

# PUBLIC CONTRACTING: KEY TIPS FOR REVIEWING PUBLIC WORKS CONTRACTS

Cal Cities, City Attorneys' Track, Fall 2022 by  
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# Agenda

- Public Works Contract Review
- Key Questions
- Special Situations
- Checklist
- Questions?

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## Public Works Contract Review



**LEGAL, ENFORCEABLE  
CONTRACT**



**AVOID TYPICAL PITFALLS**



**FACILITATE PROJECT  
SUCCESS**

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# Preparation for Contract Review

- Focus on
  - Correct Procedures Followed
  - Substantive Requirements Met
- Review Entire Bid Package, Before Publication and Release to Contractors
- Early communication and regular coordination with Public Works Director and key staff



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## Key Questions to Build Contract

- Applicable Law
- “Public Project” Status
- Contracting Entity
- Bidding Thresholds
- Project Funding Special Rules
- Environmental Review
- Approved Capital Improvements Plan

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# Applicable Law?

“Where the statute prescribes the only mode by which the power to contract shall be exercised, the mode is the measure of the power.”

Cities’ power to contract is constrained by:

- State law – Public Contracts Code, Government Code
- City Charter for Charter Cities
- Municipal Code for all Cities
- Special Rules per Funding Sources

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# Public Project?

## Default:

- “Erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement” (Public Contract Code § 1101)

## Uniform Public Construction Cost Accounting Act – “public project” means:

- “(1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.
- (2) Painting or repainting of any publicly owned, leased, or operated facility.” (Public Contract Code § 22002)

## PCC – Definition for Cities - “public project” means:

- “(a) A project for the erection, improvement, painting, or repair of public buildings and works.
- (b) Work in or about streams, bays, waterfronts, embankments, or other work for protection against overflow.
- (c) Street or sewer work except maintenance or repair.
- (d) Furnishing supplies or materials for any such project, including maintenance or repair of streets or sewers.” (Public Contract Code § 20161)

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# Prevailing Wages

“Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds” (Labor Code § 1720)

- Generally broader than PCC “public project”
- Requires prevailing wages if over \$1000
- Includes certain private contracts using City funds
- Includes pre & post construction activities
- Exceptions may apply, see Dept. of Industrial Relations Determinations and Decisions

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# Contracting Agency?



City or affiliated entity?



Consider governing law & approval requirements



May be exempt from Public Contract Code, but still require prevailing wages

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## Competitive Bidding Process

Public Contract Code §§ 20160-20175.2

### Formal Bidding

- Notice Inviting Bids/RFP
- Submission of sealed bids
- Public opening of bids
- Award contract to lowest responsible & responsive bidder
- May also reject all bids and readvertise

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## Uniform Public Construction Cost Accounting Act

Public Contract Code § 22000-22045

- Allows Informal Bidding:
  - PO/Force account up to \$60,000
  - Informal Bidding up to \$200,000
  - Formal Bidding over \$200,000
- Requires City Council resolution & informal bidding ordinance
- If not – any public project over \$5,000 requires formal bidding

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## Using the City's Own Forces

- Allowed for any project up to \$60,000 under UPCCAA
- Allowed for any project, at any value, if City:
  - Completes bidding process
  - Rejects all bids
  - Council finds by 4/5 vote that project can be more economically completed by City's own forces
  - Requires careful accounting of costs per DIR regulations

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## Funding Sources?

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Federal, State, or County?

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Grant Terms?

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Nonprofit?

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P3 – Public-Private Partnership

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Bond covenants?

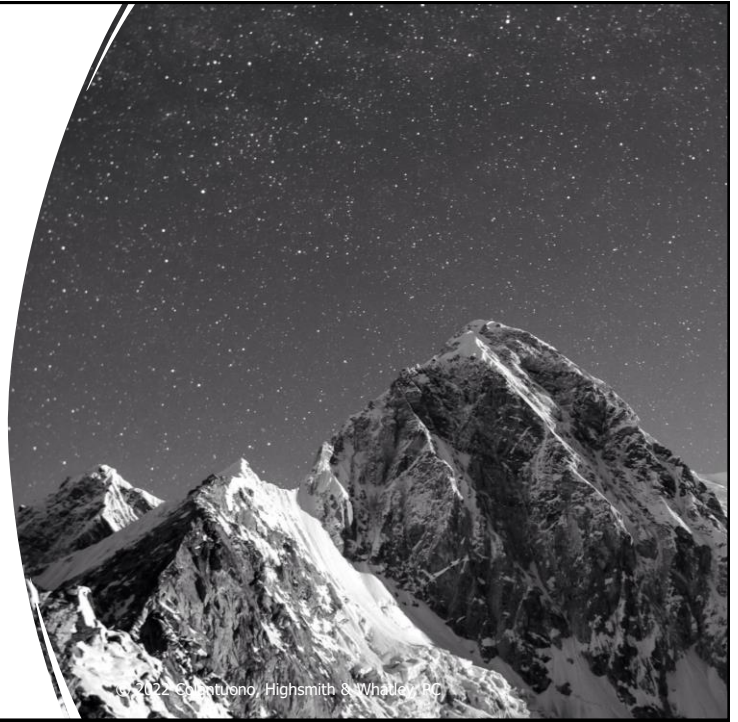
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# Environmental Review?

- California Environmental Quality Act
- National Environmental Policy Act
- Resource protection laws
- Other environmental agencies & mitigation requirements



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# Capital Improvement Plan?

- Council Policy Decision to Undertake Project
- Planning Commission Review of Capital Improvement Plan for General Plan Consistency

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# Contract Review

Complete bid package

Internally consistent

Accurate bid sheet

Subcontractor Lists

Public Contract Review checklist?

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# Special Situations



Federally Funded  
Projects



Design-Build



Energy Conservation  
Projects

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# Federally Funded Projects

Sealed bids

Competitive proposals

Micropurchases

Small purchase procedures

Noncompetitive negotiation

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## Federally Funded Contracts: Sealed Bids

- Default
- Typical formal bidding process
- Cities must publicly advertise and solicit bids
- Public bid opening
- Contract award to lowest responsive and responsible bidder

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## Federally Funded Contracts: Competitive Proposal Procurement

- Formal bidding, with qualifications-based selection, not just lowest price
- RFP must id evaluation method and list all factors and their relative importance
- Contracts must be awarded to responsible offeror with most advantageous proposal, considering price and other factors
- For architectural & engineering professional services: City may exclude price and select most qualified service provider, subject to negotiation of fair and reasonable compensation

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## Federally Funded Contracts: Micropurchases

Simple acquisition by negotiation or purchase order

Up to \$10,000 by default,  
and up to \$50,000 if qualifying low-risk City ordinance

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## Federally Funded Contracts: Small Purchase Procedures

- Up to \$250,000
- Requires price or rate quotes from several qualified sources
- Must still comply with applicable state or local small purchase dollar laws

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## Federally Funded Contracts: Noncompetitive Negotiation

Under micropurchase threshold of \$10,000

Service or property only available from a single source

Declared or extant emergency

Written permission from awarding federal agency

City deems competition inadequate after soliciting bids from a number of sources

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## Design-Build

- Design AND construction services are contracted from a single entity
- **CITIES may only use design-build contracts for public works projects valued over \$1 million**
- Specific conflict-of-interest policy
- Pub. Contract Code § 22160 – 22169
  - *Valid through 1/1/2025*

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## Design-Build: a 4-Step Process

1. Project scope and estimated price
2. City issues RFQ to create shortlist of qualified bidders
3. City issues RFP to qualified bidders
4. City may use "best value" or "low bid" to award contract

NB: Requires project labor agreement or skilled and trained workforce

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## Job Order Contracts

- Agreements for fixed price per unit for existing facility renovation/repair
- No specified specific project
- On-call services and goods
- **Not allowed for General Law Cities**
  - 76 Ops Cal Atty Gen 126 (1993)

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## Energy Conservation Contracts

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- Future cost avoidance and savings from energy projects to justify upfront costs of conservation measures through savings program
- Bidding not required
- Hearing Requirement
  - 14-day notice posting requirement
  - Findings supporting conservation savings
- "Conservation measures" = energy saving equipment

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## Energy Conservation Contracts

Requires two findings:

- (1) Energy cost savings exceeds anticipated marginal project costs
- (2) Difference, if any, between the fair rental value for the real property subject to the facility ground lease and the agreed rent, is anticipated to be offset by below-market energy purchases or other benefits provided under the energy service contract.

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## Public Works Contract Review Checklist

1. Invitation for Bids
2. Instruction to Bidders
3. Bid Proposal and Bid Schedule
4. Agreement Form
5. Standard Specifications  
(Green Book or Caltrans Standard Specs?)
6. Special Provisions
7. Mandatory Forms
8. Insurance Certificates
9. Bonds

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