



Public Contracting: Purchasing Requirements and Renewable Energy/ Energy Efficient Projects

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**LEAGUE OF CALIFORNIA CITIES
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**PUBLIC CONTRACTING: PURCHASING
REQUIREMENTS AND RENEWABLE ENERGY/
ENERGY EFFICIENT PROJECTS**

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Preface

The intent of this paper is to help city attorneys determine what procurement methods are allowed and not allowed when engaging in public contracting. Choosing the right public contracting procurement method is already difficult, but as elected officials become more concerned with the impact of climate change on their communities, city attorneys will be tasked with guiding cities through the state's purchasing requirements for renewable energy and energy efficient projects. These projects may or may not be procured as energy conservation contracts. Further complicating matters, vendors may also propose procurement methods that are viable to some California public agencies but not available to cities.

Therefore, this paper is an attempt to aid city attorneys in understanding the different ways that cities can structure purchases for goods and services, including renewable energy and energy efficient projects. Various procurement methods will be discussed, including: (1) formal or informal request for proposals, (2) sole-source procurement; (3) design-build contracts; (4) cooperative purchasing/"piggybacking", (5) job order contracts; and (6) energy conservation contracts.

The paper covers the advantages and disadvantages of each procurement method to assist city attorneys in deciding which procurement methods are the best (and allowed) for their city given the particular circumstances applicable to their jurisdiction

Disclaimers

We offer this overview of the requirements of California law without regards for the specific regulations that vary in each local agency. We recommend that each local agency and each specific project be evaluated separately for their compliance with local conditions, as well as the restrictions or requirements imposed by California law. This memorandum is not intended to be and should not be relied upon as a legal opinion or guarantee regarding public contracting. This memorandum is only intended to provide information regarding purchasing requirements and renewable energy and energy efficiency projects. Neither you nor any other person should rely exclusively on this memorandum in deciding how a project should be procured or entered into under California law.

Introduction to Public Contracting

Cities are required to adopt policies and procedures governing bidding regulations and purchases of supplies and services by the city. (Gov. Code, § 54202).¹ Such local policies and procedures may not be inconsistent with state statutes. This paper does not address procurement of supplies and services, which may have their own procurement requirements, such as Government Code § 4525 et seq., for contracts for professional services. Rather, the focus of this paper is to address common and emerging issues in public contracting for public projects.

In this context "public contracting" is when cities or other government agencies purchase materials, goods, or services for "public projects" defined under Public Contract Code section 20161 as:

- (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.

The procurement method known as competitive bidding is required for public projects over \$5,000 for general law cities. (Pub. Contract Code, § 20162). Similarly, the Public Contract Code applies to charter cities in the absence of an express exemption, city charter provision, or an ordinance that directly conflicts with the Public Contract Code. (Pub. Contract Code, § 1100.7).

Competitive Bidding Process

The competitive bidding process is central to how government agencies contract for public works projects. The competitive bidding process is intended to protect the public fisc, guard against favoritism, fraud and corruption, waste, and to ensure that cities are receiving a high level of services for the lowest price. (*Chung v. City of Monterey*)

¹ City attorneys should also become familiar with their city's purchasing regulations before advising their clients on contract procurement, especially as these ordinances may still apply even if no bids are received after the city posts a notice inviting bids and the city no longer has to follow the state's formal competitive bidding requirement.

Park (2012) 210 Cal. App. 4th 394). The competitive bidding process is the procurement method most often used by cities.

Formal Competitive Bidding

The Public Contract Code applies to virtually all public entities in California. Public agencies², with limited exceptions, have a duty to publicly bid certain contracts, particularly construction contracts, under the Public Contract Code. Specific provisions applicable to cities are set forth in § 20160-§ 20175.2 of the Public Contract Code.

Public Contract Code section 100 contains an express declaration of legislative intent, stating that the purpose of the code is:

- (a) To clarify the law with respect to competitive bidding requirements.
- (b) To ensure full compliance with competitive bidding statutes as a means of protecting the public from misuse of public funds.
- (c) To provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices.
- (d) To eliminate favoritism, fraud, and corruption in the awarding of public contracts.

The importance of competitive bidding stems from the California Constitution and more than 140 years of California Supreme Court precedent precluding all payments on contracts violating the competitive bidding laws. As stated in *Konica Business Machines U.S.A., Inc. v. Regents of University of California* (1988) 206 Cal. App. 3d 449, 456-7:

The purpose of requiring governmental entities to open the contracts process to public bidding is to eliminate favoritism, fraud, and corruption; avoid misuse of public funds; and stimulate advantageous marketplace competition. [citations omitted] Because of the potential for abuse arising from deviations from strict adherence to standards which promote these public benefits, the letting of public contracts universally receives close judicial scrutiny and contracts awarded without strict compliance with bidding requirements will be set aside. This preventative approach is applied even where it is certain there was in fact no corruption or adverse

² As will be discussed *infra*, the applicability of certain procurement procedures and methods available to other non-municipal public agencies are increasingly being marketed to cities when such procurement types are in fact *not* available to cities.

effect upon the bidding process, and the deviations would save the entity money. [citations omitted] The importance of maintaining integrity in government and the ease with which policy goals underlying the requirement for open competitive bidding may be surreptitiously undercut, mandate strict compliance with bidding requirements.

The strong public policy supporting competitive bidding as the required method for public projects for cities in California is difficult to avoid. While some vendors approach cities with examples of projects within California proceeding under other less formal methods in order to avoid the complexities of the formal bidding process, competitive bidding remains the default required procurement method for California cities.

The formal competitive bidding process usually involves public advertisement for the submission of sealed bids, the public opening of bids, and the award of contracts to the lowest responsible bidder that is responsive to the solicitation for bids. This process is almost exclusively governed by the Public Contract Code.³

The notice inviting bids is the first step in the formal competitive bidding process and must be published or posted at least 10 days before the bids are opened. (Pub. Contract Code, § 20164). The notice must be published at least twice, not less than five days apart, in a newspaper that is published in the city and posted in at least three public places in the city designated by ordinance as a place where public notices are posted. (*Id.*). When a city opens the bids, it must choose the lowest responsible bid that is responsive to the notice. If two or more bids have the same cost and are responsive, the city may choose one. (Pub. Contract Code, § 20166). The city also has the authority to reject all bids presented and readvertise the bid or if no bids are received, it no longer has to follow the competitive bidding process. (*Id.*).

It is illegal to split or separate a public project into smaller work orders or contracts in an attempt to avoid competitive bidding requirements. (Pub. Contract Code § 20163). Attorneys should be aware that intentional violation of this requirement is a misdemeanor. (*Id.*)

The advantage of the formal competitive bidding process is that the uniform method is well understood by contractors and city employees, and that it is structured with the intention to obtain the best deal for the city at the lowest cost.

³ If a city has adopted the Uniform Public Construction Cost Accounting Act (Pub. Contract Code §§ 22000 *et seq.*) or the project is valued less than \$5,000, then the Local Agency Public Construction Act (Pub. Contract Code §§ 21160 *et seq.*) will apply.

The disadvantage of the formal competitive bidding process is that the process can be cumbersome and complicated, and in many instances the costs associated with the administration and preparation of the bid process outweigh the cost savings associated with the closed bid process. Staff that is already understaffed must engage in a lengthy paper chase of design, bidding, noticing, and public meetings. The process takes a significant amount of time in what is often a foreign process to new or recently promoted employees. If city staff is unfamiliar with the formal competitive bidding process, a bid protest or legal challenge may also arise. City attorneys should work closely with city staff to ensure that they are comfortable with the formal competitive bidding process to avoid potential issues.

Informal Bidding: the Uniform Public Construction Cost Accounting Act

In response to the issues associated with the formal competitive bidding process, the legislature created the Uniform Public Construction Cost Accounting Act (UPCCAA) (Pub. Contract Code, § 22000-22045). If a city chooses to be subject to the UPCCAA then certain less-formal contracting procedures may be used for certain contracts valued at \$200,000 or less. (Pub. Contract Code, § 22032). Each public agency that elects to become subject to the uniform construction accounting procedures must adopt a resolution accepting the procedures and notify the State Controller that it has adopted a resolution. (Pub. Contract Code, § 22030).⁴ Cities then have to enact an informal bidding ordinance to govern the selection of contractors to perform public projects. (Pub. Contract Code, § 22034). The ordinance must include specified information, such as how notice to contractors will be provided and that City Council may delegate the authority to award informal contracts to the public works director, city manager, purchasing agent, or other appropriate person. (Pub. Contract Code, § 22034). UPCCAA provides a number of specific requirements for this informal contracting procedure. Cities must give notice to contractors describing the project in general terms, how to obtain more detailed information about the project, and state the time and place when bids must be submitted. (*Id.*).

For purposes of UPCCAA, “public project” means any of the following:

- (1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.

⁴ The State Controller maintains a list of all such public agencies.

(2) Painting or repainting of any publicly owned, leased, or operated facility.

(3) In the case of a publicly owned utility system, “public project” shall include only the construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

(Pub. Contract Code, § 22002(c)).

However, “public project” does **not** include maintenance work, which is defined as all of the following:

(d) (1) Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.

(2) Minor repainting.

(3) Resurfacing of streets and highways at less than one inch.

(4) Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.

(5) Work performed to keep, operate, and maintain publicly owned water, power, or waste disposal systems, including, but not limited to, dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

“Facility” means “any plant, building, structure, ground facility, utility system, subject to the limitation found in paragraph (3) of subdivision (c), real property, streets and highways, or other public work improvement.” (Pub. Contract Code, § 22002(e)).

Just as with the formal competitive bidding process, cities may reject all bids and declare that the project can be done more efficiently by city staff and provide to the lowest responsible bidder at least two business days’ advance notice of the city’s intent to reject the bids. (Pub. Contract Code, § 22038). The city is also required to award the contract to the lowest responsible bidder. (*Id.*). And if no bids are receiving, the city can perform the work itself or by negotiating directly with a contractor. (*Id.*).

City attorneys should recognize opportunities for their clients to engage in the informal bidding process. One advantage of the informal bidding process is that the procurement method is simpler and more efficient than the formal competitive bidding

process, but does not sacrifice the city's vigilance against waste and fraud. Informal bidding can also be run by the public works director or city manager, which frees up city council to focus on other matters.

The disadvantage of the informal competitive bidding process is that cities may not be familiar with the process, because they typically use the formal competitive bidding process and may therefore be subject to a bid protest or legal challenge due to an error caused by this unfamiliarity.

Federally Funded Projects

Cities sometimes accept federal grants for public works projects. When cities accept these funds, they are typically required to comply with federal laws and regulations that govern how these funds must be spent and documentation of the spending. (Gov. Code, § 53702). For instance, cities received funds under the American Rescue Plan Act, which provided funds to state, local, and tribal government to respond to and recover from the COVID-19 public health emergency and resulting fiscal crisis. The Department of the Treasury released a Final Rule for the bill, which provided that funds from the Rescue Plan Act could be used for projects that reduce energy consumption of public-owned treatment facilities, including installing energy efficient lighting, HVAC, and electronic equipment.⁵

The Final Rule also noted that whether cities may spend money on public works projects “which enhance environmental quality, remediate pollution, promote recycling or composting, or increase energy efficiency or electrical grid resilience[,]” depends on whether these projects respond to the disproportionate impacts of the pandemic on certain communities and would depend on the specific issue they address and the project's connection to the public health and economic impacts of the pandemic.

The Department of Energy also supports a number of grant, loan, and financing programs that aid state and local governments.

The Office of Management and Budget (“OMB”), a federal government agency, has issued guidance for how cities and other public agencies that receive awards of federal funds may use the funds. These regulations are entitled Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, which has been termed the “Super Circular.” The Super Circular can be found at 2 Code of Federal Regulations 200. The Super Circular was updated in 2020 and 2021 and the citations in the California Municipal Law Handbook may not be current.

All procurement contracts with federal money involved must be conducted in a manner providing “full and open competition” consistent with the applicable federal procurement rules. (2 C.F.R. § 200.319 (2022)). There are five methods of procurement that a city may use when it receives a federal grant:

- 1) Micropurchases;
- 2) Small purchase procedures;
- 3) Sealed bids (formal advertising);
- 4) Competitive proposals;
- 5) Noncompetitive negotiation.

Micropurchases

A micropurchase is the acquisition of supplies or services using a simplified acquisition procedure. Generally, the threshold for using this procurement method is for purchases of \$10,000 or less. (48 C.F.R. part 2, subpart 2.1).⁶ Cities may award contracts for micropurchases without soliciting competitive quotes if the city can document with research, experience, purchase history or other information that the price is reasonable. (2 C.F.R. § 200.320(a)(1)(ii)). Cities can also use the micropurchase method for contracts up to \$50,000 by ordinance, but the city must maintain documentation that it can make available to federal auditors explaining why it raised the micropurchase threshold and documentation of any of the following:

- 1) A qualification as a low-risk auditee;⁷
- 2) An annual internal institutional risk assessment;⁸ or
- 3) For public agencies, a threshold that is consistent with state law. (2 C.F.R. § 200.320(a)(1)(iv)).

Small Purchase Procedures

⁶ This threshold is generally adjusted for inflation and city attorneys should check the threshold before employing this procurement method.

⁷ A “low-risk auditee” is an agency that meets the requirements in 2 C.F.R. § 200.520 for the preceding two audit cycles, such that an annual audit was performed and the auditor did not identify any deficiencies in internal control or report a substantial doubt about the auditee's ability to continue as a going concern.

⁸ The term “annual internal institutional risk assessment” is not defined in the C.F.R.

A small purchase is the purchase of property, supplies, or services which is greater than the micropurchase threshold but less than \$250,000. (2 C.F.R. § 200.320(a)(2)).⁹ Cities may also establish a small purchase threshold that is less than \$250,000 based on internal controls, and evaluation of risk, and the city's documented procurement procedures. For these small purchases, cities can use "small purchase procedures." Small purchase procedures are when a city gets price or rate quotations from an adequate number of qualified sources. (*Id.*). Cities are still required to comply with state or local small purchase dollar limits under if they develop their own small purchase threshold. If the city does decide to use the small purchase procedure, then price or rate quotations must be obtained from an adequate number of qualified sources. (2 C.F.R. § 200.320(a)(2)(i)).

Sealed Bids

Sealed bids are a procurement method where a city publicly solicits bids and a firm fixed-price contract (lump sum or unit price) is awarded to the lowest responsible bidder whose bid conforms with all material terms and conditions of the invitation for bids. (2 C.F.R. § 200.320(b)). In order for sealed bidding to be a feasible procurement method, the following conditions should be present:

- 1) A complete, adequate, and realistic specification or purchase description is available;
- 2) Two or more responsible bidders are willing and able to effectively compete against one another for the contract; and
- 3) The type of project is suitable for a firm fixed price contract and the selection of the successful contractor can be made primarily based on price. (2 C.F.R. § 200.320(b)(1)(i)).

The sealed bidding procurement method is a type of formal procurement method and cities that use the method must formally advertise the invitation to bid. To use the sealed bid procurement method, cities must abide by the following requirements:

- 1) Cities must publicly advertise and solicit bids from an adequate number of qualified sources and give these sources sufficient time to respond before the bids are opened;

⁹ Similar to the micropurchase threshold, the small purchase threshold is adjusted for inflation regularly. (See 2 C.F.R. § 200.1). The small purchase procurement threshold is sometimes referred to as the "simplified acquisition threshold."

- 2) The invitation for bids must include specifications and attachments allowing bidders to properly respond;
- 3) The bids must be publicly opened at the time and place specified in the invitation for bids; and
- 4) Payment discounts may only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of. (2 C.F.R. § 200.320(b)(1)(ii)).

Cities may reject any or all bids if they can demonstrate a sound reason. (*Id.*).

Competitive Proposal Procurement

The competitive proposal procurement method is another type of formal procurement method. Competitive proposal procurement method is typically used when conditions are not appropriate to use the sealed bids process. (2 C.F.R. § 200.320(b)(2)). Under this procurement method, cities publish a request for proposal and a fixed-price or cost reimbursement contract is awarded to the lowest, responsive bidder. A city choosing to use the competitive proposal procurement method must follow four requirements:

- 1) The city's requests for proposals must be publicized and identify all evaluation factors and their relative importance. Proposals must be solicited from an adequate number of qualified offerors. Any response to publicized requests for proposals must be considered to the maximum extent practical;
- 2) The city must have a written method for conducting technical evaluations of the proposals received and making selections;
- 3) Contracts must be awarded to the responsible offeror whose proposal is most advantageous to the city, with price and other factors considered; and
- 4) The city may use competitive proposal procedures for qualifications-based procurement of architectural/engineering ("A/E") professional services, where an offeror's qualifications are evaluated and the most qualified offeror is selected, subject to negotiation of fair and reasonable compensation. (2 C.F.R. § 200.320(b)(2)(i)-(iv)).

The procurement method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. This procurement method is often referred to as “qualifications-based procurement.” Qualifications-based procurement cannot be used to purchase other types of services through A/E firms that are a potential source to perform the proposed effort. (2 C.F.R. § 200.320(b)(2)(iv)).

Noncompetitive Negotiation

Noncompetitive negotiation or noncompetitive procurement is a procurement method where a city solicits a proposal from only a single source or from multiple sources. (2 C.F.R. § 200.320(c)). Noncompetitive negotiation can only be used by cities in five specific circumstances:

- 1) The property or service sought is does not exceed the micropurchase threshold of \$10,000;
- 2) The property or service sought by the city is only available from a single source;
- 3) An emergency exists that will not allow the city to suffer the delay from publicizing a competitive solicitation;
- 4) The city receives written permission from the federal agency that awarded the city the money;
- 5) The city deems competition inadequate after soliciting bids from a number of sources. (2 C.F.R. § 200.320(c)(1)-(5)).

The Green Energy Transition

As elected officials become more concerned with the impact of climate change on their communities, city attorneys will be tasked with guiding cities through the state’s purchasing requirement for renewable energy and energy efficient projects. In 2011, Governor Brown signed SB 411 into law which required California to get 33% of its electricity from renewable sources, such as wind and solar energy, by the year 2020. In 2015, Governor Brown signed SB 350 into law, which increased California’s renewable electricity procurement goal from 33% in 2020 to 50% by 2030.¹⁰ In 2018, that goal was

¹⁰ [Stats. 2015, ch. 547; Sen. Bill No. 571 \(2015–2016 Reg. Sess.\) \(“SB 350”\).](#)

pped to 60% by 2030.¹¹ The California Energy Commission's Renewables Portfolio Standard stipulates that 100% of the state's energy must be carbon-free by 2045.

On their own, elected municipal officials are also charting a clean energy future for their cities. For instance, the City of Los Angeles unveiled a plan in 2021 to become the first major city in the United States to eliminate fossil fuels from its power supply.¹² San Diego's Climate Action Plan, unanimously passed by its City Council in 2015, calls for the City to only use electricity from renewable sources by 2035. In 2008, San Francisco adopted an ordinance amending the City's Environment Code to create greenhouse gas emissions targets and direct various city departments to take necessary actions to meet these goals. As part of the plan to reduce greenhouse gases, the ordinance charges the San Francisco Public Utilities Commission with developing a plan to completely move San Francisco away from using fossil fuels by 2030. In 2007, San Jose adopted Green Vision, a plan for improving the city's sustainability. One of Green Vision's ten goals is to acquire all of San Jose's electricity from renewable sources by 2022.

And it is not just large cities in California that are joining the transition to renewable energy. According to the Sierra Club, 54 jurisdictions in California have adopted building codes to reduce their reliance on gas, including smaller cities such as Solana Beach, Fairfax, Emeryville, Santa Cruz, Windsor, and Davis.¹³ Research by the UCLA Luskin Center for Innovation indicates that the local demand for renewable energy is helping the state exceed its clean energy goals. Research by the Luskin Center found that one of the main drivers of this trend is community choice aggregators, which buy clean energy on behalf of their residents and businesses.¹⁴

So, by choice and state pressure, elected local officials are making the decision to build and invest more in renewable energy, energy efficiency, and energy conservation projects.

Renewable Energy and Energy Efficiency Projects

As renewable energy, energy efficiency, and energy conservation projects become more of a political imperative for municipal elected officials, city attorneys will be tasked with guiding these officials through the procurement process. This section runs down the

¹¹ The State released the first joint agency report and summary document explaining how the State's electricity system can become carbon free by 2045.

¹² Sammy Roth, [Los Angeles now has a road map for 100% Renewable Energy](#), Los Angeles Times (March 24, 2021).

¹³ Matt Gough, [California's Cities Lead the Way to a Gas-Free Future](#), Sierra Club (July 22, 2021).

¹⁴ Michael Einstein, [Local demand is helping California surpass renewable energy targets](#), UCLA Newsroom (February 1, 2021).

six procurement methods which cities may use for public works projects, with particular focus on how these procurement methods can be used for renewable energy and energy efficiency projects.

Formal or Informal Request for Proposals

The City may draft a formal or informal request for proposals to consider when selecting contractors and providers for its public works projects. A request for a proposal (“RFP”) and request for qualifications (“RFQ”) are invitations to contractors and providers to submit proposals for public works contracts. Cities then evaluate these proposals based on price, quality, and other relevant factors. When a City issues an RFQ, it invites contractors to submit statements of qualifications. Cities typically use RFQs when choosing the most qualified service provider is the city’s paramount objective. RFPs and RFQ procurement allow cities to consider multiple selection criteria, not just price. By contrast, with competitive bidding it all boils down to submitting a bid—i.e., a lump sum price—and selection of the responsive bid from responsible bidders is based solely on the best price.

Cities may also employ a two-step process, by first using an RFQ process to narrow a pool of qualified respondents, then inviting only the qualified respondents to submit proposals under an RFP process.

Unlike the competitive bidding process, the legal guardrails around an RFP or RFQ are light. However, public attorneys should ensure that their clients do not use the RFP or RFQ process when competitive bidding is required by statute or a city’s own purchasing requirements. City attorneys should also ensure that submitted proposals are evaluated based on the stated criteria.¹⁵ Otherwise, cities may be forced to redo the RFP or RFQ process. Finally, unlike the competitive bidding process where contractors’ bids must be opened and announced in public and are subject to immediate disclosure as public records, the California Supreme Court has ruled that proposals submitted to public agencies in response to an RFP are not subject to disclosure under the California Public Records Act until the agency has completed negotiations with proposers. (*Michaelis, Montenari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1072-75.) The Supreme Court applied the “catchall” exception set forth in Government Code section 6255 and concluded that the public interest in protecting an agency’s bargaining position during contract negotiations outweighs the public interest in disclosing proposals before the negotiations are concluded.

¹⁵ In *Eel River Disposal & Resource Recovery, Inc. v. County of Humboldt* (2013) 221 Cal.App.4th 209, a county improperly deviated from its own stated evaluation criteria and procedures in its RFP by adding a new criterion (local preference) during the evaluation process.

The advantages of using an RFP or RFQ process when selecting contractors for public works projects is that cities may consider the quality of the services or materials to be provided and are not limited to just considering price as with competitive bidding. Doing so may enable cities to achieve the best services or materials for public benefit. Cities may also negotiate on price with qualified contractors, which may save taxpayer money. The disadvantages of using an RFP or RFQ process when selecting contractors is that it may be more time-consuming than the competitive bidding process as it takes staff time to draft an RFP or RFQ and city attorneys should ensure that city staff do not deviate from the stated evaluation criteria and judge the resulting proposals and statement of qualifications under other factors. Otherwise, cities may be forced to redo the entire process.

Sole-Source Procurement

In order to foster competition and achieve the lowest possible bid price and the highest possible quality of services and materials, cities are generally prohibited from including provisions in their bid documents which limit competition or which require a single source to be the provider of materials or products. (Pub. Contract Code, § 3400.) The motivating concept behind this provision is that competitive bidding is designed to prevent favoritism, cronyism, and kickbacks in the award of public contracts and that restrictions on sole-source procurement encourage private companies to “develop and implement new and ingenious materials, products, and services that function as well, in all essential respects, as materials, products, and services that are required by a contract, but at a lower cost to taxpayers.” (Pub. Contract Code, § 3400, subd. (a).) The prohibition on bidding provisions limiting competition is set forth in Public Contract Code section 3400(b) as follows:

“No agency . . . nor any public officer or person charged with the letting of contracts for the construction, alteration, or repair of public works shall draft or cause to be drafted specifications for bids . . . in a manner that limits the bidding, directly or indirectly, to any one specific concern.”

Public agencies are generally prohibited from “calling for a designated material, product, thing or service by specific brand or trade name unless the specifications list at least two brands or trade names of comparable quality or utility and is followed by the words ‘or equal’ so that bidders may furnish any equal material, product, thing, or service.” The exceptions to this general requirement are set forth in Public Contract Code section 3400. The four statutorily recognized exceptions are:

- (1) A field test or experiment is necessary to determine a product’s suitability for future use;

- (2) the designation of a particular material or product is necessary to match others in use;
- (3) in order to obtain a material that is only available from one source;
or
- (4) to respond to a declaration of emergency.

To take advantage of the fourth exception, the city council must declare an emergency by four-fifths vote. (Pub. Contract Code, § 3400, subd. (c)(4)(A).) The city can also use sole-source procurement when there has been an emergency declaration by the state, state agency, or county. In that scenario, the city council must include the findings for the emergency in the invitation for bid or RFP.

The advantages related to using a sole-source procurement method are that including such a requirement ensures that the required material, product, or service is included and that the goal of the public works project is achieved. The disadvantages related to using a sole-source procurement method are that it may increase the cost of the public works project and it may not be strictly necessary for the city to have required the named material, product, or service. Therefore, city attorneys should also check with city staff when they recommend including a sole-source procurement requirement for a public works project.

Design-Build Contracts

Design-build contracts are public works contracts in which both the design and construction services for the project are contracted from a single entity—often called a design-build entity. (Pub. Contract Code, § 22161, subd. (c)). In contrast, under the traditional design-bid-build method, the design and construction aspects of a public works project are conducted and bid by two different firms: a design firm and a construction firm. The rationale behind the design-build procurement method is that this method of contracting should be used when a contractor can combine functions and reduce project costs and complete the project quicker. (Pub. Contract Code, § 22161, subd. (a)). The design-build method reduces the risk cities face as to “delay claims” that arise out of the “city’s” plans (developed by the design professionals) causing delay claims to the contractor.

Cities may only use design-build contracts for public works projects worth over \$1 million. (Pub. Contract Code, § 22162, subd. (a)). Cities must also design a conflict-of-interest policy for design-build contracts. (Pub. Contract Code, § 22162, subd. (c)).

Cities wishing to enter into a design-build contract must follow a four-step process. First, the city must prepare documents setting the scope and estimated price of the project as well technical plans and specifications covering the quality of materials and equipment to be used. (Pub. Contract Code, § 22164, subd. (a)(1)). The plans must be put together by a licensed design professional (*Id.*)

Second, the city issues a RFQ to create a shortlist of qualified design-build entities for the project. (Pub. Contract Code, § 22164, subd. (b)).

Third, the city determines which companies have the experience, capability, and financial capacity to complete the project. (Pub. Contract Code, § 22164, subd. (b)). In its RFQ, the city must include information about it intends to evaluate potential design-build entities.

Fourth, the city issues an RFP for final selection of a bidder based on competitive bidding or best value including price, design, expertise, life cycle costs, labor force availability, and safety record. (Pub. Contract Code, § 22164, subd. (d)). Then the city awards the contract to a bidder. Design-build entities cannot be prequalified unless they provide an enforceable commitment that they along with all their subcontractors will use “a skilled and trained workforce.” (Pub. Contract Code, § 22164, subd. (c)). This requirement does not apply, however, when the city has a project labor agreement governing the work.¹⁶

City attorneys should be familiar with design-build contracts, especially because many solar power projects are design-build projects. The advantage of design-build contracts is that a city only has to contract with one bidder, making it easier for city staff to coordinate, especially if there are changes to the design of the project. Work may also be started quicker with the initial design of the project. The disadvantage of design-build contracts is that the city may find it difficult to evaluate different design proposals, especially with regard to their constructability and site suitability.

Cooperative Purchasing/“Piggybacking”

Under a local purchasing ordinance, cities may—without prior competitive bidding—contract with suppliers who have been awarded contracts by the state or other local agencies for the purchase of goods, information technology, and services. This is often called “piggybacking” or intra-government purchasing. (Pub. Contract Code, § 10298(a)). The idea behind this procurement method is that cities do not need to conduct

¹⁶ Project labor agreement means a “prehire collective bargaining agreement that establishes terms and conditions of employment for a specific construction project or projects and is an agreement described in Section 158(f) of Title 29 of the United States Code.” (Pub. Contract Code, § 2500).

their own competitive bidding process since one has already been conducted and doing so would just be duplicative.

Such state contracts typically take the form of master agreements, price schedules, or multiple award schedules that allow the state to take advantage of leveraged pricing that can be obtained through the state's buying power. The local agency may make these purchases directly from the vendors or the state may provide assistance to local agencies in making these acquisitions. (See Pub. Contract Code, §§ 10298-10299, 12100-12113).

In contracting for renewable energy projects, city attorneys representing multiple agencies may advise their clients that banding together to increase purchasing power parity is acceptable. Additionally, as far as we are aware the state has not encouraged cities to "piggyback" on renewable energy projects and services that it has contracted for. However, that is likely because the scale of services and materials required by the state is at a scale significantly greater than for municipalities. "Piggybacking" on state renewable and energy efficient projects may be something for city attorneys to keep their eyes on in the years to come.

Job Order Contracts

A general law city may not enter into a job order contract.¹⁷ While counties and other government agencies are permitted to engage in this procurement method, cities are not specifically allowed to. A job order contract is an agreement for a fixed price per unit for the performance of minor construction, renovation, alteration, painting, and repair of existing facilities. A job order contract is generally a multi-year contract on siting of a base year and multiple option years where the delivery of services is guaranteed at a fixed price during the term, but the agency has not yet specified the location or delivery time of the services. When the contract is awarded the specific project to be performed is not identified. These contracts are prohibited for general law cities because there is no provision in state law allowing such contracts. (See 76 Ops Cal Atty Gen 126 (1993)).

City attorneys should advise their clients to avoid job order contracts. This is especially crucial as many solar and renewable energy companies work with entities, such as community college districts and other local agencies, that are eligible for job order contracts and may pressure cities to enter into job order contract arrangements. Every city attorney should inform their clients that agencies subject to the Uniform Public Construction Cost Accounting Act are required to adopt—and bidders permitted to

¹⁷ Counties may enter into job order contracts of less than \$3 million (Pub. Contract Code, § 20128.5). Additionally, there are statutory carveouts for the Los Angeles Unified School District and other non-municipal agencies (See Pub. Contract Code, § 20919 et. seq.).

examine—plans, specifications, and working details for all public projects in excess of \$75,000. (Pub. Contract Code, § 22039, 22040.).

Energy Conservation Contracts

In order to promote energy conservation and the use of renewable energy sources, the Legislature has special contracting procedures for renewable energy and energy efficiency projects. The Government Code defines which projects qualify, such as projects for energy conservation facilities, alternate energy equipment—such as solar, biomass, wind, geothermal, hydroelectric—and conservation measures and services. (Gov. Code, § 4217.11).¹⁸

The Government Code also sets out a separate contracting procedure for these energy conservation contracts. Cities can use future cost avoidance and savings from these energy projects to pay for the upfront costs of energy efficient measures through a guaranteed savings program. This contracting method comes from the Energy Conservation Contract statutes (Gov. Code, § 4217.10-4217.18.)

The law gives cities broad latitude in entering into and structuring these energy conservation contracts. As Government Code section 4217.18 states:

“The provisions of this chapter shall be construed to provide the greatest possible flexibility to public agencies in structuring agreements entered into hereunder so that economic benefits may be maximized and financing and other costs associated with the design and construction of alternate energy projects may be minimized. To this end, public agencies and the entities with whom they contract under this chapter should have great latitude in characterizing components of energy conservation facilities as personal or real property and in granting security interests in leasehold interests and components of the alternate energy facilities to project lenders.”

Therefore, energy conservation contracts are a possible procurement method for cities to explore and employ. Care must be taken to document the required findings and present such in the requisite public hearing.

Hearing Requirement

¹⁸ “Energy conservation facility” means alternate energy equipment, cogeneration equipment, or conservation measures located in public buildings or on land owned by public agencies.

To employ this contracting method, a city has to hold a public hearing that is posted two weeks in advance. (Gov. Code, § 4217.12). The public agency can use the RFP process to select a qualified provider or can choose from a qualified pool of providers.

A hearing is not required if a city is going to impose energy conservation measures related to electrical or thermal energy rates from a public utility, the Public Utilities Commission, or the State Energy Resources Conservation and Development Commission. (Gov. Code, § 4217.15).

Findings Requirement

Competitive bidding is not required for renewable energy and energy efficiency contracts. Instead, renewable energy and energy efficiency projects may be sole-sourced or procured through either a formal or informal request for proposals process under Government Code § 4217.10 *et seq.* if the city council is able to make two findings about the project at a regular meeting, following a public hearing:

1. “That the anticipated cost to the public agency for thermal or electrical energy or conservation services provided by the energy conservation facility under the contract will be less than the anticipated marginal cost to the public agency of thermal, electrical, or other energy that would have been consumed by the public agency in the absence of those purchases.
2. “That the 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.”

(Gov. Code, § 4217.12).

The definitions of “Conservation measures”, “Conservation services”, “Energy conservation facility”, and “Energy service contract” are found at subsections (c) through (f) of Government Code § 4217.12.

There is no published case law on what constitutes sufficient findings for a city. However, the statute gives cities broad authority as articulated in Government Code section 4217.18.

Finally, the regular meeting at which the public hearing will be held (and the findings made) must be publicly noticed at least 2 weeks before the proposed meeting date. The resulting contract—whether it be a design-build contract, power purchase

agreement, or other energy services contract— may be on the terms that are deemed to be in the best interest of the city. (Gov. Code, § 4217.13).

Cities may also continue to enter into contracts and leases for energy conservation projects in any other manner authorized by law. (Gov. Code, § 4217.17).

Government Code Section 1090 Issues

Energy conservation contracts also raise issues related to Government Code section 1090, which prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.). The Fair Political Practices Commission (“FPPC”) has opined that Government Code section 1090 prohibited the City of Pleasanton from entering into two separate contracts with the same energy services company where the second contract’s scope of work would be established through services performed under the initial contract. (Advice Letter, No. A-20-042; Advice Letter, No. A-19-057.).

Subsequently, the FPPC opined that the Pleasanton could enter into an energy services contract with a company who is given the authority to determine the scope of work for the contract and then performs the work that the city selects, after the contract is amended to reflect the actual work that the city authorizes the company to perform. The FPPC stated that “Section 1090 would not prohibit the City from contracting with a company to both determine the scope of work and then perform the work so long as all of the contemplated services are contained in a single contract.” (Advice Letter, No. A-20-143.).

Since the contract that Pleasanton was proposing required amendment after the company provided options detailing the scope of work it could perform, the FPPC stated that Section 1090 would prohibit Pleasanton from entering two separate contracts with the same energy services company where the scope of work in the subsequent amended contract would be established through services performed under the initial contract. The FPPC’s reasoning is based on the holding that “changes to existing contracts are themselves ‘contracts’ under section 1090.” (See, e.g., *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 193; see also 98 Ops.Cal.Atty.Gen. 102 (2015)). Simply put, Section 1090 prohibits cities from entering into a contract with a company to develop energy related improvement options and then hire that same firm to perform the work.

Qualified Energy Services Companies

A city may also create a pool of qualified energy service companies based on qualifications, experience, pricing, or other pertinent factors from which to award

“energy savings contracts” or contracts for an “energy retrofit project” through a competitive selection process. (Pub Util. Code, § 388). “Energy retrofit project” means a project where a local agency works with a qualified energy service company to identify, develop, design, and implement energy conservation measures in existing facilities to reduce energy or water use or make more efficient use of energy or water.¹⁹ “Energy savings” means a measured and verified reduction in fuel, energy, or water consumption when compared to an established baseline of consumption. (Pub. Util. Code, § 388, subd. (c)(2)).

The pool of qualified energy service companies and contractors must be reestablished by a city at least every 2 years or it will expire. (Pub. Util. Code, § 388, subd. (b)).

Conclusion

Cities have a variety of contract procurement methods at their disposal. City attorneys should be familiar with these methods and the situations in which each contract procurement method is advantageous for their client to use. Additionally, city attorneys should familiarize themselves with the contracting procedure for energy conservation contracts as cities may elect to use this contracting procedure more in the coming years as the push to use clean energy continues to gain in importance for elected officials.

¹⁹ “Qualified energy service company” means a company with a demonstrated ability to provide or arrange for building or facility energy auditors, selection and design of appropriate energy savings measures, project financing, implementation of these measures, and maintenance and ongoing measurement of these measures as to ensure and verify energy savings.