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Legal Grounds

ECA Gets Or-equal Statute Amended

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The or-equal statute (Pub. Cont. Code § 3400) is supposed to encourage contractors and manufacturers to develop and implement new and ingenious materials, products and services that function as well, in all essential respects, as those specified, but at a lower cost to taxpayers. To implement that purpose, the statute prohibits agencies from requiring a material, product or service to be provided by one, sole, specified source.

But agencies often look for ways to circumvent this statute. This year, ECA sponsored an amendment to tighten it up; the amendment was passed and recently signed by the Governor.

The statute is based upon early 20th century federal cases finding that open, competitive bidding would be destroyed if agencies could force contractors to provide a particular product. Instead, agencies could easily misuse public funds by favoring one manufacturer over another, opening the process to corruption, and denying all bidders a fair opportunity to obtain the government contract. As a result, those cases threw out federal contracts which tried to limit bidding to just one product; the agencies were ordered to redraft the contracts so that any product which achieved the function required by the government could be offered by the contractor.

In 1961, California turned that federal case law into our first or-equal statute (then Gov. Code § 4380). It required the or-equal proposal to be submitted after award of the contract. This timing assured that an or-equal proposal could not provoke the agency to find some other reason to reject the contractor's bid in order to get the sole-sourced product.

Unfortunately, the statute was amended in 1998 to allow the or-equal submittal to be required prior to contract award, and as early as bid day. The effect of this change was profound. All of a sudden, agencies were requiring or-equal submittals with the bid, and finding all kinds of reasons to reject low bids from responsible bidders who indicated they were going to offer or-equal products.

Since then, taxpayers, manufacturers and contractors have been working to stop these abuses. In 2001, the statute was amended to provide for submittal after bid day, and to specify a default of

within 35 days after award. This helped.

However, this year one southern California agency not only started requiring or-equal submittals before bid day, but declared that the only way to get one approved was through the issuance of an addendum to the bid package. A letter from the agency explained its position: "The most important part of this [or-equal submission and approval] process is that requests for consideration of a substitute must be made prior to the receipt of bids. This requirement allows the City sufficient time to evaluate a product's equality and issue an addendum to all bidders in order to prevent one bidder from having an unfair advantage over another."

That explanation turned the or-equal concept on its head. When a contractor finds a product that performs the functions needed, but at a lower price, that is NOT an UNFAIR advantage - it is a classic FAIR advantage. It is an advantage that benefits society at large by encouraging ingenuity. It is an advantage that benefits taxpayers by leading to lower prices for the same functionality. It is exactly the kind of advantage that our society wants bidders to use to lower bids. It is one of the benefits of open, competitive bidding requirements.

That explanation also smelled of being just a way to cover up sole-sourcing to favored manufacturers.

So, ECA went back to the legislature to amend the or-equal statute to prevent perversions like that one. It was achieved by adding introductory language to the statute which explains its purpose. Effective January 1, 2010, Public Contract Code § 3400 will start out stating: "The Legislature finds and declares that it is the intent of this section to encourage contractors and manufacturers 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." Thus, leveling the playing field so all competitors get the benefit of one bidder's ingenuity will not be allowed as it defeats the whole purpose of the or-equal statute.

Thanks go to our Legislative Advocate, Phil Vermeulen, who had a tough time getting this amendment through the legislative process.