

Are public entities above the law?



Construction Law

By PAMELA J. SCHOLEFIELD

Background/question: A large school district advertised for bidders for a five-year maintenance contract for their district's HVAC systems.

The scope of this contract is to provide a list of guaranteed prices for common replacement parts, various smaller new AC units, and flat rates for specific service and repair tasks.

We followed all of the bidding instructions, provided all of the required documents and submitted our bid. At the bid opening, we were the low bidder, yet three months later the district has not issued a notice of award.

The work that would be part of the maintenance contract is currently being performed by a contractor that the district has been using all along on a piecemeal basis. Since the commercial HVAC business is a pretty tight knit community, it isn't too surprising that we are able to get insider information on what is going on.

One of our employees found out that the district is awarding the work that was supposed to be under this contract by issuing change orders to existing contracts that are perpetually kept open.

We also suspect that the district is breaking up large projects into smaller projects in order to avoid having to go out for an open bid.

We believe this to be the case because last year we inspected a particular administration building to upgrade to an energy efficient HVAC system and we submitted a competitive quote of about \$150,000.

At that time, the district said that they were going to postpone this project due to budget problems and mentioned something about putting it out for open bid once they had an acceptable budget for the work.

The district's preferred contractor is now performing the work, and this project was never put out for open bid. Word on the street has it that the district issued several separate purchase orders for the equipment and then awarded additional purchases orders for "phases" of the labor.

Our overall impression is that the district's facilities personnel had expected their preferred contractor to be the low bidder on this long-term maintenance contract, and going through the bid process was nothing more than a formality to validate the plan.

For now, the district seems to have found loopholes in the process by issuing change orders and breaking up the larger projects into smaller ones, so they can avoid issuing the award for the maintenance contract to our company.

We spent a significant amount of time and resources preparing a detailed bid in good faith, which included obtaining special pricing from the equipment manufacturers and devising creative ways to opti-

mize our labor.

Plus, we also spent money on the required bid bond. We feel we are entitled to be awarded this contract since we are the low bidder. What can we do?

Answer: I will assume that you are the lowest responsible bidder submitting a responsive bid (in public bid lingo). Most bid documents give a deadline as to when the district will issue the notice of award.

If that time has passed, you may want to consider a bid protest. I strongly encourage you to seek the advice of experienced legal counsel immediately because it is easy to lose your rights related to this contract as well as make matters worse for yourself for future bids.

For example, if a state public agency decides that your protest is frivolous, you have to post a bond at 10 percent of the contract value to proceed with the protest, and you may end up being classified as irresponsible and then be barred from future agency contracts.

The bid documents should include bid protest procedures particular to that public entity. It is very important to follow these procedures to the letter, especially the protest deadlines because they tend to be very short. For example, the bid protest procedures may give a submission deadline of five days after the bid opening, which is vastly different than a deadline of five days after the notice of award is publicized.

A bid protest usually begins with

submitting a formal written protest explaining why you are protesting.

Most bid protest procedures provide a guideline on exactly what information you must provide.

Then, you probably will receive a written response to your protest, or a notice of a hearing.

If you receive a written response, then you will usually need to submit a formal request for a hearing within a certain deadline if you do not agree with the response. At the hearing, it will feel like a one-sided argument because the very agency that you feel is violating the law is the one that will decide if you win your protest.

If you don't agree with the results of the district's hearing, you will have to file a petition for a writ of mandate in Superior Court, and can seek damages.

A writ of mandate is when the court is essentially forcing a public entity to do what they are supposed to do, but have not been doing.

You may be able to get the court to mandate that the district will not give work that was supposed to have been provided under the maintenance contract to its preferred contractor by using the various illegal means. You may also be able to petition the court to stop the district from illegally splitting up large projects into smaller ones in order to award the work to its favored contractor.

But, the court cannot force the district to award a specific contract

See **Law** on 36C

Penick

Continued from Page 25C

are patent pending.

The company's success has a foundation of collaboration.

"It's all about good and thorough preconstruction, effective design and good execution," says Tim Penick, president of T.B. Penick and Sons. Because the company uses structural engineers to assist customers with their construction needs, it is able to work collaboratively with the client to create performance specifications that optimize the overall project. At all stages of construction, productivity levels, costs and aesthetics are closely monitored and reviewed in order to meet schedule, budget and design

requirements, ultimately leading to savings in both time and money.

Because of the tremendous growth and interest in "green building," Penick prides itself on providing customers the best-in-class building services for these jobs as well. Today, Penick boasts a staff of LEED-accredited professionals that work with clients to streamline the building and certification process for projects undergoing the LEED rating system. The company has designed and built gold, silver and platinum LEED projects and offers the client design-build and design-assist services as well as environmentally conscious product lines such as pervious paving.

Safety has been contributory to the Penick growth as well. The company has received industry association safety awards, and workers and clients are drawn to the company's safe practices. Last year, the company's safety program was judged by the National Association of General Contractors as the best program in the country in its category. There have been proportionally low workers' compensation claims and few lost-time accidents in recent years. Quite simply, the company's safety record brings the company work.

T.B. Penick's customer loyalty is anchored in its cost and project management expertise.

"We design time-saving ideas into our projects. The philosophical underpinning is that we take our scheduling commitments very seriously and offer incentives for their achievement," says Penick.

CEO Marc Penick sums it up best: "It all boils down to a simple T.B. Penick concept: We are there for our customers from the project inception, building a detailed schedule and clearing obstacles in order to optimize the time and cost of construction. That's what our customers want, and that's what we deliver."

Submitted by T.B. Penick & Sons

Source Code 20080417crn

Creek restoration project opens opportunities for local companies to grow

By JAN PERCIVAL
Special to the Daily Transcript

Removing decades of neglect to the Chollas Creek Encanto Tributary and creating a beautiful natural setting for the Diamond Neighborhoods of southeastern San Diego was a fulfilling job for the excavation company that calls this community home.

"It was great transforming what had been an eyesore in a pretty bad situation into a beautified area," said Steve Groves, president of **Cats Excavating and General Engineering**.

Cats served as the general contractor on the \$2.85 million, 1.85-acre project, with Cats' contract on the work totaling \$1.6 million. The company removed tons of concrete and debris, realigned the channel of the creek bed, and installed the grade control structures lining the channel like rip-rap and cobble rock.

This was Cats' first job as general contractor and its first on a project of this kind. It was yet another sign of progress for the minority-owned contracting firm that only nine years ago was a three-man shop with \$200,000 in revenues. Cats now has 20 employees and records annual revenues as high as \$5 million.

Cats is truly a home-grown business in the Diamond Neighborhoods. Born and raised in the San Diego Fourth City Council District, brothers Groves and Cliff Smith took up leadership of the heavy-equipment rental company their father started in 1953 and left to them when he died in 1992. The name was changed to Cats (short for Caterpillar) Excavating, and has been in operation ever since. Smith serves as the vice president and Groves' wife Nita and oldest son, Steve Groves, II, all work together in the business.

Their families even live next door to each other in Encanto, just down the



Courtesy photo

Locals in the Diamond Neighborhoods, located in southeast San Diego, enjoy the walking path created by a restoration project for the Chollas Creek Encanto Tributary.

street from their mother.

Cats' recent growth was a direct result of its participation with the Jacobs Center for Neighborhood Innovation and the resident-led construction team that built Market Creek Plaza. The plaza was planned, designed, leased, built, and is now owned and operated by teams of community residents. During construction, the plaza's developers, **JCNI**, set and surpassed its goal for the participation of minority and woman-owned

contracting firms. Of the total contracts, 83 percent went to local emerging firms — like the nearly \$1 million grading contract to Cats. It was, for many, the largest contract they'd worked on in their companies' histories.

Bridging the gap for small, emerging contractors between small and large contracts was a major goal for the Market Creek Plaza construction team, which sought to remove the barriers to growth through assistance in

lines of credit, bonding, and technical and administrative assistance.

Training on the business side of contracting, mentoring relationships and lines of credit guaranteed by a program-related investment from the Jacobs Family Foundation helped these contractors grow their businesses while working on the plaza, and establish their own relationships with banks and bonding companies.

See **Creek** on 40C

Law

Continued from Page 28C

to you or anyone else. Had the contract been improperly awarded, the best the court could do is mandate that the contract be taken away from the bidder to whom it was mis-awarded. In that type of case, the district would have probably just re-bid the project.

As far as damages go, the district had the right to reject all bids and not award contract at all.

Depending on how the court looks at the district's lack of either awarding the bid or rejecting all bids, if you are entitled to damages

at all, most likely you will only get your costs for putting the bid together.

You are not entitled to an award against the district for profits that you anticipated you would have made off the contract.

Public contract laws are intended to eliminate favoritism, fraud and corruption in the awarding of public contracts. It is far from a perfect system, but is the only way we have to attempt to keep a level playing field. It is your right to expect a fair bidding process, and it may be

worth your while to force the district into playing by the rules to enhance your chances of future work.

Do you have a construction question? Send it to: info@construction-laws.com

Disclaimer

The information in this article is based upon California law and is for general information only. Any information or analysis presented here is intended solely to inform and educate the reader on general

issues. Nothing presented or referenced to, regarding facts, documents or applicable laws, constitutes legal advice. Before acting or relying on any information presented here, consult with a qualified attorney for your specific situation.

Scholefield holds an active PE license in Colorado, an undergraduate engineering degree from the University of Florida, and received her JD from the University of San Diego.

Source Code: 20080425tca