



**Public Sector Capital  
Projects: Is  
there a better way  
than  
Low-Bid?**

**David Bergquist  
Office of General Counsel (Land Use)  
University of California  
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# Public Construction Law

- What a difference a year makes
- 2008 vs 2009

**2008**

- **10) Bidder Qual/Prequal to Attract Bidders**

**2009**

**10) Bidder Qualification/Prequalification to decrease bidders from 30 to 13**

**2008**

- **9) Developer Financing Of Project**

**2009**

- **9) UC Financing of Developers**



**2008**

- **8) Incentive Clauses for Contractors**

**2009**

- **8) Joint Checks for Contractors and Subcontractors**

**2008**

- **7) Commodity Escalation**
- **- steel, concrete, etc...**

**2009**

- **7) Suspended Projects**



**2008**

- **6) Contractor Friendly General Conditions**

**2009**

- **6) Friendly Contractors with no conditions**

**2008**

- **5) Bidder Apathy**



**2009**

- **5) Bid Protests**



**2008**

- **4) Better Faster Cheaper**



**2009**

- **4) Better Faster Cheaper..... Dumber**

**2008**

- **3) Public Private Partnerships**

**2009**

- **3) Public Ownership of Private Partnerships**

**2008**

- **2) Green Building – Bush Style**

**2009**

- **2) Green Building – Obama Style**

**2008**

- 1) “Infrastructure” is “boring”

2009

- 1) “Infrastructure” is “Stimulus”

The image features a blue vertical bar on the left side of the slide, which contains a faint, light blue watermark of the University of California seal. The seal depicts a building, a book, and a sun, with the text 'UNIVERSITY OF CALIFORNIA' and '1868' visible. The main content of the slide is the title text, which is centered and reads: 

**Best Value For University of California (San Francisco Campus)**

# History of Best Value for Public Works

- Design Build
- Other public entities' experience
- Legislative efforts of UC

## UC Contracting Methods (PCC 10503)

- **Lump Sum**
- **CM at Risk**
- **Design Build**
- **Cost Plus**
- **Other methods in the best interests of the Regents provided proposals are compared on a uniform basis and that award be made as determined by the published selection standards.**
- **Projects over \$50,000**

# What is Best Value for UC Projects

- Statutory definition –PCC § 10506.4 – 10506.9)
- 5 bases
  - (1) "Demonstrated management competency"
  - (2) "Relevant experience"
  - (3) "Financial condition "
  - (4) "Labor compliance "
  - (5) "Safety record"

# Best Value Steps

- **Prepare solicitation**
- **Give notice**
- **Establish prequalification procedures**
- **Identify criteria used for selection**
- **Identify method of weighting system**
- **Prevent cost information from being disclosed to persons doing scoring**

# Best Value Mechanics

- Divide each bidder's price by its score
- Lowest cost per quality point is the “best value bid”
- Make the award public along with scores and bid amounts

# **Reporting obligations – report by January 1, 2010**

- **A description of the projects awarded using the best value procedures**
- **The contract award amounts**
- **The best value contractors awarded the projects**
- **A description of any written protests concerning any aspect of the solicitation, bid, or award of the best value contracts, including the resolution of the protests**
- **A description of the prequalification process**
- **The criteria used to evaluate the bids, including the weighting of the criteria and an assessment of the effectiveness of the methodology**
- **If a project awarded under this article has been completed, an assessment of the project performance, to include a summary of any delays or cost increases**

# Best Value

- **Interim Report was filed with Hon. Carol Migden on 5/15/08**
  - *Description of criteria and factors UCSF uses to determine project is proper for BV*
  - *Community Buy-In*
  - *Results of Bids/Protests*
  - *Identification of Projects*
  - *Goals*

# How We Currently Implement Best Value

- **Projects Using Best Value**
  - *Mission Bay Hospital (\$1 billion)*
  - *Moffett Radiology*
  - *CVRB*
  - *Mt Zion CT*
  - *Pharmacy\**
  - *Mt Zion Expansion\**
  - *Cranio-Facial\**
  - *Fifth Floor School of Medicine\**

# Best Value

- **Subcontractor Packages**
  - *CVRB Electrical\**
  - *CVRB Mechanical\**
  - *CVRB Plumbing\**
  - *CVRB Skin*
  - *MB Hospital Electrical*
  - *MB Hospital Mech & Plumbing (3)\**

# Best Value

- **Projects in Pipeline next 3 months**
  - **Telemedicine**
  - **MSB LARC**
  - **5<sup>th</sup> and Kirkham Landscape**
  - **Kidney Transplant**

## Results of Bidding on Current Projects (CVRB and Moffett Radiology)

- **Best Value Scoring Results CVRB:**

*(a) Project experience: experience with the critical aspects of our project delivery; large complex labs, vivarium, design-build subcontractors, BIM, lean construction, and educational institutions.*

*(b) Management competency: sample documents that demonstrated management skills in several areas including scheduling, subcontractors, and preconstruction services. Asked for most of these documents to be from one project at different phases so we could see how they tracked over time.*

## Results of Bidding on Current Projects (CVRB and Moffett Radiology)– cont.

- Best Value Scoring Results CVRB (cont.):

(c) Some contractors submitted documents from different projects at the various phases so we could not see how they tracked over time.

*Example - we asked for copies of a project budget at 50% CDs and at bid from a single project and at least one of the contractors submitted a budget at 50% CDs from one project and the at bid budget from an entirely different project.*

*(d) Also scored the quality of project teams and the organization of the teams - wanted some continuity between preconstruction and construction.*

# Contractors

- **Three main factors differentiated between the contractors-**
  - (a) Project experience*
  - (b) Management competency*
  - (c) Quality of project teams and the organization of the teams*
- **The labor compliance, safety and financial conditions sections were very nearly equal for all three of the contractors.**

# Goals

- **Broad range of projects**
- **Write the results now and work towards them**
- **Refine and expand the processes**
- **Success such that program extends to all 10 campuses and 3 labs; duration in perpetuity**
- **Demonstrated results**

# Refinement of Processes

- Sub-bases for five item criteria
- Bidding procedures (blind alternates, etc...)
- How to make it meaningful
- Proper weighting of the five bases
- Established dollar and Project type criteria

# Utilizing Best Value for Subcontractor Selection

- Mechanical
- Electrical
- Plumbing
- Exterior skin

# Utilizing Best Value for Outreach Purposes

- Pros and cons
- GC need not be low, need not pick lowest subs bids
- Complicated process
- Increased participation
- Misunderstanding of process/more hand holding
- Debriefing necessary
- Criteria needs to be more specific than prequal
- Prequalification required
- Projects are going well

# Tracking Results

- Impact Result of Selection
- Increase bidder participation
- Attract new bidders
- Bid Protests
- Feedback from bidders
- Compare with similar projects
- On Budget
- On Time
- Quality of Work
- Change Orders and Claims
- Criteria
- Outreach
- Prequal Process
- Performance Assessment

## Utilization with Other Tools

- **BIM**
- **Incentives**
- **Continuous Cost modeling**
- **Lean Construction**
- **CM at Risk; Lump Sum; Cost Plus**

# Where Contracts and Further Information Can Be Found

- Facilities Manual
- Office of General Counsel
- Handouts
- Campus contracts manager
- Office of the President



# Bidder Qualification and Prequalification Strategies

## Prequalification and Qualification Defined

- **Prequalification – determine qualifications before taking bids (prospective bidders who do not prequalify are not allowed to submit bids)**
- **Qualification – determine qualifications as part of bidding process (bidder submits bid and qualifications simultaneously; qualifications evaluated as part of process of selecting lowest bidder)**

# Goals of Prequalification and Qualification

- **Eliminate contractors and subcontractors who lack desired skill set**
- **Eliminate claims artists and those who do poor work**
- **Encourage bids from good contractors and subcontractors**
- **Encourage good bids (not low ball bids that cause claims)**
- **Minimize bid protests**
- **Simplicity-cut down workload for UC staff**

## Which is better suited to meet goals - Prequalification or Qualification?

- Eliminate contractors and subcontractors who lack desired skill set
- Eliminate claims artists and those who do poor work

Prequalification is probably better than qualification

- more time to evaluate, particularly if you do interviews

- more time to conduct investigation of bad actors

**Significant factor: bidder found not prequalified less likely to file court challenge, bidder must go to court just to get chance to bid – so even if grounds for finding contractor not qualified is weak, better chance of keeping contractor from bidding**

## Which is better suited to meet goals - Prequalification or Qualification?

- Encourage bids from good contractors
- Encourage good bids (not low ball bids that cause claims)

Prequalification is probably better than qualification

- prequalified bidders know ahead of time that they will not be competing against lowball contractors
- particularly helpful if good subcontractor pool qualified

Significant factor: If pool of qualified bidders can be limited to three quality bidders, bidders less likely to submit unrealistically low bids

## Which is better suited to meet goals - Prequalification or Qualification?

- Minimize bid protests

Prequalification is probably better than qualification

Litigation less likely – bidder must go to court just to get chance to bid

**Significant factor: Appeal limited to hearing at campus level; Prequalification documents should provide that any challenge to prequalification determination must be made at time of prequalification determination or is waived.**

## Which is better suited to meet goals - Prequalification or Qualification?

- **Simplicity-cut down workload for UC staff and good contractors**

**Qualification is probably better than Prequalification**

- **Qualification can be done at last minute (bid opening)**
- **Only need to evaluate one bidder at a time (if low bidder qualified, unnecessary to evaluate other bidders)**

**Significant factor: If low bidder found not qualified, significant risk of court challenge**

# Collecting Information - Written Questionnaires

- fill-in-the-blanks form prepared by the University; thought should be given to devising a form that can be filled out quickly and simply without ambiguity as to what information is to be furnished
- must be signed under penalty of perjury by each prospective bidder
- the form must be fully completed and may not be supplemented after the deadline for submitting it to the public entity (if supplements allowed, ground rules should be specific).

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# Pass Fail vs. Rating systems

## Pass fail:

- Bidder is evaluated on a pass/fail basis against each prequalification criterion; if the bidder fails to meet any of the minimum requirements the bidder fails and is eliminated from the bidding pool
- Simplicity

# Pass Fail vs. Rating systems

## Rating systems:

- bidders are assigned points for various items such as experience, claims history and the like. A bidder must score above a pre-established minimum score or the bidder will be disqualified.
- rating system avoids putting too much emphasis on any one criteria, which may work to the public entity's advantage in case of a legal challenge attacking one or more of the criteria.

# Submission of False vs. Incorrect information

- Prequalification procedures often provide that a contractor will be disqualified if it submits false information in answering the prequalification questionnaire.
- -The term “false” implies knowledge of the untruthfulness, which can often be difficult to prove.
- rules may provide that a bidder will be disqualified for submitting false, misleading, inaccurate, or incomplete information.

## Methods for determining whether Contractor is Qualified

- If no standards in bidding documents, Public entity must establish that contractor lacks the quality, fitness, and capacity (including trustworthiness) to perform the work

-difficult standard; if you want a minimum of three years experience, hard to justify eliminating someone with 2 years 11 months of experience

## Methods for determining whether Contractor Is Qualified

- **If standards in bidding documents, Public Entity only needs to establish that standards are reasonable and that bidder does not meet them**
- easy standard; if owner wants minimum three years experiences minimum, that standard would usually be found reasonable and owner could find bidder with two years eleven months of experience not qualified even though the bidder is just as likely to be able to complete project as someone with three years experience**

## **Problems: determining whether Contractor Has Desired Skill Set**

- **Standards are too vague – contractor must have completed three projects of similar type, size and complexity within last three years –**
- **-set forth precise definition of what constitutes a “similar project,” such as minimum dollar amounts, square feet of tile work, type of HVAC systems, must have been performed in operating hospital, etc.**

## **Problems: determining whether Contractor Has Desired Skill Set**

**Standards are too specific – eliminates too many prospective bidders (problem: can't be fixed if using qualification; can sometimes be fixed if using prequalification, but causes delay because prequalification documents must be reissued)**

**Solution: Try to determine if desired contractors will be able to prequalify**

## Avoiding “Bait and Switch.”

- **Contractor (the company) has great experience, sends out the second string employees**
- **Require prequalification of principle contractor employees, with minimum experience requirements**
- **Contract requirement to use employees as long as employed by contractor; substitutions only allowed if UC consents**
- **Interviews could be second round of prequalification**

## **Avoiding “Bait and Switch.”**

- contractor claims that it is a successor business to a predecessor contractor that went out of business and seeks to use the experience of the now defunct predecessor business to prequalify for a contract**
- might be valid if name change or same management as predecessor contractor**
- might not be valid if purchase assets of defunct company, personnel entirely different**

# Avoiding “Bait and Switch.”

**Avoid bait and switch by stating, in the prequalification documents, what a bidder must demonstrate to utilize the experience of a predecessor business to prequalify for a contract.**

## Avoiding “Bait and Switch.”

**joint venture: contractor who is going to perform contract does not have the requisite experience; that contractor seeks to prequalify as a joint venture with a contractor who has the experience but who actually does not intend to perform any of the work.**

**avoid by requiring both members of any joint venture to independently have requisite experience.**

## Methods for Eliminating Contractors who Do Poor Work

- **Set Reasonable Standards**
  - a. **Previous assessment of liquidated damages for unexcused delays in completing another construction contract.**
  - b. **Previous assessment of back charges for incomplete work or damage to others.**
  - c. **Previous disqualification for providing false, incorrect, or misleading statements to another owner or as part of another qualification or prequalification process.**

## Methods for Eliminating Contractors who Do Poor Work

- **Set Reasonable Standards**
  - d. **Making false, incorrect, or misleading statements in answering prequalification questionnaires.**
  - e. **Contractor's surety completed or assisted in completion of another contract.**
  - f. **Contractor had judgments or arbitration award(s) entered against it in claims involving owners.**
  - g. **Contractor has been assessed penalties for failing to pay prevailing wages.**

## Methods for Eliminating Contractors who Do Poor Work

- **Set Reasonable Standards**
  - h. Contractor has been debarred by another public entity (or has agreed to forgo bidding as part of a negotiated settlement).**
  - i. Contractor has history of contractor license revocation or suspension due to performance.**
  - j. Significant negative reference or references.**

## Methods for Eliminating Contractors who Do Poor Work

**Problem:** Contractors almost never supply information that allows you to disqualify them if you limit the information to what's supplied in the questionnaire

**Solution:** Reference checks. Ask for a list of ALL UC projects at ALL campuses within the last 3, 5 or 10 years. Check the references. If you disqualify on the basis on negative references, be prepared to identify the reference and to state what it was that was negative about the contractor's performance on other projects.

If you want to get rid of bottom feeders, this is the way to do it.

## **Methods for Eliminating Contractors who File excessive unmeritorious Claims**

- Establish prequalification criteria-excessive unmeritorious claims**
- define claim to exclude ordinary disputes over adjustments to the contract price. For example, claim could be defined any claim against an owner that was the subject of litigation, arbitration, mediation, or other formal dispute resolution process.**

## **Methods for Eliminating Contractors who File excessive unmeritorious Claims**

- Establish prequalification criteria-excessive unmeritorious claims**
- claim presumed excessive if it was settled or resolved for less than 25% of the amount claimed, unless contractor can establish that claim was not excessive despite resolution amount.**

# Subcontractors

- Subcontractors should be subjected to the same prequalification procedures as prime contractors.
- Prime contractors who have prequalified can only use subcontractors from the public entity's list of prequalified subcontractors
- Public entity can confirm the use of prequalified subcontractors during bidding process by checking the list of subcontractors provided under the Subletting and Subcontracting Fair Practices Act.

## Prequalification for a Period of Time

- Do one prequalification for all projects in a certain category at the campus for a specified period of time (e.g., one year) to establish a pool of prequalified contractors
- Pool could be closed or open
- Pool members could be subject to further prequalification

# Prequalifying Teams

- **General Contractor and Subcontractors**
- **General Contractor and Design Professional**
- **Subcontractor Teams**

# Avoid Bid Protests

- **Do not put qualifications for subcontractors in the specifications (ok to put qualifications for employees)**
- **If using prequalification, do not put qualifications for prime contractors in specifications (could cause protest of prequalified contractor); still ok to put in qualifications for employees**

# Cost Plus Fixed Fee and IPD

- **Contractor and Subcontractors and Design Professionals bid hourly rates and overhead**
- **Incentives established at percentage of estimated cost (functions as profit)**
- **Design Professionals and Contractor and certain subcontractors are only paid incentives when and if they meet certain milestones in schedule, price and quality**
- **Have not been able to justify 3 party contracts legally**