

**CMAA Southern California Chapter
Bid Protest Legal Seminar
January 17, 2014**

Audience Handout

I. The Players

City Agency Board	Audience
Bidder Alpha Attorney	Mike
Bidder Beta Attorney	Kevin
Construction Manager	Marcia
City Clerk	Chip Ossman

II. Overview

An Owner is considering whether to award a contract to Alpha or to Beta, or to rebid, and is being advised by their outside consultant Construction Manager's legal counsel. The Moderator will present the issues described below for discussion to the bidders' attorneys and to the Construction Manager, and the audience will then vote on whose opinion to adopt. The Moderator will tabulate and release results at the end of the presentation.

III. The Project

The Owner, a newly formed Charter City, has advertised for bids for construction of its new City Hall on land owned by the City, as well as minor improvements to the Street on which the project will be located, which is State Route 10. The City has hired Construction Manager to manage the bid process. The City Council, all well intentioned members of the community, know nothing about competitive bidding or public contracting.

IV. Bid Documents

- A. Prequalification: At the CM's recommendation, the City prequalified bidders using the standard DIR form. The Bid

documents require bidders to have completed at least two similar projects within the last three years valued at \$15 million or more.

- B. Project delivery method: Design/bid/build.
- C. Bid Submittal: All bids and related bidding documents must be submitted electronically using the City's new proprietary software system recommended by the CM. The City's bid site includes an electronic file that lists all bids and related documents received by the City and the date and time of receipt. The City's software also generates a receipt that is sent by e-mail to each bidder immediately after its bid and any related documents are submitted.
- D. Bid Price & Alternates: Because project funding is limited by bond proceeds from a local bond, the CM drafted the bid docs to include a base bid and alternates for the City Council's "wish list" as follows:
 - 1. Base Bid LS _____
 - 2. Alternate 1 LS (on site child care center) _____
 - 3. Alternate 2 LS (on site community center) _____
 - 4. Alternate 3 LS (playing field and playground on adjacent lot) _____ (respectfully suggest moving para G to here – cause I asked the question myself at this point)
- E. Basis for Award: The contract will be awarded to the responsible bidder who submits the lowest responsive bid.
- F. Good Faith Efforts: Each bidder must make a "good faith effort" (GFE) to subcontract at least 15% of its bid price to Small Business Enterprises (SBE). All bidders must submit proof of their GFE with their bids, regardless of whether they achieve the subcontracting goal.

G. Bid Deadlines:

1. October 15, 2013 – Last day to submit prequalification form
2. November 1, 2013, 2:00 p.m. – Deadline for submitting bids
3. Bid protest filing deadline – five (5) days after City's issuance of Notice of Intent to Award.

V. **ISSUES**

A. Basis for Contract Award Issue 1

- At pre-bid meeting, Agency engineer verbally informed all persons present that contract award would be based on base bid plus all alternates and that addendum to bid documents would be issued.
- Bidder Alpha submitted the lowest base bid.
- Two days after the bid opening, on May 3rd, the City issued a Notice of Intent to Award saying it would award the contract to Alpha, including base bid and all alternates.
- With all alternates included, Alpha's bid is \$5 million higher than Beta's bid.

B. Prequalification Issue

- Bidder Alpha submitted its prequalification form on October 15, 2013, but failed to list 3 projects of \$15m or more; it instead listed qualifying projects completed by its principal for Alpha's parent company.
- Alpha timely submitted the lowest base bid. Sadly, Alpha's alternate prices were all twice as expensive as the remaining bidders, but the City understands it must consider Alpha as the low bid, unless an excuse is found...
- CM recommends that City reject Alpha's bid as non-responsive on grounds of lack of experience.

C. GFE Submittal Issue 1

- Bidder Alpha timely submitted the lowest base bid.
- The next day, the City notified Alpha that the City did not receive Alpha's GFE documentation.
- Alpha has an e-mail confirming submission of its GFE documentation, but there is no record of Alpha's GFE submittal on the City's electronic bid site.
- Beta timely submitted the next lowest monetary bid.

D. GFE Submittal Issue 2

- Bidder Alpha submitted its bid on time but did not submit its GFE documentation with its bid.
- However, Alpha did promise to achieve the 15% SBE participation goal as reflected in its bid and subcontractor listing.
- Several days after the bid deadline, Bidder Alpha submitted its GFE documentation to the City after receiving a request from the CM.
- Bidder Beta timely submitted the second lowest base bid.

E. Basis for Award Issue 2

- Alpha timely submitted the lowest base bid, but Beta has serious questions about irregularities in the bidding process.
- On May 5th, two days after issuance of the City's Notice of Intent to Award to Alpha, Beta submitted a Public Records Act request for documents relating to the City's evaluation of bids and bid alternates, as well as all pre-bid communications between City, Construction Manager and Alpha.
- The City responded on May 7th claiming that, under the "public interest" exception, the requested records are exempt from disclosure because the contract remains under consideration and has not yet been awarded.

F. Prevailing Wage Issue

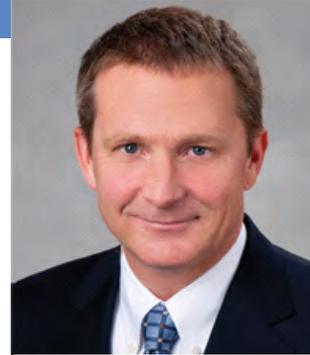
- Alpha's base bid is \$3 million lower than Beta's.
- Alpha's bid is not based on paying prevailing wages.
- The City Charter does not require payment of prevailing wages on purely municipal projects that are locally funded & this job is completely locally funded.

Kevin S. Collins

Kevin Collins is a partner in the firm's Los Angeles office and a member of its Construction and Government Contracts Groups. Mr. Collins specializes in construction industry business litigation and transactions representing contractors, owners, subcontractors and design professionals on public and private works of improvement. Mr. Collins has specific expertise in the prosecution and defense of construction claims involving competitive bidding, delays, disruption, changed conditions, inaccuracies and other deficiencies in plans and specifications, contract terminations, mechanic's liens, stop notices, payment and performance bonds. Mr. Collins' transactional expertise includes the negotiation and drafting of construction contract documents for project delivery methods, including design/bid/build, design/build, EPC, design-build-operate-maintain and CM at-risk.

Experience

- Represented an owner in a negotiation of a completion contract and prosecution of claims following the default of a design-builder on three contracts totaling over \$250 million.
- Represented a city in defense of a \$16 million claim by a contractor arising from construction of a new airport terminal. Achieved a settlement in which the city paid less than contract price and retained a portion of the liquidated damages.
- Represented an international contractor in the successful negotiation of a \$13 million additive change to an EPC contract for the modernization of a hydroelectric pumped storage generating facility.
- Represented a project owner as part of the trial team in a three-month jury trial of a contractor's \$66 million claim arising from the construction of a major industrial processing facility in which the contractor recovered less than half of the amount claimed.
- Lead outside construction claims counsel for a public agency in connection with the agency's \$3.4 billion capital improvement program.
- Represented a general contractor in an action arising from a hotel modernization and expansion to recover an \$800,000 contract balance, extras and prompt payment penalties. Recovered the entire amount sought, including attorneys' fees.
- Following legislative enactment of competitive bidding requirements, drafted a public agency's procurement policies and procedures for the competitive bidding of construction contracts and solicitation of professional services. Drafted standard design, professional services and construction procurement and contract documents for the agency's capital improvement program.



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Related Services

Litigation
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Education

Loyola Law School Los Angeles
(J.D., 1992)
University of California, Los Angeles
(M.A., 1989)
Pitzer College
(1985)

Admitted To Practice

California
Colorado

- Prepared EPC contract documents for an acetylene pipeline project.
 - Prepared design-build documents for groundwater treatment facilities.
 - Prepared contract documents for the design and construction of a major groundwater desalination plant.
 - Prepared standard form agreements for a major telecommunications company for the expansion of its cellular telephone network.
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News

144 Alston & Bird Attorneys Named 2014 *Best Lawyers*; 17 Named “Lawyer of the Year”

One hundred and forty-four Alston & Bird attorneys have been selected for inclusion in the 2014 edition of *The Best Lawyers in America*. In addition, 17 Alston & Bird attorneys were named “Lawyer of the Year” by the publication.
August 15, 2013 In the Press

Publications

“*Pioneer Construction, Inc. v. Global Investment Corp., et al.*, 202 Cal.App.4th 161 (2nd Dist, December 21, 2011),” *Bankruptcy e-Bulletin, Insolvency Law Committee - Business Law Section of the State Bar of California*, January 30, 2012.

January 30, 2012 Publications

Events

Past Events

ACC MCLE Ethics Presentation

July 17, 2013 Seminar

California’s New Mechanic’s Lien Laws: What Every Owner, Contractor and Lender Needs to Know

November 14, 2012 Seminar

Elimination of Bias: An Interactive Discussion of Bias and Discrimination

August 17, 2011 Seminar

Construction Management Association of America Meeting

January 28-29, 2010 Seminar

ACCess MCLE: Your Relationship With Outside Counsel - Hiring and Managing Law Firm Attorneys

October 21, 2009 Seminar

Grand or Faustian Bargain? New Opportunities and Perils for State and Federal Contractors Under the New Administration

April 16, 2009 Seminar

Construction Law Update - A Review of Legal Developments in the Courts and Legislature Affecting the Construction Industry

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MARCIA HABER KAMINE completed her undergraduate studies at the University of California, San Francisco, and received her law degree, *cum laude*, from Southwestern University College of Law. After more than 30 years in the Los Angeles City Attorney's Office, where she tried almost 50 jury trials to a verdict, she retired as an Assistant City Attorney and joined the firm. For 20 years with the city, she had been assigned to the Civil Branch, General Counsel and Special Litigation sections, where she represented the city on all aspects of public works construction, including bid protests, bidder responsibility hearings, subcontractor substitution hearings, and trials and appeals in both state and federal courts. Her cases involved Hyperion Sewage Treatment Plant, North Outfall Replacement Sewer, police stations, libraries, and the L.A. Convention Center. She also advised Parks and Recreation, the Police Department and the Fire Department on construction claims and procurement issues. For the last 10 years with the city, she advised the Department of Water and Power, Board of Water & Power Commissioners, on construction and procurement issues, including development of standard terms and conditions for a variety of contracts (including software and hardware procurement, design-build for solar and wind farms, and sales of surplus property), and on energy related regulatory and procurement matters. She joined the firm in May 2009, and represents contractors, owners and sureties in all aspects of construction and procurement matters. She regularly serves as an arbitrator (over 250 times) and mediator in construction industry cases, and is a member of the American Arbitration Association Large Complex Case Panel. She co-wrote "Chapter 22, Construction Contracts" in 2 CALIFORNIA FORMS OF JURY INSTRUCTION (Matthew Bender, 1985, repub'd 1997), presented a paper at the World Tunneling Conference on Differing Site Conditions writes papers on government procurement, bond and construction related issues, and often makes presentations to construction industry groups. She served for 7 years on the governing board of California Continuing Education of the Bar (publisher of many legal treatises) culminating in a year as the Chairperson. She has also been very involved in community organizations, including Boy Scouts and citizen advisory panels for the expenditure of public works bond money.



GEORGE OSSMAN III
President



Mr. Ossman is President of Ossman Project Management Consulting, Inc. Providing mediation, arbitration, and dispute resolution services for the construction industry, Mr. Ossman consults with clients involved in construction disputes, and prepares and evaluates construction delay, disruption, and inefficiency claims, and serves as an industry neutral. Mr. Ossman's services are founded in his practical background of construction jobsite experience, his continuing industry education through teaching and attending trade association seminars, and his construction management and dispute resolution academic degrees.

His field experience includes the on-site management and administration of construction projects with values of up to \$115,000,000, with concentration in heavy industrial projects. Recent consulting assignments have included:

- Providing management and administrative support to Owners, Contractors, and Subcontractors in the construction of a variety of public and private projects including hotels, power plants, sewer and underground facilities, high schools, multi-family residential complexes, process plants, and waste water treatment facilities;
- The evaluation and benchmarking of Facilities Management Departments in both public and private sectors; and provision of recommendations for their improvement;
- Construction management support to municipalities and School Districts;
- Project schedule preparation, support, and monitoring for General Contractors;
- Project schedule evaluation for project owners;
- Preparation of General and Special Provisions to be included with Specifications for numerous municipality projects;
- The evaluation of an individual project's performance with respect to cost and schedule.
- Dispute process support and advice - from the identification of the dispute through mediated settlement; typically including supporting the client at the mediation.

Mr. Ossman provides support for the defense and for the prosecution of construction litigation in Federal and State Courts, and analyses to support the arbitration of construction claims. He has qualified and testified more than fifteen times as a California Superior Court expert witness in issues involving construction contract administration, as well as being accepted and testifying as expert in AAA, private, and Caltrans' arbitrations.

He received his Bachelor of Mechanical Engineering degree (graduated in 1976) and his Master of Science degree, with concentration in Construction Management (in 1983), from the Georgia Institute of Technology (aka Georgia Tech). In 2003 he earned the Master of Dispute Resolution degree from the Straus Institute for Dispute Resolution at Pepperdine University; summary studies of his Thesis: "Construction Arbitration Consistency and Reliability: An Empirical Study" are published in four industry juried publications.

His professional affiliations include neutral membership in The American Arbitration Association, Board member of the Southern California Chapter of the Construction Management Association of America, member of the Southern California Mediation Association, past Board member of the Western Council of Construction Consumers, and committee member of the ASCE Construction Institute's Claims Avoidance and Resolution Committee.

Mr. Ossman also teaches seminars and continuing education programs in the skills and procedures of project planning, project scheduling, contract administration, and dispute resolution. He serves as industry mediator, is named as neutral in construction contract ADR provisions, is a listed AAA neutral for arbitration, and is a listed mediator for California Superior Courts in Los Angeles County.

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