

# Preference Programs in Public Projects

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# Question # 1

I had never heard of the Subletting and Subcontracting Fair Practices Act, can you explain to our audience what that is?

# State Listing Statutes

- Twenty-four states have listing statutes
- Early statutes focused on particular trades
- States differ as to the timing of the identification of subcontractors
- Majority impose some sanction for substitution of a listed subcontractor

# Federal Listing Requirements

- General Services Administration required listing by regulation in 1970s
- GSA amended the regulations in 1982 to remove the listing requirement
- Pending regulations to add back requirements for Small Business Administration

# California

- Must list all subcontractors in excess of  $\frac{1}{2}$  of 1% of prime bid or self-perform
- Failure to comply makes bid non-responsive
- Enumerated grounds for substitution
- Penalty at 10% of subcontract value or cancellation of contract
- Private right of action against contractor

## Question # 2

Why should the contractors be required to contract with particular subcontractors if they can get a better price from someone else?

# Stated Legislative Purpose

“The Legislature finds that the practices of bid shopping and bid peddling in connection with the construction, alteration, and repair of public improvements often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among contractors and subcontractors, and lead to insolvencies, loss of wages to employees, and other evils.”

Cal. Pub. Contract Code § 4101

# Purpose of Preference Programs

- Allow public owner the ability to approve subcontractors
- Quality assurance
- Avoid bid shopping or bid peddling
- Windfall to Contractor



# Definitions

- “Bid Chiseling” is post-award conduct by a general contractor.
- “Bid Shopping” is pre-award conduct by a general contractor.
- “Bid Peddling” is subcontractor use of prior bids to obtain a contract.

*People v. Inland Bid Depository*, 233 Cal. App. 2d 851 (1965)

## Question # 3

What particularly did the contractors do on the Summer Olympics project that the Los Angeles Subcontractors Association is protesting?

# Listing Violations

- Failure to list subcontractor in excess of listing threshold
- Listing subcontractor who will merely subcontract the work after bid opening
- Substitution for other than enumerated grounds
- Clerical error on listing form

# Penalties

- Vary state to state
- Difference between listed subcontractor's bid and substituted price
- Set percentage of subcontract or contract value
- Cancellation of contract
- Disciplinary action against license

## Question # 4

You said earlier that several states have adopted new listing statutes in the last couple years. What do you anticipate will be the future of these types of requirements?

# The Future of Federal Listing

- Small Business Jobs Act of 2010 regulations
- Construction Quality Assurance Act
  - Higher listing thresholds
  - “Good Faith” basis for substitution
  - Penalties against both contractor and subcontractor

# Future of State Listing

- Advance of subcontractor listing statutes dwindling
- No one approach dominant
- Trend towards applying listing to all trades based on dollar volume
- Post award listing requirements

# Factors Affecting Listing

- Move away from hard bid environment
- Contractor concern with scope gap
- Increased subcontractor default