What Constitutes an Emergency in Public Contracts?

In recent years, California has experienced the worst wildfires in its history, devastating the state and setting record-breaking highs. In just 2018 alone, the wildfires across California took 106 lives and burned more than 1.5 million acres of land. Thousands of residents were forced to evacuate as fire blazed through houses, businesses and public sites. Local agencies must now undertake the enormous task of recovery, including hiring contractors to perform repairs, rebuild infrastructure from ashes, and replace the state’s resources. Under these conditions, are public agencies free to bypass California’s competitive bidding laws?
Emergency Exception to Competitive Bidding

Ordinarily, the selection of contractors on public projects is regulated by state and federal procurement laws. In California, state agencies must comply with Public Contract Code section 10340 to secure at least three competitive bids or proposals for each contract. Pub. Contract Code § 10340(b). The Code seeks to promote competition and prevent bias, fraud, corruption and the misuse of public funds. The drawback to the requirements is that the bidding process is lengthy and bid awards are further subject to delays from bid protests and taxpayer challenges. Yet, when an agency fails to fully comply with competitive bidding, the contract is void and the contractor might not be able to recover the value of the goods and services provided.

One exception to the competitive bidding requirement exists in emergency situations. In situations where time is of the essence, the Code will allow public agencies to immediately procure goods and services without a formal bidding process.

What Constitutes an Emergency?

Public Contract Code section 1102 defines “emergency” as “a sudden, unexpected occurrence that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services.” Pub. Contract Code § 1102. This definition is strictly construed due to California’s strong public policy favoring competitive bidding.

In order to warrant the narrow exception, the emergency must be a genuine one. Natural disasters qualify as emergencies, including fire, flood, earthquake, drought, tidal wave or storm. In other situations, factors such as the urgency and magnitude of the exigency help determine whether a qualified emergency exists. Importantly, an emergency is not merely synonymous with convenience, expediency or the best interests of the agency. Rutherford v. State of California, 188 Cal. App. 3d 1267, 1280 (1987). As the age-old saying goes — poor planning is not an emergency.

One case from the California Court of Appeal illustrates the application of these factors. In Marshall v. Pasadena Unified School District, the Pasadena School District awarded the plaintiff a construction bid but later terminated the contract due to serious delays on the project. Marshall v. Pasadena Unified School Dist., 119 Cal. App. 4th 1241 (2004). The district then issued an emergency resolution to award the project to another contractor on the basis that the delays impacted school curriculum and presented safety concerns for the students. The Court of Appeal disagreed. Specifically, the district’s own...
decision to terminate the contract “did not come close” to an emergency as it was solely based on the inconvenience from project delays. Compounding the court’s decision was the fact that the district also waited four months before finding a substitute subcontractor. It appears that the longer an agency waits to address the problem, the less likely courts will find that a true emergency exists.

**Emergency Contracting Procedures**

When an emergency does exist, the governor and local agencies may proclaim the emergency and immediately procure emergency contracts. With the California wildfires, for example, Governor Jerry Brown declared a state of emergency on multiple occasions. Agencies in the affected areas could then immediately engage contractors for services without soliciting competitive bidding. However, the scope of the emergency procurement must be limited to only what is necessary to address the needs of the emergency. As soon as this is met, the agency must terminate the emergency action and resume compliance with formal bidding requirements.

Agencies should nonetheless aim to select the most suitable candidate for the situation. Local agencies and their governing boards may adopt resolutions that set forth the specific procedures and standards for emergency procurement. Contracting procedures may also vary under the Public Contract Code depending on the specific entity involved.

**Conclusion**

The emergency exemption to California’s competitive bidding requirements provides public agencies with the flexibility to procure goods and services in times of crisis. Although strict compliance with formal bidding is not necessary, failure to follow emergency procedures could nonetheless void a contract and cause project delays and costs. Contractors should take care to stay up to date with local, state and federal regulations in order to avoid the preventable ramifications.