

# Managing Underperforming Contractors

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# Introductions

**Dan Mortensen**

**Role: Moderator**

*Director of Facilities, Lake Forest School Districts 67 and 115*



**Alison Andrews**

**Role: Speaker**

*Principal, PK-12 Educational Planner, Wold Architects and Engineers*



**Ken Florey**

**Role: Speaker**

*Partner, Robbins Schwartz*



**Scott Gaunky**

**Role: Speaker**

*CPMM Principal, GHA*



**Jason Wasser**

**Role: Speaker**

*Project Manager, International Contractors, Inc.*



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# Learning Objectives



- Understand the Duty to Publicly Bid
- Identify proactive strategies to include in Bid Documents
- Discuss what it means to award to the “lowest, responsive and responsible” bidder
- Review available tools when issues arise during construction

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# Know Your Design and Construction Team

- District Representative
- Architect
- General Contractor
- Construction Manager (CM)
- Owner's Rep (OR)
- Commissioning Agent



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# The Duty to Publicly Bid

- Section 10-20.21 of *The School Code*, 105 ILCS 5/10-20.21, provides school districts with the authority:
  - To award **all** contracts for purchase of supplies, materials or work or contracts with private carriers for transportation of pupils involving expenditures in excess of **\$35,000 (Effective 1/1/24) or a lower amount as required by board policy** to the lowest responsible bidder considering conformity with specifications, terms of delivery, quality, and serviceability...



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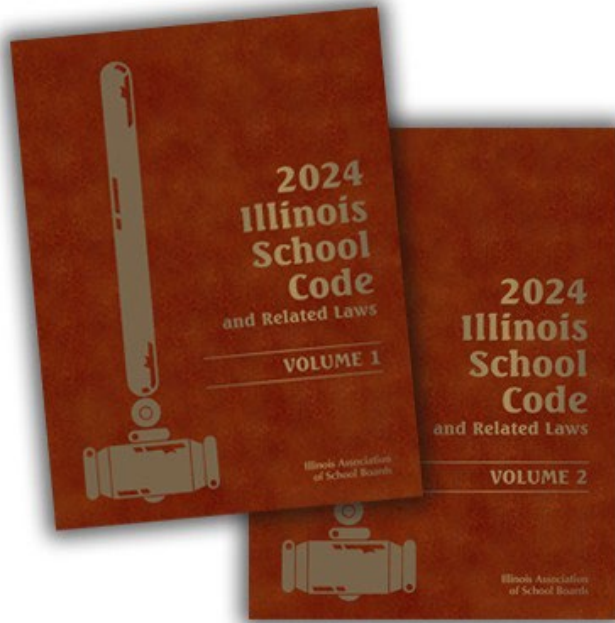


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# The Duty to Publicly Bid

- **Except the following:**
  - Contracts for the services of individuals possessing a high degree of professional skill where the ability or fitness of the individual plays an important role;
  - Contracts for materials and work which have been awarded to the lowest responsible bidder after due advertisement, but due to unforeseen revisions, not the fault of the contractor for materials and work, must be revised causing expenditures **not in excess of 10% of the contract price**;
  - Contracts for the maintenance or servicing of, or provision of repair parts for, equipment which are made with manufacturer or authorized service agent of that equipment where the provision of parts, maintenance or servicing can best be performed by the manufacturer or authorized service agent;



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# The Duty to Publicly Bid

- **Except the following:**

- Purchases and contracts for the use, purchase, delivery, movement, or installation of **data processing** equipment, software, or services and telecommunications and interconnect equipment, software, and services;
- Purchases of equipment **previously owned** by some entity other than the district itself;
- Contracts for repair, maintenance, remodeling, renovation or construction, or a single project involving an expenditure **not to exceed \$50,000** and not involving a change or increase in the size, type or extent of an existing facility;
- Contracts for goods or services procured from another governmental agency;
- Where funds are **expended in an emergency** and such emergency expenditure is approved by  $\frac{3}{4}$  of the members of the Board (6 yes votes)



# Other Procurement Options



- **Co-operative Purchasing**
  - Contract Terms
  - New legislation
- **Job Order Contracting (JOC)**
- **Design-Build**
  - Contract Terms
- **Performance Contracting**
  - Know your subcontractors

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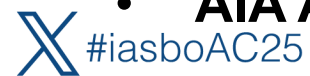
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# Contract Documents

# What is in the Contract?

- **General Conditions**
  - Liquidated Damages
  - Substantial Completion Requirements
  - Supervision Requirements
  - Performance Bond (100%); Surety Rating
  - Payment Bond (100%)
  - Construction Warranty
- **Construction Schedule**
- **Scope of Work Descriptions**
- **Prequalified Bidders**
- **AIA A305 Contractor Qualifications Statement**



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# Bidding

**PRE-CONSTRUCTION MEETING CHECKLIST**

Pre-construction meeting agendas will vary based on the project. However, most pre-construction meetings should cover the following to ensure everyone is aware of what to expect once building begins.

- ☐ Go over all important documents and contracts with the client.
- ☐ Go over payments, safety plans, inspection plans, and permits.
- ☐ Ensure all parties are aware of the project timeline and schedule.
- ☐ Review and finalize the design.
- ☐ Discuss any potential issues and resolutions.
- ☐ Open the floor for questions.
- ☐ Walk the site or lot with everyone in attendance.
- ☐ Ensure all contractors and subcontractors understand their role and responsibilities in the project.



- **Bid Bond:** acts as a guarantee that the Bidder, if awarded the Contract, will furnish the required Performance and Labor and Material Payment Bonds, execute the Contract and proceed with the work. Upon failure to do so, the Contractor shall forfeit the amount of Bid Bonds as liquidated damages.
- **Pre-Bid Meeting**  
Mandatory vs Non-Mandatory

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# Bid Review Process



## Awarding the Bid – Criteria

- **Lowest**
  - Alternate Bids
- **Responsive**
  - Material Defects – Nonwaivable
  - Minor Variances – Waivable
- **Responsible**
  - Rejecting a bidder as not responsible
- **Post-Bid Pre-Award Negotiations**

# Bid Review Process

## Review of the “Apparent” Low Bidder



- **Scope Review**
  - Scope Gaps
  - Existing Conditions
  - Protection of Existing
  - Alignment with Specifications
  - Labor/crew Size
  - Lead Times
- **Review Anticipated Construction Schedule**
- **Check References**
- **Review the Schedule of Values**
- **Review the Sub-contractor List**
- **Other Project Commitments**



# Bid Review Process

- **Rejecting the Bid**
  - Discretion “to reject any and all bids.”
  - Documenting the Basis for Awarding/Rejecting Bid
- **Bid Mistakes - Circumstances Warranting Judicial Relief from a Bid Mistake**
  - Material Feature of the Contract
  - Neglect in the Preparation of the Bid
  - Maintaining the Status Quo
  - The Owner’s Knowledge of the Mistake
  - Unconscionability





# During Construction

**BE PROACTIVE**



- **Regular Occurring Construction Meetings**
  - Review Look Ahead Schedule – Identify Potential Roadblocks
  - Review Submittal Log – Discuss Lead Times
  - Clash Detection Drawings between Sub-Contractors
  - Follow-thru on Required Pre-Installation Conferences
- **On-Site Observations**
- **Owner's Right to Stop the Work**
  - Non-conforming work
  - Failure to carry out work

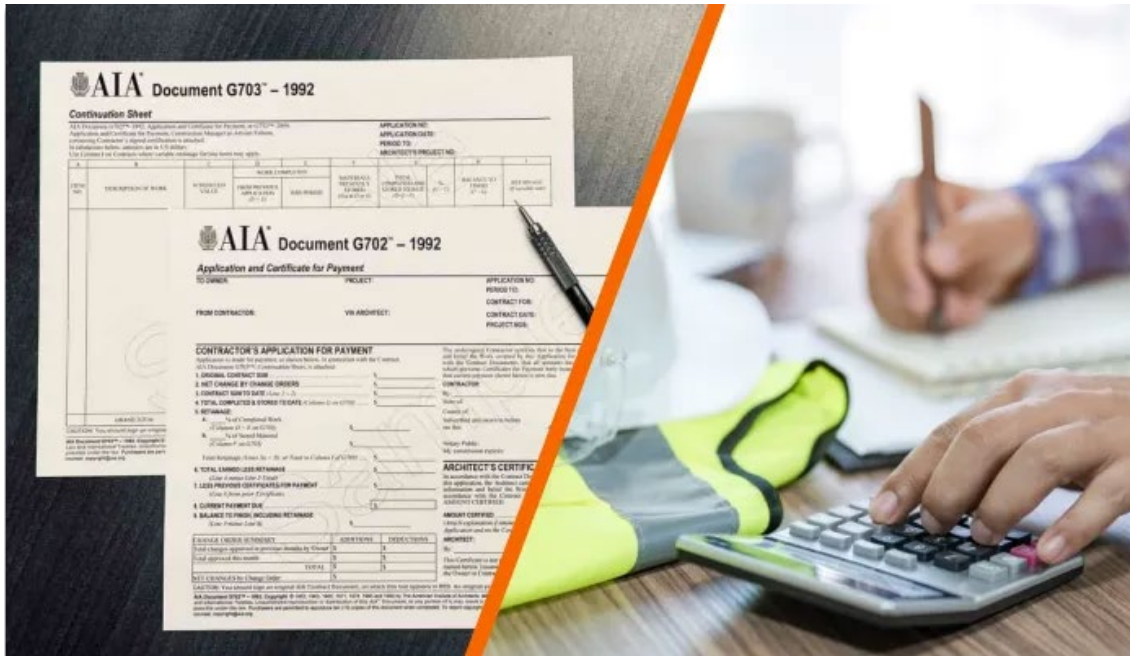
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# During Construction



- Applications for Payment
- Retainage
- Partial Lien Waivers

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# During Construction

- **Decisions to Withhold Certification**

- Defective Work not remediated;
- Third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the Contractor;
- Failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment;
- Reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
- Damage to the Owner or a separate contractor;
- Reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay;
- Repeated failure to carry out the Work in accordance with the Contract Documents.

# During Construction



## Bond Claims

Payment Bond  
Performance Bond

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## What is Non-Conforming Work?

- **Owner's right to carry out and perform work**
  - Contractor default; Bond Claim
  - Delay of work
- **Acceptance/Rejection of Non-conforming work**
- **3 or 7-day notice letter**
- **Results in a deductive Change Order**
  - reasonable cost of the work, Owner's attorneys' fees and other Owner expenses, and architectural additional services

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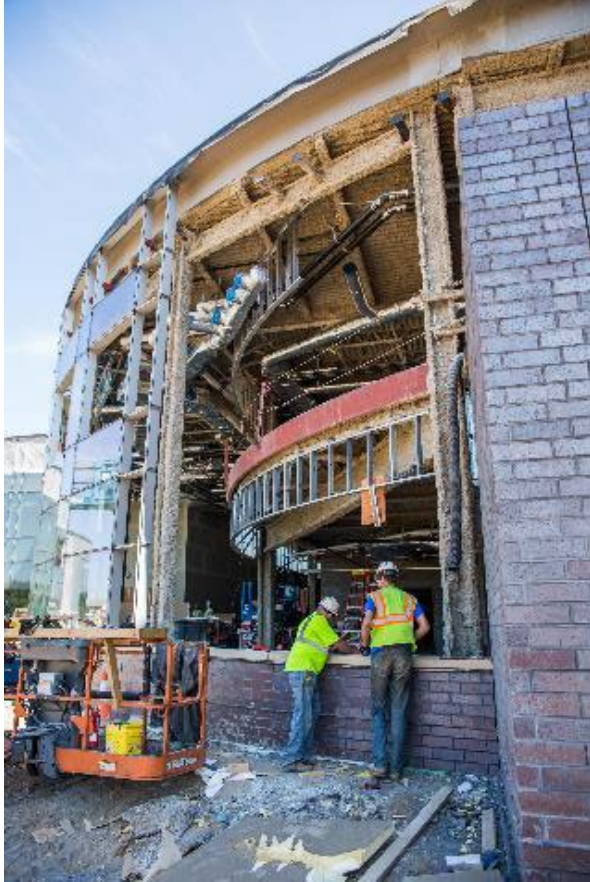
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## Termination by the Owner for Cause

- **The Owner may terminate the Contract if the Contractor**
  - Refuses or fails to supply enough properly skilled workers or proper materials;
  - Fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
  - Disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or
  - Otherwise, is guilty of a breach of a provision of the Contract Documents



# During Construction



## What is a construction dispute?

- Disputes are encountered when one side wants **money, time or both** from the other side.
- Disputes may not always involve **money**.
- When using the AIA General Conditions, the Architect acts as Initial Decision Maker to render initial decisions on Claims

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- **Types of Disputes**
  - Change Order
  - Delay Claim
  - Failure to Complete on Time
  - Defects Claim
  - Warranty Claim

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# Construction Close-Out



- **Punchlist**
- **Commissioning**
- **Substantial Completion**
  - Determining Party
- **Liquidated Damages**
- **Construction Warranty**
  - Materials and equipment furnished
  - Conformance with Contract Documents
  - Warranty response terms
  - Warranty period terms

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# Questions and Answers

*We thank you for your time!*

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