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No License? No Problem!

Court Limits Public Agencies' Ability to Reject Bids Listing Unlicensed Subcontractors

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If your company submits bids on public works in California, then you need to know about the recent court decision in *D.H. Williams Construction, Inc. v. Clovis Unified School District*, 146 Cal. App. 4th 757 (Jan. 10, 2007). In short, this case says that a bid that lists an unlicensed subcontractor may not be rejected as *nonresponsive*, unless the solicitation explicitly requires that subcontractors are licensed when the bid is submitted. While the public owner may disqualify a bidder that lists an unlicensed subcontractor as *non-responsible*, that is, unable to perform the work, it may only do so after giving the bidder notice and an opportunity to explain why it can perform.

The *D.H. Williams* court explains the distinction between the terms "responsive" and "responsibility." While responsiveness goes to the contents of the bid, responsibility goes to the qualities of the bidder. More specifically, responsiveness means "whether the bid 'promises to do what the bidding instructions demand'". Responsibility, in contrast, is a proposer's "fitness, quality, and capability to perform the proposed work satisfactorily." While responsiveness can be determined from the face of the bid, responsibility often cannot. In most instances, whether a bid is responsive is based on an analysis of the solicitation and the bid and is not dependent on disputed facts. For that reason, a hearing may be necessary on some issues of responsibility, but it is not required on questions of responsiveness.

What does this mean for public works contractors? Mostly, it means that the times at which contractors must be licensed for public works jobs will often be different

for prime contractors and subcontractors. Here's how it breaks down:

The prime contractor (bidder) must be licensed when it submits its bid. The *D.H. Williams* decision does not change the rule in California that forbids "any person to submit a bid to a public agency in order to engage in the business or act in the capacity of a contractor within this state without having a license therefor." Nor does it change the duty of public owners to reject bids by unlicensed contractors: "a bid submitted to a public agency by a contractor who is not licensed in accordance with this chapter shall be considered nonresponsive and shall be rejected by the public agency." Bus. & Prof. Code § 7028.15.

Subcontractors may or may not need to be licensed when the prime submits its bid. This is the primary impact of the *D.H. Williams* decision. In most cases, public owners do not expressly require in their solicitations that all subcontractors listed in the bids be licensed at bid submission. In those cases, if the public agency were to learn during bid evaluations that a prime bidder listed an unlicensed subcontractor, it would not be able to reject that bid as nonresponsive. The agency could still require that the prime bidder demonstrate that its team will be able to perform the work, *i.e.*, by showing either that the unlicensed contractor will be able to get a license before executing its subcontract and commencing work or that the prime is properly licensed and prepared to do the work if the listed subcontractor cannot obtain the required license.

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Subcontractors must be licensed when they execute their contracts with the successful prime bidder. The D.H. Williams decision does not change the rule in California that generally requires a license at the time a subcontractor executes its contract with a successful prime bidder on a public works job. MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc., 36 Cal. 4th 412, 436 (2005); Pub. Cont. Code § 4107.

In order to be compensated for their work, all contractors must be licensed when they commence work and throughout performance. The rule remains that contractors are precluded from recovering compensation for work they perform if they are not properly licensed when they commenced work. And, if a contractor's license lapses after the work starts, then it must promptly obtain a new license or it will not be entitled to compensation for work performed after the license lapsed. Bus. & Prof. Code § 7031(a); MW Erectors, 36 Cal. 4th at 440.

What are the practical steps that California public works contractors should take? First, look carefully at the licensing requirements in every public works solicitation for which you are considering to bid either as prime or as a listed subcontractor. If it explicitly requires that all subcontractors be licensed as of bid opening, then the bid must meet this requirement or it will be nonresponsive and the public agency will have a duty to reject it. Even if, as is more common, the solicitation has no express subcontractor licensing requirement as of bid opening, it is still a good idea to list licensed subcontractors because the public agency may determine, after further discussion with the prime bidder, that the prime and its team are non-responsible based on a subcontractor's lack of licensure. Finally, if the agency disqualifies your team's bid based on a subcontractor's lack of licensure, the prime may have grounds for a protest if the agency did not give it an adequate opportunity to explain why its team is capable of performing.



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