresponsive. The agency could still require that the prime bidder demonstrate that its team will be able to perform the work, *i.e.*, by showing either that the unlicensed contractor will be able to get a license before executing its subcontract and commencing work or that the prime is properly licensed and prepared to do the work if the listed subcontractor cannot obtain the required license.

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