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presents

Public Law 101 Conference

Public Contracting

Wednesday, November 15, 2023
9:30 a.m. – 10:30 a.m.

Speakers:

Michael McDonnell, Assistant General Counsel
San Diego Water Authority

Conference Reference Materials

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**San Diego County
Water Authority**
And Its 24
Member Agencies



California Public Contracting

California Lawyer's Association
Public Law Section
2023 Public Law 101 Conference
November 15, 2023

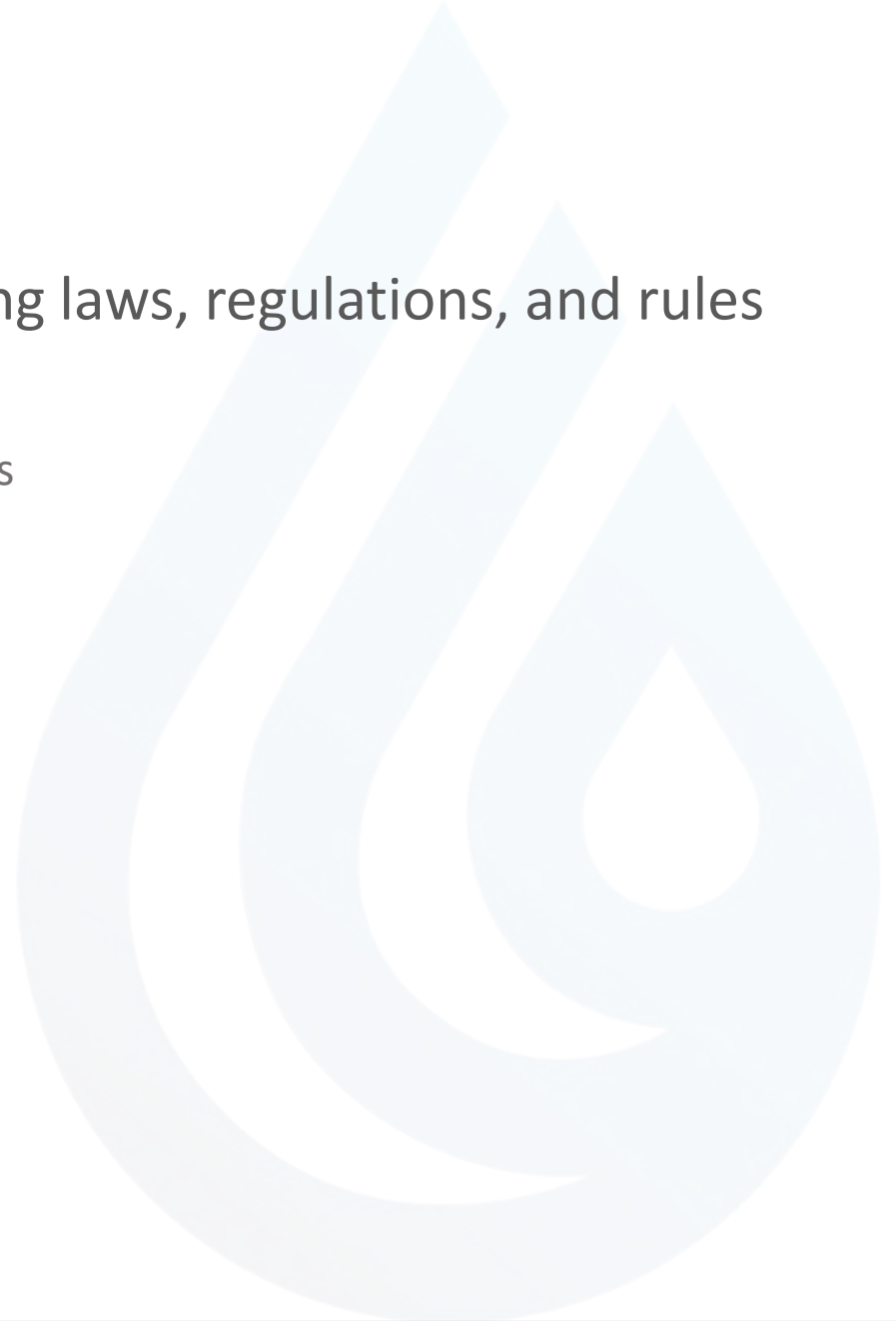
Michael J. McDonnell

San Diego County Water Authority, Assistant General Counsel

- 14+ years experience as public agency/municipal attorney.
- Worked in private firms and as in-house agency counsel.
- Experience in litigation and advisory/transactional practices.
- Advise on laws and regulations related to public works construction, real estate, contractual/procurement matters, the Brown Act, the Public Records Act, and other municipal law matters.
- Handle advisory/transactional/pre-litigation work for capital improvement program projects, including bidding, bonding, insurance, and claims.

Topics

- Overview of public contracting laws, regulations, and rules
- Public procurement issues
 - Overview of procurement types
 - Competitive bidding
 - Awards
- Public works issues
 - Subcontractor listing
 - Prevailing wages
 - Bonds
 - Prompt payment/retention
 - Claims/dispute resolution



What do local agencies purchase/procure?

- Goods/Equipment
- Services
- Public works
- Real estate



What is Procurement?

- The process by which agencies purchase and obtain goods, services etc.

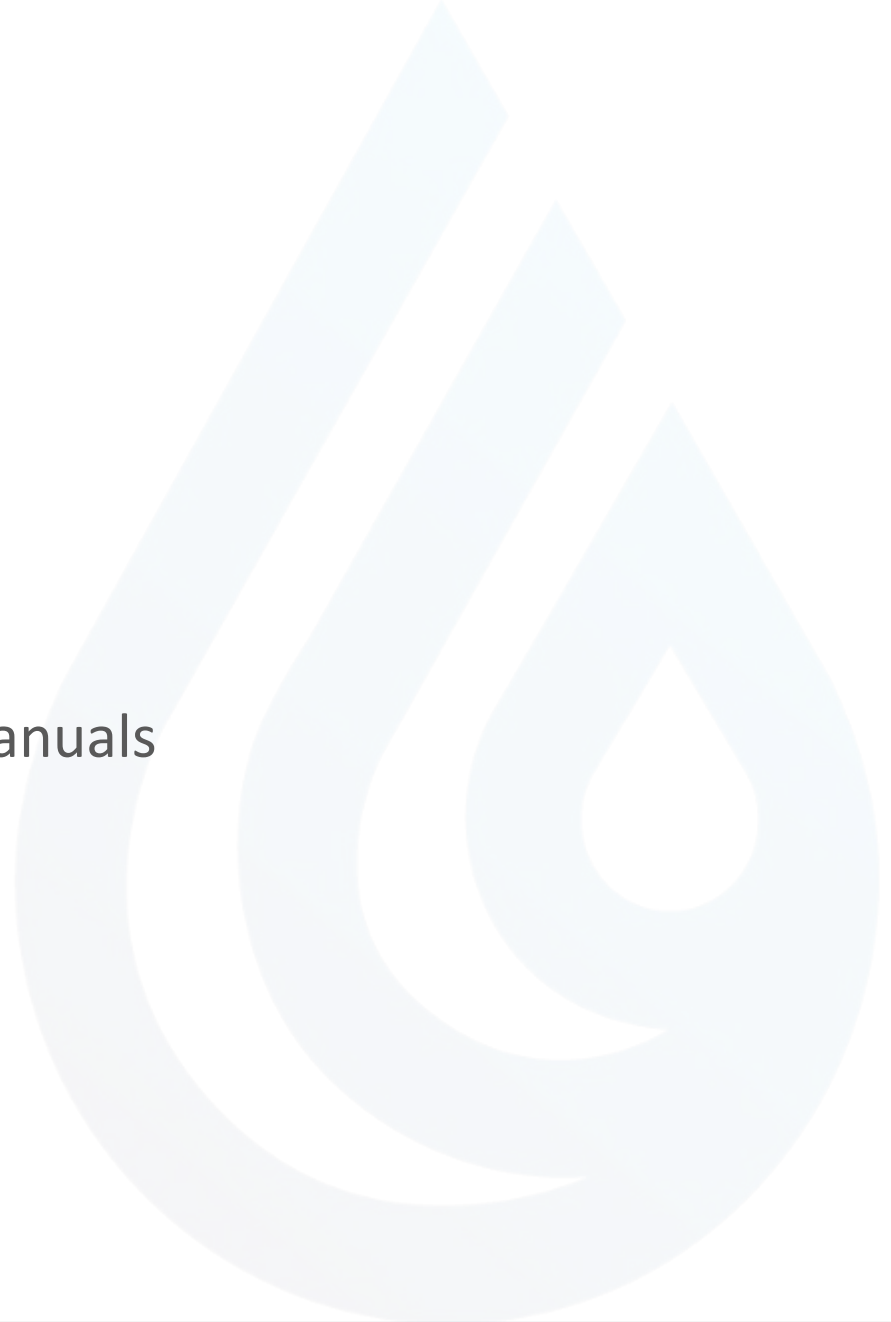
Common Procurement Types

- Competitive
 - Low bid
 - RFQs/RFPs
 - Cooperative
- Non-Competitive (exceptions to competitive)
 - Emergencies
 - Sole Source
 - Unsolicited proposals

Public Contracting

Laws, Regulations, and Rules

- Federal statutes/regulations
- CA Constitution
- State statutes/regulations
- Local law and policy
- Procurement/contracting manuals
- Solicitation documents
- Funding requirements



CA Constitution

Cal. Const. Art. XVI, § 6

“The Legislature shall have no power ... to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation ... ”

CA Statutes - Competitive Bidding

Public Contract Code § 100

[I]t is the intent of the Legislature in enacting this code to achieve the following objectives:

- (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.

Local Laws – Competitive Bidding

- City Charters; Municipal Codes (Cities)
- Administrative Codes (Special Districts)

General Law Cities

Public Contract Code generally applies.

Can enact local laws that don't conflict with general state laws.

Charter Cities

“Home rule” doctrine reserves right to adopt and enforce ordinances that conflict with general state laws if the subject of the regulation is a “municipal affair” vs. one of “statewide concern.”

Konica Bus. Machines U.S.A. Inc. v. Regents of Univ. of California

206 Cal. App. 3d 449 (Ct. App. 1988)

The purpose of requiring governmental entities to open the contract process to public bidding is to:

- Eliminate favoritism, fraud, and corruption
- Avoid misuse of public funds
- Stimulate advantageous marketplace competition

Public Works

- What is a public work?
 - Public Contract Code § 1101
 - “Public works contract,” ... means an agreement for the erection, **construction, alteration, repair**, or improvement of any public structure, building, road, or other public improvement of any kind.”
 - Labor Code § 1720(a)
 - “[P]ublic works” means ...“(1) **Construction, alteration, demolition, installation, or repair** work done under contract and paid for in whole or in part out of public funds .. “
 - Local agency definitions

Responsive Bid vs. Responsible Bidder

To maintain fairness during the contract award process, bids may (and in some instances must) be rejected where:

1. The bid is not responsive to the invitation and specifications;
2. The bidder is not responsible to perform the work.

Responsive Bids

- Can be determined on the face of the bid, without investigation
- Bid must conform to material terms of the bidding documents.
- May accept non-material defects in a bid
 - “Material terms” = terms that affect price, quantity, quality or delivery and those identified as mandatory.

Responsible Bidder

- Can look beyond the face of bid
- Public Contract Code § 1103 defines “responsible bidder” as a bidder who has demonstrated these attributes to satisfactorily perform the public works contract:
 - Trustworthiness, quality, fitness, capacity, experience
- Before rejecting a low bidder on grounds of non-responsibility, the public entity must:
 - Notify the bidder of the evidence supporting that finding
 - Afford the bidder an opportunity (hearing) to demonstrate that it is qualified.

Rejection of Bids

Awarding agency generally has the discretion to:

1. Reject all bids and re-advertise
2. Abandon the project

Bid Mistake

Public Contract Code § 5100 - § 5110

- In case of bid mistake:
 - Bid cannot be changed.
 - Bid cannot be withdrawn unless the public entity consents.
- If consent improperly withheld, bidder can sue for amount forfeited (bid security).
 - If bidder does not prevail, must pay public entity's costs of suit and reasonable attorneys' fees.

Bid Withdrawal

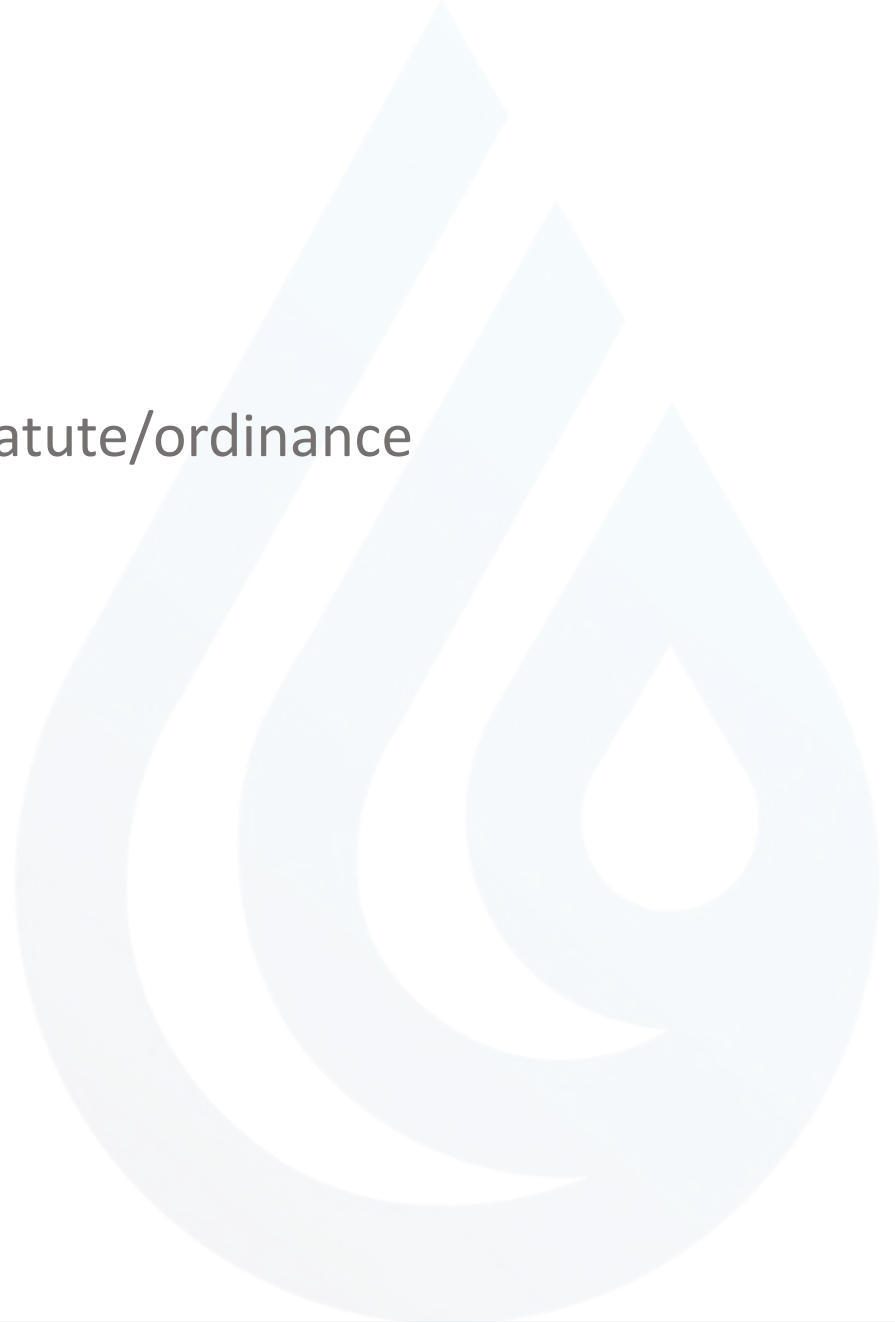
Public Contract Code § 5103

Bidder's grounds for relief:

- Mistake made.
- Written notice to public entity within 5 working days after bid opening, specifying in detail how mistake occurred.
- Mistake made bid materially different than intended.
- Mistake in filling out the bid and not due to error in judgment or to carelessness in inspecting the site or in reading the plans and specifications.

Bid Protests

- Procedural Rules
 - In bid documents or statute/ordinance
- Substantive Legal Standards
 - Primarily case law



Bidder Remedies

If an unsuccessful bidder has exhausted its administrative remedies (i.e. protest procedures), and is not satisfied with the agency's decision, it may:

1. Seek a writ of mandate from the court
2. Seek injunctive relief.

Public Works

Subletting and Subcontracting Fair Practices Act - PCC§ 4100 et seq.

- Must include in the bid all subcontractors who will perform in excess of .5% of the total bid
- Only 1 subcontractor per portion of the work
- After bid acceptance, prime contractor cannot permit a subcontract to be assigned or transferred
- Violations subject prime contractor to penalty of 10% of value of subcontract (or termination of contract)

Public Works

Prevailing Wages – California Labor Code

- Contractors required to pay prevailing wages on public works projects in excess of \$1,000
- Public works means the (1) “construction, alteration, demolition, installation, or repair work” (2) done under contract and (3) paid in whole or in part out of public funds
- Agency requirements during:
 - Bid phase
 - After award

Public Works

Bonds

- Payment Bonds
 - Security to ensure subcontractors, laborers, material suppliers are paid for their work
- Performance Bonds
 - Security to ensure ultimate performance of the project
- Sufficiency of Sureties

Public Works

Prompt Payment and Retention

- Progress Payments - Public Contract Code § 20104.50
 - Agency to make payment within 30 days
- Retention - Public Contract Code § 7107
 - Agency to make payment within 60 days after completion of the work

Public Works

Claims and Dispute Resolution

Public Contract Code § 9204

- Requires numerous terms and conditions for claims be included in public works contracts
- “The Legislature finds and declares that it is in the best interests of the state and its citizens to ensure that all construction business performed on a public works project in the state that is complete and not in dispute is paid in full and in a timely manner.”

Questions?

Thank You!



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