Prequalification of Contractors by State and Local Agencies: Legal Standards and Procedural Traps

Daniel D. McMillan and Erich R. Luschei

Daniel D. McMillan

Erich R. Luschei

Prequalification programs have spread like wildfire over the last decade and now are a staple of procurement for many public owners throughout the nation. The prevalence of prequalification as a means to procure construction services on fixed-price contracts for public projects has significant implications for owners, contractors, and their counsel.

Most construction lawyers are familiar with the traditional method of competitive bidding used by public agencies to procure fixed-price construction contracts and procedures for protesting contract awards. Bids on fixed-price contracts typically consist of three basic elements collectively referred to as the "bid": a financial proposal to perform the work, a response to the owner's solicitation, and a statement of qualifications.[1] The bidder submitting the best financial proposal (the low bid) wins the contract unless that bid is not responsive to the solicitation or the bidder is determined to be "not responsible" (for instance, unqualified, insolvent, or untrustworthy). An owner usually cannot reject the lowest responsible bid in favor of a higher bid submitted by a more-qualified bidder; if the owner decides to award the contract, the owner normally must award it to the lowest *responsible* bidder whose bid is responsive.[2] In this traditional model of competitive bidding, public owners evaluate the contractor's responsibility *after* receipt of the bid based on information submitted by the contractor and on the owner's independent investigation.

When a public owner adopts a prequalification program, those traditional methods and procedures no longer apply in their entirety. They are replaced instead by a different system for procuring construction services that has a number of unique attributes. In many prequalification programs, the determination of responsibility (or some aspect of responsibility like financial wherewithal or bonding capacity) is the owner's first order of business and that determination is separated from and independent of the bid prices subsequently submitted by prequalified contractors. Stated differently, under such programs, the owner determines which contractors are "responsible" *before* soliciting bids and then limits the submission of bids to those contractors who have been "prequalified."[3] Contractors that are not prequalified are excluded from bidding for the contract, a method of screening that helps ensure all contractors submitting financial bids on the contract are responsible and capable of successfully performing the work.[4]

The adoption of this type of prequalification program does more than merely change the sequence in which responsibility or other qualifications are determined. It also changes the nature of challenges to an owner's determination of "nonresponsibility" and the process for instituting such challenges. Relatively little authority exists to provide guidance in structuring, challenging, or defending prequalification programs or in the administration of such programs. Available case law concerning prequalification is limited and not always directly applicable because the requirements of each prequalification program tend to be sui generis. This dearth of legal authority stands in stark contrast to the decades of decisional law underlying bid protests challenging the award of contracts under the traditional method of competitive bidding, which have made such protests a process fairly familiar to owners, contractors, and the courts. Notwithstanding that prequalification programs in the United States date back at least to the 1930s,[5] the process for challenging denial of prequalified status, both administratively and through litigation, remains largely a made-from-scratch endeavor governed by often unclear legal standards and fraught with procedural traps that become apparent only in hindsight.

This article is intended as a practical guide for structuring, challenging, and defending prequalification programs and for addressing denial by an owner of a contractor's application for prequalification. After highlighting the relatively recent and rapid expansion of prequalification programs, we analyze the role that typical prequalification programs play in the procurement of construction services, the types of challenges that can be made to prequalification programs and the rejection of prequalification applications, and some of the procedures and unique considerations applicable to such challenges.

Proliferation of State and Local Prequalification Programs

The history of the development and acceptance by owners of prequalification programs explains why construction attorneys rarely can turn to a comprehensive body of law or a secondary resource that spells out the elements of such programs and grounds on which they may be challenged. Before this decade began, public owners in a relative handful of states—Florida, Massachusetts, Pennsylvania, and New York among them—used prequalification programs on a consistent basis. Most common-

Daniel D. McMillan is a partner and Erich R. Luschei is a counsel in Jones Day's Los Angeles office. The views expressed herein are the personal views of the authors and do not necessarily reflect those of the law firm with which they are associated.

Published in *Construction Lawyer*, Volume 27, Number 2, Spring 2007

ly, prequalification programs applied to specific types of public construction such as schools and roads rather than to all construction throughout a state or local jurisdiction. The sporadic development of prequalification programs, in terms of both time horizon and geography, has yielded idiosyncratic programs with very little commonality.[6]

Even the American Bar Association's Model Procurement Code (ABA Model Code), first adopted in 1979 and revised in 2000, and the corresponding Model Procurement Regulations (ABA Model Regulations), adopted in 2002, touch only lightly on prequalification programs.[7] Section 3-402 of the ABA Model Code is only two sentences long and simply authorizes public agencies in states that adopt this provision to prequalify contractors and develop methods for prequalification.[8] A relatively small number of states adopted section 3-402 of the ABA Model Code or similar enabling statutes authorizing the use of prequalification.[9] The ABA Model Regulations are similarly sparse when it comes to prequalification.[10] The ABA Model Code provides little to no guidance on the details of a prequalification program or its administration. Public agencies must look elsewhere for sample prequalification questionnaires and regulations governing challenges to denial of prequalification and other issues associated with such programs.

As a general matter, prequalification programs for construction services still were very much the exception as the twentieth century came to a close. Such programs since have multiplied at a remarkable rate. In California alone, the legislature in 1999 authorized cities, counties, special districts, and other local public entities to adopt prequalification programs and directed the California Department of Industrial Relations to develop model prequalification documents for use at the local level.[11] Prequalification now is routinely used in California for multibillion-dollar construction programs, such as that of the Los Angeles Unified School District, and has been employed on high-profile public construction projects such as the Merced Campus of the University of California, as well as local projects like police and fire department facilities for the City of Manhattan Beach.[12]

Public owners in numerous states now view prequalification as a useful, if not essential, element to ensure successful completion of construction projects. Public officials today often point to newly adopted prequalification programs to assure the public that problems encountered on prior projects will not be repeated, including problems of poor workmanship, delays, and cost overruns.[13] Jurisdictions in the vanguard of the prequalification "movement" also have expanded and refined their programs based on experience to date, becoming increasingly sophisticated in the use of prequalification. In 2004, Massachusetts enacted legislation that expanded and refined the use of prequalification for making mandatory the use of prequalification for public building projects valued at $10 million or more; permitting the use of prequalification for projects valued between $10 million and $100,000; making mandatory and permissive at those same monetary thresholds prequalification of subcontractors; and adopting a statutory system for rating the qualifications of contractors and subcontractors.[14]

Participants on public works projects also appear to have become increasingly savvy about prequalification programs. This may be attributable to the emergence of a cottage industry of prequalification consultants and construction management firms with niche prequalification practices. Or it may be due to increasing acceptance and reliance on prequalification programs. Public owners have used prequalification for construction of more routine projects that are part of a larger construction program, such as new school and road construction. Public owners also have used and continue to use prequalification to ensure that contractors that bid on specialized types of projects have the requisite qualifications before bidding commences. To that end, owners recently have used prequalification programs to select contractors for a new "high design" library,[15] for the roofing replacement of a large and distinctive federal building,[16] and for the nation's largest environmental restoration project involving $1.5 billion of water-quality improvements in the Florida Everglades.[17] In the same vein, owners increasingly require prequalification of specialty subcontractors, particularly with regard to worker safety, payment of prevailing wages, and other similar matters.

Public owners are not the only project participants that have learned lessons from experience. Even where owners do not require prequalification of subcontractors, general contractors appear to be paying closer attention to the financial condition, historical experience, claims history, and safety records of potential specialty subcontractors.[18] In part, this may be due to the recognition by contractors of the value of formal and informal prequalification, but it also may be partly an outgrowth of the expanding use of cost-plus contracts with guaranteed maximum prices under which contractors seem to be self-performing less of the work and managing more construction performed by prime specialty subcontractors.

A perhaps unanticipated development of the expansion of prequalification programs involves organized labor. Labor unions now are eyeing prequalification programs as potential vehicles to expand benefits for their members. Some unions have seized on prequalification programs as a means to secure some of the same benefits that their members otherwise would secure through project labor agreements.[19] This occurred in New York City where private owners recently were required to prequalify contractors for construction of facilities that would then be leased to the city for use by the public school system. This prequalification requirement, which applied to an estimated $1 billion in construction, was adopted through a memorandum of understanding with trade unions requiring that contractors conduct approved apprenticeship programs and comply with prevailing wage laws.[20] Union officials also recently urged the board of supervisors of a county in California to adopt prequalification criteria that favor contractors that guarantee health benefits, draw apprentices from certain programs, and advance other traditional union objectives.[21]

The rapid proliferation and expansion of prequalification programs for construction services suggest that owners believe that well-designed and properly administered prequalification programs are beneficial and advantageous. Although a prequalification program can contribute to the success of a construction project, prequalification is not a panacea. Indeed, a poorly designed prequalification program may not be beneficial and actually may be contrary to the public interest.

Some critics contend that prequalification is inherently exclusionary and may have anticompetitive effects that defeat one of the

primary objectives of fixed-price competitive bidding—namely, obtaining a fair and reasonable price for public construction projects.[22] When bids on a recent rural sewer project came in 50 percent over the engineer's estimate, some blamed what they characterized as overly stringent prequalification criteria that resulted in the submission of a single bid on a major project component.[23] Additionally, contractors complain that the costs of complying with the peculiarities of prequalification programs administered by different public owners within the same state, city, or county increases bid prices or discourages contractor participation because of the administrative burdens of complying with the unique requirements of multiple programs.[24] Finally, like other government processes, prequalification programs can be abused or mismanaged by those who control them. The federal government recently announced bribery indictments of a group of employees of Jefferson County, Alabama, who controlled the county's prequalification committee and had sole authority to award $2.3 billion in sewer contracts.[25]

Despite occasional criticism, prequalification programs are here to stay for the foreseeable future. A substantial portion of public construction contracts will continue to be awarded through procurement systems involving some form of prequalification and the number of disputes arising from adoption and administration of prequalification programs will increase. The vagaries of prequalification programs underscore the need for contractors and attorneys to review and understand the statutory and administrative details of the prequalification program applicable to each particular project and not just rely upon experience with prequalification programs in other jurisdictions or for other public agencies.

Types of Prequalification Programs: Three Defining Characteristics

Prequalification programs can be grouped by three types of characteristics: exclusive versus nonexclusive prequalification programs; project-specific prequalification versus programwide prequalification; and programs that prequalify for responsibility versus those that prequalify for something less than or different than full responsibility. A public owner developing a prequalification program should clearly understand the type of program it is seeking to create and administer and emphasize characteristics consistent with its approach. A contractor applying for prequalification or assessing whether to challenge a denial of prequalification should understand the nature of the program as it may influence the preferred strategy.

Exclusive and Nonexclusive Programs

An owner must decide whether or not only prequalified contractors may bid on projects. An exclusive program limits bidders to those that have been prequalified. A nonexclusive program permits bids to be submitted by prequalified contractors as well as bidders that have not been prequalified, provided those bidders make the requisite submission at the time of bid and are found to be qualified.[26]

An exclusive program offers several potential benefits to owners. First, it may improve the quality of the assessments of contractor responsibility by truly separating responsibility from the assessment of the financial bid.[27] An exclusive prequalification program eliminates the risk that an owner may be influenced to find an otherwise-nonresponsible low bidder to be responsible because of the large gap between the low bid and the second-lowest bid. Second, exclusive programs afford administrative convenience to an owner. By only allowing prequalified contractors to bid on projects, the owner knows that all bids that are received and evaluated will be from prequalified contractors. On balance, as stated in the comments to the ABA Model Code: "Prequalification is only of limited utility if a procurement cannot be limited to prequalified suppliers."[28]

A nonexclusive program does not have these benefits, but has its own potential advantages. Contractors that have been prequalified under a nonexclusive program have the advantage of knowing that they are "qualified" at the time the bid is submitted. In addition, owners know that all contractors that are interested will be permitted to bid, thereby not restricting the pool of potential bidders.

Project-Specific and Programwide Prequalification

The distinction between project-specific and programwide prequalification concerns the scope of the projects upon which a contractor may be prequalified to bid. A project-specific prequalification program allows an owner to prequalify contractors to bid on a particular construction project. For example, a state department of transportation might prequalify contractors for a single subway tunnel construction contract. The prequalified contractors would be entitled to bid on that contract and would not be prequalified to bid on any other contracts. An important consideration for owners utilizing project-specific programs, especially those that limit bidding to contractors that have been prequalified, concerns providing sufficient advance notice of the procurement to enable enough interested contractors to complete the prequalification application and become prequalified *before* the deadline for submitting bids.[29] Unless sufficient advance notice is provided, the pool of prequalified contractors may be artificially restricted. Conventional wisdom holds that more bidders are better for the public and help ensure competitive pricing.

In contrast to project-specific prequalification, a programwide prequalification program prequalifies contractors to bid on more than one contract. Using the example from above, a state department of transportation could prequalify contractors to bid on subway construction contracts on a programwide basis. A prequalified contractor, rather than being prequalified to bid on one particular subway contract, would be prequalified to bid on any subway contract. Programwide prequalification programs take a variety of forms. Some owners maintain lists of prequalified contractors that are eligible to bid on any contract (or contracts within certain classifications) and those contractors are notified whenever there is a procurement.[30] Other owners may prequalify contractors for contracts of certain values through financial capacity ratings.[31] Programwide prequalification programs can be attractive to contractors that plan to regularly bid on contracts offered by a public owner. Programwide prequalification holds out the promise of reducing a contractor's administrative burden by eliminating the need to submit the same information with each separate bid. However, owners need to carefully consider issues like the duration of prequalification status, the process for updating information,

and whether any waiting period is to be imposed before a contractor may reapply following an unsuccessful application.[32]

Full Versus Limited Prequalification for Responsibilty

The third defining characteristic of prequalification programs concerns the qualities that are being prequalified by the program. Many prequalification programs attempt to evaluate whether a contractor is a "responsible" contractor within the meaning of the applicable competitive bidding statute and prequalify those that are. Other prequalification programs prequalify contractors on a narrower basis. Limited prequalification programs may prequalify contractors as to financial wherewithal, bonding capacity, or entitlement to bid on contracts up to a specified dollar value, as licensed and experienced to perform certain types of work, or as to safety or some other attribute.[33]

Whether the program prequalifies contractors as "responsible" or on a more limited basis, the program should address clearly whether prequalification is a final determination of responsibility or whether the owner may further evaluate the contractor's qualifications at the time that bids are submitted. Some programs require contractors to advise the owner of any "material" change in the information submitted on the prequalification application through the time of submitting a bid or contract award.[34] It is in the owner's interest to be clear that changed circumstances or subsequently discovered information can result in revocation of prequalification status or the denial of a contract award. The Commentary to the ABA Model Code states that "[p]requalification is not a conclusive determination of responsibility, and a prequalified bidder or offeror may be rejected as nonresponsible on the basis of subsequently discovered information."[35]

Understanding Prequalification: The Nature of Prequalification and Its Relationship to Responsibility

The focus of the balance of this article is on prequalification programs, whether project-specific or programwide, that are exclusive in nature and serve as a functional substitute for the traditional postbid method of determining responsibility. The concepts addressed here, however, may apply in other prequalification contexts as well.[36]

The concept of responsibility is the same for the traditional procurement model and for prequalification programs that are intended to prequalify contractors for responsibility under the applicable competitive bidding statutes. Owners may define responsibility in many different ways, but it essentially refers to the experience and ability of a contractor to successfully complete the contract on the terms agreed to with the owner.[37] As defined in one competitive bidding statute, a responsible bidder is "a bidder who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract."[38] Responsibility potentially incorporates a wide range of possible attributes, including a contractor's past experience in successfully completing projects, its financial condition, its claims history, and its compliance with numerous different regulatory requirements, including environmental, health, and safety laws. Responsibility is so broad and versatile a term that owners themselves seem to have some difficulty agreeing on its most important attributes.[39]

In the context of bid protests on contracts awarded through the traditional model of competitive bidding, courts have shown considerable deference to nonresponsibility determinations made by owners. The courts have upheld such determinations for a wide array of reasons, including where a bidder lacks a required license classification;[40] is embroiled in disputes with the owner involving issues of fraud, improper billing, and defective work on prior projects;[41] fails to demonstrate that it has sufficient working capital to perform the work;[42] has violated prevailing wage laws;[43] or is the subject of criminal indictments.[44]

In some instances, the concepts of responsibility and responsiveness may be blurred. A public owner may view certain contractor qualifications as project requirements. A bidder's lack of a license or certification required to perform the work may be viewed either as a question of responsibility or as a question of responsiveness.[45] Under either approach, a bidder that lacks the requisite license would not be awarded the contract.

Meaning of Responsibility in Prequalification Programs

Anecdotal evidence suggests that owners using prequalification in connection with specific projects may use a more refined practical definition of responsibility than they would without prequalification. Owners administering a project-specific prequalification program seem to focus more closely on the technical requirements of the project design and the experience of potential contractors with projects involving similar requirements. If the project design requires procurement, installation, and testing of specialized equipment, the owner may request information about the contractor's credentials and prior experience performing the same or similar work on other contracts. Contractors lacking such experience may not prequalify as bidders despite their general competence as builders to the extent "responsibility," as defined for the project in question, necessitates specialized experience in a particular area. As a practical matter, however, "responsibility" should have the same meaning under a competitive bidding statute when responsibility is evaluated postbid as when responsibility is evaluated through a prequalification program, provided that the prequalification statute or program makes clear that is what is intended.

A prequalification program that fails to clearly indicate that it intends to prequalify a contractor as "responsible" within the meaning of the state's competitive bidding law may create ambiguity and serve as an invitation to litigate. For example, in *Crest Construction Corp. v. Shelby County Board of Education*,[46] the Alabama Supreme Court upheld an owner's decision to deny an award to a prequalified low bidder. The owner there concluded after bids were submitted that the prequalified low bidder in fact was not responsible.[47] The low bidder challenged the award to the second-lowest bidder, contending that the owner was barred from revisiting the question of responsibility after submission of bids.[48] The court viewed the prequalification program and the solicitation for bids as not clearly indicating that the school board was prequalifying contractors for responsibility and held that the board reserved the discretion to decide that a prequalified contractor was not responsible.[49]

In affirming the owner's decision, the *Crest* court stated:

> Prequalification saves time, money and effort by eliminating obviously unqualified bidders, and it is generally based on tangible and objective criteria, such as work experience, size, net worth, equipment, etc. Determining responsibility is different, because it involves more qualitative and less quantitative considerations, such as determining which bidders "in point of skill, ability and integrity would be most likely to do faithful, conscientious work, and to fulfill the terms of the contract."[50]

The court rejected the notion that "prequalification is synonymous with a finding of responsibility."[51] But the court was careful to note that it was "*not* . . . holding that a public agency cannot predetermine the responsibility of a bidder" and specifically recognized that another agency in Alabama "[a]pparently . . . established a prequalification procedure that is binding on the Commission."[52]

Thus, *Crest* highlights the fact that a court may view a prequalification determination as something less than a responsibility determination unless the agency or the enabling statute and applicable regulations make clear that the prequalification process culminates in a responsibility determination.[53]

How Is Responsibility Determined in a Prequalification Program?

A well-conceived prequalification program has five essential elements: qualifying criteria that identify the attributes of contractors with whom the owner wishes to do business (i.e., the criteria for assessing responsibility); a standardized questionnaire or application used to elicit information regarding the qualifying criteria; a scoring system used to weigh the relative importance of the qualifying criteria; an appeals process for contractors whose applications are denied; and other rules governing operation of the program (such as standards concerning reapplication for or revocation of prequalified status).[54]

While all of these elements and the unique issues they present are discussed in greater detail later in this article, the qualifying criteria are what define the concept of responsibility employed by the owner to assess potential contractors. Collectively, the criteria manifest the owner's decision about the type of contractors that are acceptable or not. The criteria are exclusionary by nature and often evoke criticism from contractors unable to meet the qualifications, particularly in the case of local procurements that operate to exclude local contractors.[55] Qualifying criteria are derived from a variety of sources. Prequalification statutes in some states specify the standards contractors must satisfy and the weight assigned to them.[56] In other states, statutes provide broad authorization for state and local governments to adopt prequalification programs but not much guidance in exercising that authority.[57] Criteria also may be chosen for a variety of different reasons, including because they are essential to a particular project, other owners use them, consultants recommend them, or simply that they are available on the Internet for downloading.[58]

Is Prequalification of a Contractor a Final Determination of Responsibility?

Many prequalification programs are intended to establish a method for determining contractor responsibility. Such programs are designed to resolve the question of responsibility at the front end of a procurement. A contractor that has made the effort to prequalify will want the assurance that its bid will not be rejected after bids are opened on the basis that the contractor, though prequalified, is subsequently determined by the owner to be not responsible. An owner implementing a prequalification program, moreover, should not need to second-guess its own prior determination of the low bidder's capabilities and qualifications. In short, a prequalification program should be designed so that prequalified status is a seal of the contractor's responsibility for ensuing bids on contracts advertised by the owner in the case of programwide prequalification or on the specific project that is the subject of prequalification.

In some circumstances, a public owner cannot award a contract to the lowest prequalified bidder and still exercise good judgment as a trustee for the taxpaying public. The most compelling example of such a circumstance is where the owner learns of information after prequalifying a contractor that otherwise would have resulted in a denial of this status. Where a contractor submits materially false information in a prequalification application, or omits disqualifying information the contractor is required to disclose, an owner's decision to revoke prequalified status follows as a matter of course. The newly discovered information that presents a greater challenge is information about events or circumstances that arise after the owner has certified the contractor to be prequalified and before the owner awards a contract.

In some programs, a contractor may be prequalified or approved to bid on projects for a fixed period of time (e.g., one year) after prequalified status is granted. Many things can happen between the time the owner prequalifies the contractor and the time an owner decides to award a contract. One illustration of such changed circumstances arises with prequalification programs that classify contractors on the basis of the dollar value of contracts for which they may bid or on the maximum outstanding contract balances they may carry with the owner. Owners in those situations rely on a contractor's financial condition and bonding capacity when they set dollar thresholds for prequalified status. An owner may learn, months after prequalifying a contractor, that the contractor's ratio of current assets to current liabilities has declined substantially, whether as a result of receivables the contractor has had to write off or current liabilities that have suddenly hit its books, and that the contractor is facing a liquidity crisis that all but makes certain the contractor will be unable to perform any new work awarded to it. Other programs prequalify contractors to perform certain types or classifications of work and rely on factors such as the experience of the contractor's key personnel with that work. An owner may learn later that such key personnel have died, retired, quit, or been terminated, leaving the contractor effectively unable to perform work of the nature for which it was prequalified.

When a public owner discovers new information, a fair argument can be made that the owner should be permitted to deny an award to the lowest prequalified bidder where the information demonstrates that the bidder is not or is no longer responsible. In such cases, the real question is whether the owner is permitted to revoke the contractor's prequalified status and what process the owner must follow in doing so, subjects addressed later in this article.

The statutory or regulatory framework should clearly address the circumstances under which an owner may determine that a contractor that has been prequalified as "responsible" nonetheless may be determined to be "nonresponsible." The comments to the ABA Model Code specify that "[p]requalification is not a conclusive

determination of responsibility, and a prequalified bidder or offeror may be rejected as nonresponsible on the basis of subsequently discovered information."[59] Some states require that contractors submit any information to an awarding authority reflecting a material change "affecting the basis of prequalification."[60]

Denial of Prequalification: What's a Contractor to Do?

A contractor that unsuccessfully seeks prequalification has any number of options that should be evaluated.[61] First, it may decide to let the public owner's decision stand and not challenge the denial of prequalification. In assessing this option, a number of business considerations may come into play. If the prequalification application pertains to a single construction project, the contractor may decide to take a pass and pursue other opportunities. The business calculus may be different where prequalification is a predicate to eligibility to bid on all projects to be constructed by the owner, especially where the contractor's business model assumes successfully obtaining a portion of those contracts. Similarly, a contractor that plans to pursue projects with other public agencies should assess whether denial of prequalification is something that such agencies will consider as part of their procurement regime and whether that might complicate obtaining future public contracts.[62]

Second, a contractor that wishes to contest the denial of its application for prequalification should review carefully the applicable procedures, whether specified by statute, regulation, or the internal policies of the public agency. The prequalification program may permit a contractor to reapply with or without some sort of waiting period. Additionally, specific procedures may exist to challenge or appeal the denial of prequalification. Time limits and other technical requirements may apply to these options. Accordingly, it is important to be familiar with the details of the prequalification program. Failure to comply with procedures to challenge or appeal denial of prequalification may preclude or restrict the contractor's ability to pursue administrative and judicial relief.

Third, a contractor denied prequalification may have any number of grounds on which to challenge the decision whether administratively or through litigation. The next section discusses various types of potential challenges that may exist to a denial of prequalification or to the prequalification program itself. Again, it is important to develop an overall strategy for dealing with a denial of prequalification that takes into consideration business issues and legal issues. Early input from experienced counsel (even before submitting a prequalification application and, at a minimum, immediately after denial of prequalification) can be quite valuable to guard against mistakes that may compromise the contractor's ability to vindicate its rights.

The adage that "an ounce of prevention is worth a pound of cure" applies to the prequalification process. Unless the public agency made a clear and easily correctable mistake in assessing the prequalification application, an administrative appeal or judicial challenge often is an uphill battle. Even a successful administrative appeal or judicial challenge can be a costly diversion. This is not to say that such battles are not worth fighting or never succeed. Instead, contractors are well advised to invest up front in the application process to ensure that the submission is complete and accurate, and provides information that clearly meets the prequalification criteria. Of course, when a battle must be fought, there certainly are some archetypical challenges that can be mounted to the denial of prequalification decisions and to prequalification programs.

Challenges to Prequalification Programs and Denial of Prequalified Status

A contractor that is denied prequalification may assert any of several potential challenges. Many of those objections can and should be processed through the internal or administrative procedure specified by the public agency for challenges and appeals or as part of a legal action filed in court. The issues that may be raised include some that do not arise in the context of a traditional bid protest. This section addresses different types of challenges that can be mounted against a public agency's denial of prequalification and against the prequalification program itself.

The first step in resisting the denial of prequalification, and for that matter applying for prequalified status, should be a thorough reading of the rules of the prequalification program and an understanding of the prequalification criteria used by the owner, the manner in which the owner assesses compliance with those standards, and the scoring system.

The Underlying Principles of Uniformity, Objectivity, and Competition

As a prelude to discussing specific grounds on which prequalification programs may be challenged, it is important first to see the forest before looking at the trees. The process of prequalifying contractors for responsibility must be considered in light of the overall objectives of competitive bidding as developed in the context of the traditional model for awarding construction contracts on public projects. Under customary competitive bidding, contracts are awarded to the lowest responsible (and responsive) bidder. The following three principles underlie that traditional model: competition in bidding sufficient to ensure that the owner gets a fair price for the work; uniformity in the treatment of contractors to avoid favoritism; and the use of objective criteria and methods of evaluating contractor credentials. These bedrock standards need to be considered when developing, defending, or challenging a prequalification program or the denial of prequalification. Prequalification programs do not set aside these principles. Instead, they implement them.

Prequalification programs are not intended to take the competition out of competitive bidding. Program requirements that are too stringent or difficult to satisfy may stymie competition by discouraging or unduly limiting the number of qualified potential bidders.[63] Criteria employed to prequalify contractors are less vulnerable to attack where they are dictated by statute or rationally related to the requirements of the project. In assessing whether or not a prequalification program unduly restricts competition, it is tempting to look at the pool of bidders and the number of bids the owner receives. The size of the pool may be informative, but it also may mislead. There can be many explanations for a small number of bids having nothing to do with a public owner's use of a prequalification program or the restrictions imposed by it. Nonetheless, if twenty contractors apply for prequalification, and nineteen are prequalified, a contractor may have an uphill battle contending that the program improperly restricts competition. But if twenty contractors apply,

and only one is prequalified, a court is more likely to be concerned about the prequalification process and more apt to closely scrutinize the criteria when considering arguments about its flaws.[64] Likewise, a court may be less receptive to an argument that the prequalification program unduly undermines competition when multiple contractors have bid. Where only one or two bids are submitted and they substantially exceed the engineer's estimate, a party challenging a prequalification program may find a court more willing to believe that the results speak for themselves and contravene the principle of competition.[65]

The principle of uniformity relates to the principle of competition in public contracting and applies to prequalification programs. Uniformity in the treatment of contractors applying for prequalified status helps ensure that competition is fair, effective, and untainted by improper favoritism. It provides that all applicants be judged by the same standards and using the same process.[66] The requirement of uniformity may be expressly stated in statutes authorizing prequalification programs,[67] or it may be implicit in statutes requiring competitive bidding and the award of contracts to the lowest responsible bidder.

One of the earliest prequalification cases involved a challenge to a municipal ordinance that treated applicants for prequalified status differently. In *Harris v. Philadelphia*,[68] the Pennsylvania Supreme Court invalidated the prequalification ordinance due to disparate treatment:

> The city may, as heretofore she has done, accept and schedule all bids, and then, if acting in good faith, refuse to award the contract to one who is the lowest bidder because he is not the "lowest responsible bidder." Or she may, as she is now attempting to do, determine in advance who are responsible bidders, and refuse to receive bids from those who, after treating all alike, she determines are not in that class. But she may not impose conditions on one prospective bidder, which are not imposed upon all; nor may she enforce a method by which, through favoritism, one person may be conclusively authorized to bid on a pending contract, while another, equally as responsible and perhaps more so, is wholly excluded from even submitting a bid.[69]

Thus, the failure to adhere to the principle of uniformity in the structure or administration of a prequalification program makes it more susceptible to a legal challenge.

Finally, objective measures of a contractor's credentials further guard against favoritism, corruption, and influence peddling in the contracting process. The use of objective standards may be mandated by statute or implicit under competitive bidding laws.[70] As a result, the use of criteria that only can be measured subjectively, such as whether the contractor does "good" work, may open the door to attacks on the owner's subjectivity. Once opened, this door can lead a court to question an owner's motives and to set aside the usual deference accorded decisions of a public agency. Normally, the owner can secure the same information by means that appear more objective. Whether a contractor's work was "good" or not can be elicited by questions concerning conformity of work previously performed to project specifications and/or the extent of defective work needing correction. Ultimately, it is difficult to remove all subjectivity from the criteria for evaluating a contractor. A court usually takes a commonsense approach to whether the criteria appear sufficiently objective and may make its assessment in light of any evidence of improper manipulation of the standards.

If a prequalification program fails to reflect the principles of competition, uniformity, or objectivity, it and the decisions made by owners become more vulnerable to challenge by contractors and other interested parties. Even the use of criteria specifically authorized by statute may be subject to attack if the owner has applied those rules to improperly favor certain contractors, employs only subjective evaluations of a contractor's abilities, or effectively eliminates competition by limiting the bidding pool to a single, identifiable bidder.

For example, a contractor's prior experience is commonly used in determining responsibility in the traditional model of postbid assessments and in prequalification programs, and it usually is rationally related to assessing a contractor's ability to successfully complete a contract.[71] A contractor ordinarily would stand little chance of successfully challenging the concept of prior experience as a pertinent consideration. However, if a public owner required contractors to have completed a certain number of projects for *that* owner to *that owner's satisfaction*, that criterion would be highly vulnerable to attack. Such standards would exclude from prequalification all contractors that had not performed work for that owner no matter how well qualified, leaving those who previously worked for the owner with a lock on future jobs unless the owner did not "like" them.

Challenges to Program Authorization

Just as the principles of competition, uniformity, and objectivity are fundamental to a prequalification program, so too is a public owner's authority to adopt that program. One issue that rarely arises when owners make postbid responsibility determinations is whether they are authorized to do so. Most of these owners have determined responsibility after submission of bids as their standard operating procedure for decades with a statute expressly requiring that contracts only be awarded to the lowest responsible bidder. By contrast, owners using prequalification programs may find their authority to predetermine the responsibility of a contractor challenged in court due to the novelty of the process and exclusion of contractors from bidding that previously were familiar faces at prebid meetings.

Very little case law addresses whether owners are authorized, in the absence of specific enabling legislation, to use prequalification programs. Where a state legislature expressly grants a public owner authority to adopt a prequalification program, the express grant of authority usually is dispositive of the owner's authority to implement such a program.[72] But that may not be the end of the inquiry into whether a program is legally authorized. A legislature's own authority may be confined by state constitutional provisions vesting home rule powers in chartered cities or counties. Conversely, such chartered cities or counties may enact ordinances authorizing prequalification but have their power to do so challenged on the basis that the legislature has prohibited prequalification, the question then being whether prequalification is a matter of local or statewide concern.

More difficult (and more common) questions arise when the owner adopts a prequalification program without an express grant

of authority by either a state or local legislative body. The issue then is whether the owner has inherent authority to adopt the program. Not surprisingly, courts are divided about the inherent or implied authority of owners to adopt prequalification programs in the absence of an express legislative grant.

On the one hand, some courts have held that prequalification is just another way of doing something that the owner already is authorized and required to do and is a mere change in form. In other words, owners that are statutorily authorized to award contracts to the lowest responsible bidder have been expressly authorized to make a determination of responsibility, and it does not matter whether that is done prebid or postbid. Under this approach, absent a statutory requirement for postbid responsibility determinations, prequalification is impliedly authorized as simply another means to the same end.

This approach is exemplified by *Sciaba Construction Corp. v. Massachusetts Turnpike Authority*.[73] In that case, the owner employed a prequalification program to select bidders for the demolition and construction of a tunnel. The owner denied the plaintiff's application for prequalification and the plaintiff challenged the owner's authority to use prequalification. The Massachusetts Supreme Judicial Court acknowledged that the owner was not expressly authorized to prequalify bidders, but it considered that fact irrelevant. By statute, the owner had a duty to make responsibility determinations. The statute did not specify the method for determining responsibility, leaving the owner free to decide the matter through a prequalification program: "Since the authority must determine which entity is 'responsible and eligible,' there is no suggestion in the statute that the authority is precluded from prequalifying bidders, as opposed to determining whether such bidders are 'responsible and eligible' post-bid, as long as other statutory requirements are followed."[74]

On the other hand, some courts have taken a more rigid approach, ruling that owners may adopt prequalification programs only as expressly authorized by the legislature. Those courts view competitive bidding requirements as creatures of statute established by the legislature and only the legislature has the authority to modify such requirements. Viewed in this light, any perceived modification to the traditional method of competitive bidding constitutes a change in substance permitted only to the extent legislatively authorized.[75]

This more rigid approach was followed in *J. Weinstein Building Corp. v. Scoville*,[76] where the New York Supreme Court invalidated a prequalification program that had excluded eleven of twenty applicants for prequalified status. The court considered the program anticompetitive and concluded that the public owner was not authorized to adopt it. "If the principle of prequalification of bidders is a good one, and should be adopted by municipalities generally, provision for it should be made in the statute law, or, where not prevented by statute, in the ordinances of the municipalities."[77]

Another case following this approach is *Louisiana Associated General Contractors, Inc. v. Calcasieu Parish School Board*,[78] where the owner required, as a precondition to bidding, that a contractor agree to pay its workers prevailing wages. The Louisiana Supreme Court rejected the owner's argument that it had the power to predetermine contractors that would be allowed to bid. "There is no legal authority requiring or allowing a responsibility determination to be a precondition to bidding on public contracts. Absent statutory law authorizing the 'prequalification' of bidders, we refuse to allow a public entity to engage in a process which eliminates certain bidders from competing before the bidding process even begins."[79]

Where a statute does not expressly authorize or prohibit a prequalification program, courts in jurisdictions following the implied-authority approach may more closely scrutinize prequalification programs. Courts have been protective of competitive bidding laws and may perceive prequalification as a threat to the public interests that the competitive bidding laws were designed to advance. Those interests include guarding against favoritism, improvidence, extravagance, fraud, and corruption; preventing the waste of public funds; and obtaining a fair and economical price for the public.[80] As a result, absent legislative authorization of a prequalification program, it may be difficult to persuade a court to depart from conventional procedures when doing so serves to exclude otherwise-qualified contractors from the bidding process because they were not prequalified to bid.

Even where owners are legislatively authorized to adopt prequalification programs and have done so, they may not have done so in the manner required by law. Public entities often are required to take official action using specific procedures. For instance, where a public owner awards a contract on a negotiated basis that is required to be bid competitively, the contract may be void.[81] If a public owner does not follow the procedure required, its program may be unlawful and the owner precluded from using it.[82] Public agencies may be required to adopt a prequalification program, including procedures for the administration of the program, through a regulatory process accompanied by public notice and hearings. An agency that circumvents the requirements of its state's administrative procedure act may find its prequalification program invalidated.[83] The same lesson holds true for cities, counties, and special districts, whose official actions often must be authorized from the outset, or subsequently ratified, by a majority of the members of the governing board. Failure to comply with such requirements may make a prequalification program legally vulnerable.

Challenges to Qualifying Criteria

Assuming that a prequalification program comports with the principles of competition, uniformity, and objectivity, and is authorized and validly adopted, the focus of a challenge to the denial of prequalified status may turn to the specific criteria the owner used to determine "responsibility" or other qualifications of the contractor. As with postbid nonresponsibility determinations, an owner's decision not to prequalify a bidder arises from failure of the bidder to demonstrate some attribute of responsibility to the owner's satisfaction. A contractor lacking adequate financial resources to ensure that a project will be successfully completed without delay is likely to be determined nonresponsible no matter what means are used to determine responsibility. Still, there are a number of different issues that arise where prequalification programs are used that typically do not arise where responsibility is determined after bids are submitted.

The first area where differences are apparent concerns the criteria established by statute that owners may use in prequalifying con-

tractors. In the case of postbid responsibility determinations, owners ordinarily evaluate bidders based on a broad concept of responsibility as elucidated by statute, regulations, case law, and local custom and practice. Again, there should be no difference in theory about the meaning of responsibility where prequalification is used. Some enabling statutes are silent about the prequalification criteria owners may use but make relatively clear that the common meaning of responsibility should be employed. Other statutes identify particular criteria that are permissive but are silent as to additional standards.[84] Some prequalification programs are designed to evaluate only certain limited issues with the fuller responsibility determination reserved to the actual postbid process.

In all events, where a public owner includes criteria in its program that are not authorized by statute, injunctive relief may be available to contractors that are denied the ability to bid on a project.[85] If enabling legislation states criteria in broad terms, such as the contractor's "financial condition," a court is likely to defer to an owner's implementation of those criteria, unless the owner employs them in an arbitrary or irrational manner. Where a contractor's financial condition is a permissible criterion, for instance, an owner rationally might request financial statements from contractors to evaluate matters such as the contractor's working capital and current ratio.[86] However, if a public owner requests financial information that is overbroad, and a contractor is not prequalified for failure to provide that information, the denial of prequalified status may be vulnerable to legal challenge as arbitrary or capricious. For example, an owner may be hard-pressed to justify requiring that a publicly traded corporation provide personal financial statements of all of its shareholders, directors, and officers.

A more difficult question arises when a statute identifies specific criteria that a public owner may use in its prequalification program but is silent about whether the owner may use additional criteria not specified in the statute. The question then is whether an owner's use of other criteria in its prequalification program that are not specified in the statute violates the grant of the authority. In the abstract, arguments can be made either way. One position might be that the legislature did not grant the authority when it could have and presumably meant to withhold it. A counter-argument might be that the legislature understood that the owner could consider any criteria reasonably bearing on whether a contractor is responsible, whether or not the statutory grant expressly permitted use of additional criteria.

In *Manson Construction & Engineering Co. v. State of Washington*,[87] an owner's use of prequalification criteria not authorized by statute was enjoined by the courts. The owner in that case needed to construct an interim floating bridge to replace one that had been destroyed by adverse weather conditions. The owner, which was statutorily authorized to prequalify bidders, included a prequalification criterion that was not expressly authorized by statute. In particular, to be prequalified, the owner required that the contractor demonstrate "previous successful use by the Contractor of the proposed floating bridge configuration."[88] Three of the four contractors applying for prequalification were denied prequalified status because they had never before constructed floating bridges.[89] In a challenge brought by one of the contractors that had been denied prequalified status, the trial court enjoined the contract award to the sole bidder and the appellate court affirmed the injunction. The Washington Court of Appeals explained:

> Prequalification standards . . . tend to limit the extent of competitive bidding. It is the function of the legislature, not the judiciary or administrative agency, to circumscribe competitive bidding. When, as in the case at bench, the legislature has already defined those limits, courts will be wary of interpreting the legislatively mandated standards so as to further circumscribe the competitive bidding policy.[90]

This decision highlights the reluctance of some courts to defer to prequalification criteria that may be perceived as unduly restricting competition.

Public owners are in a stronger position to justify the use of criteria that are not expressly authorized by statute when the criteria arise from other statutory mandates with which the agency must comply. Public owners often are charged with numerous statutory duties relating to protection of the public, workers, and the environment. Owners may be prohibited from contracting with unlicensed contractors[91] or they may be required to specify the license classification required of bidders seeking the work.[92] A court may be far less inclined to upset a prequalification decision or program when such items are not specified in a prequalification statute but included as part of the prequalification process.

Although owners often have broad discretion to determine whether a bidder is responsible, and therefore may have broad authority to dictate qualifying criteria, the criteria also are subject to attack if they contravene law or public policy or are arbitrary and capricious. Some owners now ask contractors to disclose prior instances in which contractors were denied prequalified status by any federal, state, or local public agency. Implicit in the question is the presumption that the denial of prequalified status is tantamount to a determination that the contractor is not responsible. That presumption may be correct in some cases, but it also may be completely wrong in others. An application for prequalification may be denied for many different reasons, including mere glitches in the preparation and submission of an application.[93] There may be no way of determining the basis for another agency's denial of prequalification. No reported case was found addressing a challenge to the denial of prequalified status based on a prior denial of prequalified status by a different owner. The commentary to the ABA Model Code, however, states that "a prior failure to prequalify will not bar a subsequent determination that a bidder or offeror is responsible with respect to any given procurement."[94]

Challenges to the Scoring and Assessment System

One of the final items on the checklist of possible infirmities of a prequalification program concerns the system used to score or assess the contractor's level of responsibility. A contractor ordinarily needs to secure the minimum score designated by the owner to be prequalified. The minimum score is determined by adding together the contractor's scores concerning the various criteria the owner has used to practically define the concept of responsibility for the purpose of its program. Of all of the elements of the prequalification program, the scoring system appears at first blush to be the most objective and rational part of the process. After all, it is just math.

A contractor or a contractor's attorney can conclude mistaken-

ly that the scoring system is beyond reproach because it involves numbers. Careful scrutiny may reveal a variety of issues that arise from the scoring system. The owner may have misinterpreted a contractor's response to a question and given the contractor an erroneous score. Just like contractors that submit bids containing mistakes, owners tallying scores on prequalification applications may commit errors.[95] Despite its appearance as an objective testing device to assess contractor qualifications, the scoring system simply may assign numbers to criteria that are themselves problematic or involve qualitative judgments as to the appropriate weight that should be given to different types of information.

A common assessment device involves questions requiring a yes/no or true/false response. Public owners often use such questions in the case of disqualifying criteria. The owner may decide that a "yes" answer to certain questions, such as "have you been convicted of felony involving submission of false claims on a public works contract within the last year," may automatically disqualify the contractor without consideration of any other criteria. Though all-or-nothing "yes" and "no" questions avoid having to assign weight to such answers in connection with computing a score, not all attributes of interest to an owner may be susceptible to such questions.

The process of assigning numerical values to information in the prequalification questionnaire and the relative numerical values within certain categories that are then used to calculate the contractor's "score" itself are potentially problematic. A contractor may be asked "how many subcontractors have filed claims against you for late payment or nonpayment in the last three years?" The value of a contractor's score regarding the frequency of subcontractor claims may be assigned a number value by the owner ranging from 0 to 5, with 0 representing a contractor that consistently pays its subcontractors late or less than they are owed, 5 representing a contractor that never has had a subcontractor make a claim, and 3 a default score for contractors that self-perform almost all of their work. The reviewer scoring the contractor's answer usually does not have a quantitative basis on which to scale the contractor's response (such as 100 claims = 0, 50 claims = 1, etc.). At times, a general contractor may be warranted in not paying a subcontractor. The information sought by the prequalification application might not elicit information that allows the reviewer to assess the nature of prior disputes with subcontractors. A contractor that rarely has any subcontractor disputes, that resolves all of them without litigation, and that should get a 5 for its businesslike approach to contracting may get a 3 due to the tendency of reviewers to average scores when they lack sufficient information to distinguish between contractors. At the same time, the contractor's less businesslike competitor also may get a 3, as will the contractor that self-performs most work.

The structure of the scoring of a prequalification application presents opportunities for contractors to target both the uniformity and objectivity of the prequalification program. In a close case, such as where a contractor fails to achieve the minimum score by one point, the contractor may be able to raise an issue that requires an adjustment that results in an application being reconsidered and the contractor being prequalified. The owner may not have the stomach for a fight over an issue so negligible and on the margin of acceptability, particularly if the program has excluded a high percentage of applicants. A contractor that is far away from the minimum score needed to achieve prequalification may not find such a challenge to be worthwhile since the outcome may not change once the score is adjusted.

Litigating Prequalification Disputes: Judicial Review and Exhaustion of Administrative Remedies

Where a contractor's application for prequalification is denied, or its prequalified status is revoked, the contractor may decide it is necessary to contest the owner's decision. State laws vary considerably in matters of procedure and universal statements are difficult to make. A contractor often may challenge in court the denial of its prequalification application by petitioning for a writ of mandate directing the owner to grant the contractor's application,[96] filing a complaint for declaratory and injunctive relief seeking the same relief,[97] or a combination of both. In most circumstances, litigation may be pursued only after "exhausting the administrative procedures" of the public agency, if any, regarding appeals or challenges to denial of a prequalification decision.

Administrative Rules and Requirements

Litigating a prequalification dispute often requires that certain steps have been taken before filing a lawsuit challenging the basis for the owner's decisions. Many prequalification programs have rules with which the contractor must comply to preserve the contractor's ability to seek judicial relief. A contractor's failure to comply with those rules may foreclose any further challenge. Similarly, an owner's failure to follow its own rules may ensure that relief is granted to the contractor.[98]

Owners appear to have considerable latitude in adopting procedural rules governing the denial and revocation of a contractor's prequalified status and related avenues of appeal. A number of courts have held that prequalified bidders do not have a right to a due process hearing *before* an owner revokes the bidder's prequalified status, and that a process that provides a minimal opportunity to be heard may satisfy due process concerns.[99] In contrast to a prequalification determination, most courts hold that actual debarment of a contractor requires more expansive, predeprivation due process safeguards.[100] Depending on the nature of the prequalification program, contractors may argue that a denial of prequalification that has the effect of precluding contractors from bidding for an extended duration is tantamount to debarment and that more extensive due process protections are warranted under those circumstances than in the typical prequalification scenario.

Most prequalification programs include a process by which a contractor can seek review of the owner's denial of the contractor's application for prequalification. For some public agencies, review procedures are mandated by statute; for others, they are a normal part of the owner's general process for responding to challenges to the public agency's decisions; and for still others, they may have been established to satisfy due process concerns.[101] The appeal provided usually is administrative in nature and is made to representatives of the same owner that rejected the contractor's application. If the rules of a prequalification program permit a contractor to administratively appeal a denial or revocation of prequalification, and the contractor fails to exercise its right to such an appeal, the contractor may be barred from bringing a subsequent judicial chal-

lenge to the agency's decision.[102] There are a number of exceptions to the doctrine of exhaustion of administrative remedies, and counsel for contractors should carefully consider such exceptions before determining that a procedural default precludes judicial relief.[103]

The rules of a prequalification program often provide a very limited period of time in which to challenge the owner's decision, often as little as ten days. Depending on the structure and language of the program, failure to appeal within the time and in the manner required may result in a waiver of any right to appeal or to pursue judicial remedies.[104]

The case of *Cummins v. Department of Transportation*, which involved a more traditional bid protest by a prequalified contractor, illustrates the perils of failing to comply with procedural requirements.[105] There, the owner's prequalification program provided that a contractor could be prequalified for designated types of work activities.[106] Contractors were permitted to bid on projects where 50 percent or more of the contract work involved a work classification for which a contractor had been prequalified.[107] In *Cummins*, a prequalified contractor was the lowest bidder on a contract, but the bid was rejected because the contractor was not prequalified for the work classification designated in the owner's solicitation.[108] The contractor argued that the owner had misclassified the contract work and, when properly classified, the contractor was prequalified to perform the work.[109] The state procurement code, however, required a bidder to file a protest with the public agency within seven days of when the bidder "knew or should have known of the facts giving rise to the protest."[110] The owner took the position that a protest based on a work classification issue needed to be filed prior to the time bids were opened.[111] Without addressing whether the owner had misclassified the work, the Pennsylvania Commonwealth Court agreed that the contractor had failed to file a timely protest. The court found that the contractor clearly was aware when it submitted its bid of the work classification issue and that the protest was untimely because the contractor had not filed the protest until two weeks after bidding the work.[112]

Judicial Review of Agency Decisions

When a prequalification dispute does reach court, judicial review of a public owner's decision ordinarily is limited by the same standards of review applicable to any other analogous governmental or administrative decision. The owner's reason for denying or revoking prequalified status may be a legal one, a factual one, or one of mixed law and fact. Depending on the nature of the decision, the court will afford no deference or considerable deference to the owner's decision.

Where the agency's decision is based purely on a legal determination, the court usually will evaluate that issue without providing any deference to the owner's interpretation of the law.[113] In some cases, a legal issue is closely bound to a factual one or to a matter over which the owner has discretion. Standards of review vary considerably in these circumstances, and in some jurisdictions a court may defer to a public owner's determination if it is rational and made in good faith.

For example, in *Frontier Traylor Shea, LLC v. Metropolitan Airports Commission*,[114] a group of three contractors secured prequalified status as a joint venture partnership for a large transportation corridor project.[115] The same group of contractors later submitted a low bid of approximately $110 million to construct the project. However, the bid was submitted in the name of a limited liability corporation, rather than in the name of the joint venture that had been prequalified.[116] The public entity rejected the low bid on the basis that the limited liability corporation submitting the bid was not itself prequalified and therefore was not entitled to bid. Despite ardent briefing about when a corporation is a joint venture, the court did not decide that legal issue. Instead, the federal district court deferred to the owner's decision due to a "lack of clarity" on the legal issue and the absence of "evidence that the [public owner's] decision was motivated by any other consideration than a good faith belief that [the Contractor's] bid did not comply with the established process."[117]

Questions of fact, however, are another story. Where an owner denies prequalified status to a contractor on factual grounds, a court ordinarily will not reverse the agency's decision unless the decision is arbitrary and capricious, meaning in effect that it is irrational and lacks evidence to support it.[118] Establishing that an owner's denial of prequalified status is arbitrary and capricious can be difficult. If the owner acted in good faith, but exercised its discretion in a debatable way, a court is likely to uphold the owner's decision. If the owner's conduct falls considerably below that standard, a contractor's chances of a successful challenge are enhanced. An owner's decision to deny an application may be reversed if the owner acted in bad faith and treated the contractor differently than other contractors without any appropriate justification, used highly irregular procedures in considering the contractor's application, or in some other way based its decision on inappropriate factors extrinsic to the contractor's application.[119]

Conclusion

Prequalification programs are now an integral part of the procurement process for many owners contracting for construction services. The dollar value of contracts awarded to contractors under prequalification programs is quite substantial and growing. The consequences of a denial of prequalification therefore can be very significant and adversely affect a contractor's business. The process of challenging denial of prequalification is subject to any number of procedural traps for the unwary and the types of challenges that may be asserted may be quite different from those asserted in the traditional model of competitive bidding. As a result, those involved with the prequalification process need to be mindful of these differences, avoid procedural defaults, and carefully study the requirements of the particular prequalification program applicable to the procurement.

Endnotes

1. As used in this article, the terms "public owner" and "owner" are generic references to state or local governmental entities or agencies responsible for constructing public projects. This article does not address prequalification of construction contractors on federal projects or limitations federal law places on state and local prequalification programs when federal funds are involved in a project. The federal government generally does not employ prequalification to procure construction services. *See, e.g.*, FEDERAL ACQUISITION REGULATION (FAR), 48 C.F.R. §§ 9.105-1(b)(1) & 9.202 (prequalification not authorized except in the case of negotiated contracts and procurement of products); 23 C.F.R. § 635.110 (requiring competitive bidding on projects funded through the Federal Highway Administration and prohibiting prequalification requirements that restrict competition or prevent submission of bids

by responsible contractors).

2. *See*, *e.g.*, City of Inglewood-Los Angeles County Civic Center Auth. v. Superior Court, 7 Cal. 3d 861, 867–68, 500 P.2d 601, 604, 103 Cal. Rptr. 689, 693 (1972); 1 PHILIP L. BRUNER & PATRICK J. O'CONNOR, CONSTRUCTION LAW § 2:94 (West 2005) [hereinafter BRUNER & O'CONNOR]. A public owner usually retains the right or discretion not to award a contract to any of the bidders. *See generally* Noralyn O. Harlow, Annotation, *Public Contracts: Authority of State or Its Subdivisions to Reject All Bids*, 52 A.L.R. 4th 186 (2001).

3. *See generally* Daniel D. McMillan & Erich R. Luschei, *Prequalification Programs: The Key to the Public Contract Door*, CONSTR. BRIEFINGS 4–5 (June 2004) [hereinafter *Prequalification Programs*].

4. The use of prequalification does not guaranty that an owner will regard a prequalified contractor as responsible when the owner decides to award a contract. *See*, *e.g.*, Crest Constr. Corp. v. Shelby County Bd. of Educ., 612 So. 2d 425, 430 (Ala. 1992) (owner prequalified low bidder but rejected its bid after finding low bidder was not responsible); Rollings Constr., Inc. v. Tulsa Metro. Water Auth., 745 P.2d 1176, 1179 (Okla. 1987) (owner refused to accept bid by prequalified contractor where contractor was involved in litigation with owner on other projects).

5. *See*, *e.g.*, Harris v. Philadelphia, 299 Pa. 473, 149 A. 722 (1930).

6. A survey of prequalification programs established by various state departments of transportation (DOTs) highlighted the diversity of prequalification critieria among such programs. *See* R.E. Minchin Jr. & G.R. Smith, *Quality-Based Performance Rating of Contractors for Prequalification and Bidding Purposes* 11–12 (March 2001) (on file with National Cooperative Highway Research Program (NCHRP Web Document 38), Transportation Research Board, National Research Council), *available at* www4.trb.org/trb/crp.nsf/All+Projects/NCHRP+10-54. This survey of state DOTs indicated that while many state DOTs use similar criteria, no two programs of the thirty-five surveyed used all of the same criteria in prequalifying contractors for transportation-related construction. *Id.* at 11–12. A recent study of Australian prequalification programs agreed that owners "use a vast range of prequalification criteria," reflecting an "individualistic" rather than universal approach, and that "criteria tend to be established on an ad-hoc basis." *See* A. Mills, *Client and Contractor Attitudes to Prequalification*, 2005 AACE INT'L TRANSACTIONS RISK.08.1 (2005).

7. MODEL PROCUREMENT CODE § 3-402 (2000) [hereinafter ABA MODEL CODE]; MODEL PROCUREMENT REGULATIONS R3-402.01 (2002) [hereinafter ABA MODEL REGULATIONS].

8. Section 3-402 of the ABA Model Code provides in its entirety as follows:

> Prospective suppliers may be prequalified for particular types of supplies, services, and construction. The method of submitting prequalification information and the information required in order to be pre-qualified shall be determined by the [Policy Office] [Chief Procurement Officer].

ABA PROCUREMENT CODE, *supra* note 7, at § 3-402.

9. *See*, *e.g.*, ARIZ. REV. STAT. ANN. § 41-2541 (2006); COLO. REV. STAT. § 24-92-107 (2006); HAW. REV. STAT. § 103D-311 (2006).

10. The ABA Model Regulations provide that (i) "Prospective Contractors may be prequalified for bidder lists, but distribution shall not be limited to prequalified contractors nor may a prospective contractor be denied award of a contract simply because the contractor was not prequalified"; (ii) "[t]he fact that a prospective contractor his been prequalified does not necessarily represent a finding of responsibility"; and (iii) "[t]his Section is not applicable to qualified product lists," which are treated separately. ABA PROCUREMENT REGULATIONS, *supra* note 7, at R3-402.01, R3-402.02.

11. CAL. PUB. CONT. CODE § 20101 (West 2006). This statute permits most local California public agencies to use prequalification programs by authorizing adoption and application of a uniform system of rating bidders, based on objective criteria, to determine the minimum requirements for prequalification and the type and size of contracts upon which each bidder may bid. *Id*. § 20101(b). Section 20101(a) directs the California Department of Industrial Relations to develop a questionnaire through which to implement the uniform system of rating bidders. *Id.* at § 20101(a). Any prequalification program adopted pursuant to this statute must include provisions for appeals of the denial of prequalified status. *Id*. at § 20101(c).

12. *See Prequalification Programs*, *supra* note 3, at 1.

13. *See*, *e.g.*, Bradford L. Miner, *Reform Law Late for Class; Problems Plague Brookfield-Area School Projects*, WORCESTER TELEGRAM & GAZETTE, Feb. 7, 2005, at B1; *State Audit Points Fingers over Olympic Village Problems*, Associated Press, Dec. 16, 2004, BC cycle; Michael O'Connor, *Kiewit Crew Takes over on 132nd Street; The Company Plans to Assign Workers to the Project for Six 10-Hour Days a Week*, OMAHA WORLD-HERALD, Oct. 14, 2004, at 3B; Joseph Morton, *Fahey Promises Changes in Omaha's Road Work*, OMAHA WORLD-HERALD, Aug. 19, 2004, at 01A.

14. MASS. GEN. LAWS ch. 149, §§ 44D(a), 44D(e), 44D(i) & 44D(a) (2006).

15. Kathleen Furore, *Orland Park Public Library; Space Tripled, Design Invites Patrons*, 7:10 MIDWEST CONSTR. 63 (Oct. 1, 2004).

16. Shawn Holiday, *Top of the Pyramid*, 24:1 ROOFING CONTRACTOR 12 (Jan. 2004).

17. Kate Grusich, *Businesses to Learn of 'Glades Job Opportunities*, STUART NEWS/PORT ST. LUCIE NEWS, June 22, 2005, at D1.

18. Michael B. Ceschini, *General Contractors Should Know Subcontractors' Finances; To Minimize Potential Difficulties with Subcontractors, General Should Request Financial Information, such as Current Banking Institutions, Financial Statements, and Bonding Company Information*, 51:10 N.Y. CONSTR. 95 (Apr. 1, 2004).

19. A recent federal case described a project labor agreement (PLA) as follows:

> A PLA is a multi-employer, multi-union pre-hire agreement designed to systemize labor relations at a construction site. It typically requires that all contractors and subcontractors who will work on a project subscribe to the agreement; that all contractors and subcontractors agree in advance to abide by a master collective bargaining agreement for all work on the project; and that wages, hours, and other terms of employment be coordinated or standardized pursuant to the PLA across the many different unions and companies working on the project. The implementation of a PLA on a project underwritten by the Government almost always is accomplished by making agreement to the PLA a bid specification, thereby allowing the contracting authority to ensure that firms at every level—from the general contractor to the lowest level of subcontractor—comply with the terms of the PLA.

Bldg. & Constr. Trades Dep't v. Allbaugh, AFL-CIO, 295 F.3d 28, 30 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1171 (2003). In *Allbaugh*, the court held that the president acted within his constitutional authority in issuing Executive Order No. 13,202, which precluded requirements for PLA agreements on federally funded projects. *Id*. at 36.

20. *N.Y.C. Schools Reach Trade Deal*, 52:8 N.Y. CONSTR. 13 (Apr. 1, 2005).

21. Phillip Reese Bee, *Debate on County Contracts Heats Up Unions, Bidders Argue as Supervisors Study Policy*, SACRAMENTO BEE, June 15, 2005, at B1.

22. *See, e.g.*, *Prequalification Programs*, *supra* note 3, at 9; Minchin & Smith, *supra* note 6, at 8; J. Weinstein Bldg. Corp. v. Scoville, 141 Misc. 902, 908; 254 N.Y.S. 384, 391 (N.Y. Sup. Ct. 1931).

23. David Sneed & Lindsay Christians, *Officials Explain High Bids on Sewer; Estimates Were $38M Short; Those Involved in the Project Blame a Rise in Material Costs, Lack of Bidders and Politics*, SAN LUIS OBISPO TRIB., Mar. 2, 2005, at 1.

24. *See* Mills, *supra* note 6, at RISK.08.1. ("Criteria used in the past have been developed in a largely idiosyncratic manner with little or no consultation with the contractors affected. As a result, contractors are faced with a variety of calls for information by prequalifiers, the collection of which can be quite costly. This is leading to expensive duplication of effort by contractors in providing what is often similar information but

in different formats."). While project-specific requirements still would require contractors to provide information regarding their qualifications to perform particular types of work, the burden of providing similar information in different formats is something that would be avoided by use of uniform prequalification questionnaires for information that generally is requested in one form or another under most prequalification programs.

25. Eric Valesco, *Panels in Sewer Case Had No Oversight, Officials Say*, BIRMINGHAM NEWS, Feb. 13, 2005, at 1A.

26. *Cf.* ABA MODEL REGULATIONS, *supra* note 7, at R3-402.01.1; ARIZ. REV. STAT. § 41-2541 (2006); COLO. REV. STAT. § 24-92-107 (2006); HAW. REV. STAT. § 103D-311 (2006). The ABA Model Code comments and regulations seem to be internally inconsistent. On the one hand, the comments to the code indicate that only bidders that are prequalified should be permitted to bid. ABA MODEL CODE, *supra* note 7, at § 3-402, cmt. 1. On the other hand, the ABA Model Regulations provide that "[p]rospective contractors may be prequalified for bidder lists, but distribution of the solicitation shall not be limited to prequalified contractors nor may a prospective contractor be denied award of a contract simply because such contractor was not prequalified." ABA MODEL REGULATIONS, *supra* note 7, at R3-402.01.1.

27. Minchin & Smith, *supra* note 6, at 6.

28. ABA MODEL CODE, *supra* note 7, at § 3-402, cmt. 2.

29. *Cf. id.* ("Regulations should establish that unless an emergency exists or the contract is for a small purchase, a competition may not be limited to prequalified offerors unless public notice of the procurement was given in sufficient time for any interested firms to prepare necessary submissions and become prequalified.").

30. *See, e.g.*, ABA MODEL REGULATIONS, *supra* note 7, at R3-402.01.1; ARIZ. REV. STAT. ANN. § 41-2541 (2006); COLO. REV. STAT. § 24-92-107 (2006); HAW. REV. STAT. § 103D-311 (2006).

31. Minchin & Smith, *supra* note 6, at 8.

32. In the context of a programwide prequalification program, an owner also may have the ability to evaluate a prequalified contractor's performance on one project to determine whether and to what extent the contractor should remain prequalified for future projects. *See*, *e.g.*, Bucko Constr. Co. v. Indiana Dep't of Transp., 850 N.E.2d 1008 (Ind. App. 2006) (upholding owner's decision to reduce contractor's prequalification rating due to ongoing dissatisfaction with contractor's performance during work on highway project).

33. *See, e.g.*, Cummins v. Dep't of Transp., 877 A.2d 550, 552 (Pa. Commw. Ct. 2005) (prequalification of contractors to perform certain classifications of work); Minchin & Smith, *supra* note 6, at 8.

34. *See, e.g.*, ARIZ. REV. STAT. § 41-2541 (2006) ("Prospective contractors have a continuing duty to provide the director with information on any material change affecting the basis of prequalification.").

35. ABA MODEL CODE, *supra* note 7, at § 3-402, cmt. 1; c*f.* ABA MODEL REGULATIONS, *supra* note 7, at R3-402.01.1 ("The fact that a prospective contractor has been prequalified does not necessarily represent a finding of responsibility.").

36. In addition to contracts that must be awarded to the lowest responsible bidder in a design-bid-build setting, state law may authorize prequalification programs to be used with other statutorily authorized methods of project delivery such as best-value procurements and design-build projects.

37. *See generally* 1 BRUNER & O'CONNOR, *supra* note 2, at § 2:94.

38. CAL. PUB. CONT. CODE § 1103 (West 2006). The California Supreme Court has defined the lowest responsible bidder as "the lowest bidder whose offer best responds in quality, fitness, and capacity to the particular requirements of the proposed work." City of Inglewood, 7 Cal. 3d at 867–68, 871, 500 P.2d at 604, 607, 103 Cal. Rptr. at 689, 693.

39. *See, e.g.*, Minchin & Smith, *supra* note 6, at 11–12; Mills, *supra* note 6, at RISK.08.7.

40. M & B Constr. v. Yuba County Water Agency, 68 Cal. App. 4th 1353, 1357–58, 81 Cal. Rptr. 2d 231, 232–33 (1999).

41. *See, e.g.*, Miami-Dade County v. Church & Tower, Inc., 715 So. 2d 1084 (Fla. App. 1998); Stacy & Witbeck, Inc. v. City & County of San Francisco, 36 Cal. App. 4th 1074, 44 Cal. Rptr. 2d 472 (1995).

42. B. Milligan Contracting, Inc. v. State, 674 N.Y.S.2d 204 (App. Div. 1998).

43. Ray Angelini, Inc. v. City of Philadelphia, 984 F. Supp. 873 (E.D. Pa. 1997).

44. Rutigliano Paper Stock, Inc. v. U.S. Gen. Servs. Admin., 967 F. Supp. 757 (S.D.N.Y. 1997).

45. *Cf. M & B Constr.*, 68 Cal. App. 4th at 1357–58, 81 Cal. Rptr. 2d at 232–33 (lack of particular license classification made bid nonresponsive) *with* Textar Painting Corp. v. Delaware River Port Auth., 296 N.J. Super. 251, 259, 686 A.2d 795, 799–800 (N.J. Super. 1996) (contractor denied prequalified status in the absence of required certification).

46. 612 So. 2d 425 (Ala. 1992).

47. *Id*. at 428.

48. *Id*.

49. *Id*. at 430–31.

50. *Id*. at 430.

51. *Id*. at 431.

52. *Id*. at 432 & n.3.

53. *Compare* D.A.B. Constructors, Inc. v. State Dep't of Transp., 656 So. 2d 940, 943 (Fla. App. 1995) (public agency interpretation of its rules required "contractor must be deemed responsible as a matter of law" if contractor "is prequalified and its certificate has not been suspended or revoked at the time of the bid") *with* Rollings Constr., Inc. v. Tulsa Metro. Water Auth., 745 P.2d 1176, 1179 (Okla. 1987) ("Does the award of such a [prequalification] certificate vest its holder with a property right to be the absolute recipient of the contract if it submits the low bid? We hold that it does not. . . .").

54. *See Prequalification Programs*, *supra* note 3, at 10–12.

55. *See, e.g.*, Sneed & Christians, *supra* note 23, at 1; Richard Korman & Tony Illia, *South Carolina School District "Grades" Bidders—and Some Fail*, ENG'G NEWS-RECORD, Dec. 16, 2002, at 32; *Quest for Quality and Speed Will Cost Some Contractors*, ENG'G NEWS-RECORD, Dec. 16, 2002, at 48.

56. MASS. GEN. LAWS ch. 149, § 44D(e) (2006).

57. CAL. PUB. CONT. CODE § 20101 (West 2006) (requiring uniform system of rating bidders, based on objective criteria, to determine minimum requirements for prequalification, and type and size of contracts upon which each bidder may bid).

58. *See, e.g.*, CALIFORNIA DEP'T OF INDUS. RELATIONS, PRE-QUALIFICATION OF CONTRACTORS SEEKING TO BID ON PUBLIC WORKS PROJECTS: THE 1999 STATE LEGISLATION AND THE MODEL FORMS CREATED BY THE DEPARTMENT OF INDUSTRIAL RELATIONS (2001), *available at* http://www.dir.ca.gov/prequal.htm.

59. ABA MODEL CODE, *supra* note 7, at § 3-402, cmt. 1; *see also* ABA MODEL REGULATIONS, *supra* note 7, at R3-402-01.1 ("The fact that a prospective contractor has been prequalified does not necessarily represent a finding of responsibility.").

60. *See, e.g.*, ARIZ. REV. STAT. § 41-2541 (2006).

61. In addition to being denied prequalified status by a public owner, a contractor's successful prequalification may be challenged by another contractor that has been prequalified. The topic of one contractor challenging prequalification of another contractor is not addressed in this article. There are other legal standards and procedural traps regarding such challenges. *See*, *e.g.*, D.A.B. Constructors, Inc. v. State Dep't of Transp., 656 So. 2d 940, 944 (Fla. App. 1995) (contractor foreclosed from challenging qualifications of competitor where challenge to prequalification was presented in context of bid protest rather than in context of prequalification determination).

62. The comments to the ABA Model Code provide that "a prior failure to prequalify will not bar a subsequent determination that a bidder or offeror is responsible with respect to any given procurement." ABA MODEL CODE, *supra* note 7, at § 3-402, cmt. 1.

63. *See, e.g.*, MASS. GEN. LAWS ch. 149, § 44D(f) (2006) (requiring rejection of all applicants if less than three contractors are prequalified); Manson Constr. & Eng'g Co. v. State, 24 Wash. App. 185, 191, 600 P.2d 643, 647 (1979) ("By choosing to so eliminate competent bidders at the prequalification stage, the salutory effect of truly competitive bidding was lost.").

64. J. Weinstein Bldg. 141 Misc. at 908, 254 N.Y.S. at 391.

65. *See, e.g.*, *Manson Constr. & Eng'g Co*., 24 Wash. App. at 191, 600

P.2d at 647.

66. Harris v. Philadelphia, 299 Pa. 473, 480, 149 A. 722, 724 (1930) ("[A]ll bidders on a municipal contract must be accorded the same treatment, for not otherwise can the requirements of the [competitive bidding] statute be complied with. . . . [The City] may not impose conditions on one prospective bidder, which are not imposed upon all; nor may [it] enforce a method by which, through favoritism, one person may be conclusively authorized to bid on a pending contract, while another, equally as responsible and perhaps more so, is wholly excluded from even submitting a bid."); *see also* Allegheny Contracting Indus., Inc. v. Flaherty, 6 Pa. Commw. 164, 171–72, 293 A.2d 639, 642–43 (Pa. Commw. Ct. 1972) (affirming trial court order requiring city to open bid of complaining contractor where mayor refused, for undisclosed reasons, to open contractor's bid).

67. *See, e.g.*, CAL. PUB. CONT. CODE §§ 20101 & 20111.5 (West 2006).

68. 299 Pa. 473, 149 A. 722 (1930).

69. *Id*. at 480, 149 A. at 724; *see also Allegheny Contracting*, 6 Pa. Commw. at 171–72, 293 A.2d at 642–43.

70. *See, e.g.*, CAL. PUB. CONT. CODE § 20101 (West 2006); *Harris*, 299 Pa. at 480, 149 A. at 724; J. Weinstein Bldg. 141 Misc. at 902, 254 N.Y.S. at 389.

71. A recent peer-reviewed study compared owner and contractor attitudes about the most and least important prequalification criteria. Both owners and contractors ranked a contractor's prior experience at the top of their lists of important criteria. "The results show that [d]etails of past projects is the most important factor in prequalification decision making by all groups, and that [s]uccess of completed projects, [p]ast project time performance, and [b]ank reference also seem to be important considerations by all groups in the survey." *See* Mills, *supra* note 6, at RISK.08.3.

72. The ABA Model Code, for example, expressly authorizes adoption of prequalification programs and enables the awarding agency to adopt "[t]he method of submitting prequalification information." ABA MODEL CODE, *supra* note 7, at § 3-402.

73. 412 Mass. 606, 591 N.E.2d 190 (1992).

74. *Id*. at 609–10, 591 N.E.2d at 192–93.

75. *Id.*; *see also* Crest Constr. Corp. v. Shelby County Bd. of Educ., 612 So. 2d 425, 430 (Ala. 1992).

76. 141 Misc. 902, 254 N.Y.S. 384 (N.Y. Sup. Ct. 1931).

77. 141 Misc. at 907, *Id*. at 390.

78. 586 So. 2d 1354 (La. 1991).

79. *Id*. at 1364.

80. Amelco Elec. v. City of Thousand Oaks, 27 Cal. 4th 228, 240–41, 115 Cal. Rptr. 2d 900, 909–10 (2002); M & B Constr. v. Yuba County Water Agency, 68 Cal. App. 4th 1353, 1360, 81 Cal. Rptr. 2d 231, 234 (1999); Stacy & Witbeck, Inc. v. City & County of San Francisco, 36 Cal. App. 4th 1074, 1095, 44 Cal. Rptr. 2d 472, 484 (1995); Graydon v. Pasadena Redevelopment Agency, 104 Cal. App. 3d 631, 636, 164 Cal. Rptr. 56, 59 (1980).

81. *Amelco*, 27 Cal. 4th at 240–41, 38 P.3d at 1128–29, 115 Cal. Rptr. 2d at 909–10.

82. *See, e.g.*, Pulaski v. Occupational Safety & Health Stds. Bd., 75 Cal. App. 4th 1315, 1328, 90 Cal. Rptr. 2d 54, 61 (1999).

83. California's administrative procedure act (APA) does not permit state agencies to issue or enforce guidelines, standards of general application, or other rules that are "regulations" unless such agencies follow specific procedures in promulgating them. CAL. GOV'T CODE § 11340.5 (West 2006). Section 11342.600 of the APA defines "regulation" broadly to include "every rule, regulation, order, or standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedures." *Id*. § 11342.600.

84. *See, e.g.*, CAL. GOV'T CODE § 14661 (West 2006); CAL. PUB. UTIL. CODE § 130051.21 (West 2006).

85. Manson Constr. & Eng'g Co. v. State, 24 Wash. App. 185, 191, 600 P.2d 643, 646–47 (1979) (affirming order enjoining award of contract to construct flotation bridge, where statute authorized consideration of contractor's ability to perform contract, but prequalification criteria further required evidence of prior construction of flotation bridges).

86. *See, e.g.*, CAL. PUB. CONT. CODE §§ 20101, 20111.5 (West 2006).

87. 24 Wash. App. 185, 600 P.2d 643 (1979).

88. *Id*. at 188.

89. *Id*. at 189.

90. *Id*. at 190.

91. CAL. BUS. & PROF. CODE § 7028.15(e) (West 2006).

92. CAL. PUB. CONT. CODE § 3300(a) (West 2006).

93. A contractor applying for prequalification with the City of Manhattan Beach, California, failed to provide examples of three "completed" projects exceeding $10,000,000 in value because an earlier part of the questionnaire asked for information about projects "completed or in process." *See Prequalification Programs*, *supra* note 3, at 13. The contractor could have provided past contract experience meeting the qualification criteria but mistakenly included a contract in process in responding to a question about completed projects. The contractor's application was denied as a result of this mistake. *Id*.

94. ABA MODEL CODE, *supra* note 7, at § 3-402, cmt. 1.

95. *Prequalification Programs*, *supra* note 3, at 13.

96. A writ of mandate is designed to compel an owner to perform an act when it has a duty to act in a specific manner based on the requirements of law, but is not typically available to compel the owner to exercise its discretion in a particular way. *See*, *e.g.*, August H. Skoglund Co. v. Illinois Dep't of Transp., 67 Ill. App. 3d 276, 278–79, 384 N.E.2d 849, 851–52 (1978) (trial court's issuance of writ reversed where court of appeal determined that factual issue of compliance with program requirements precluded mandate and necessitated factual hearing on sufficiency of application); D.A.B. Constructors, Inc. v. State Dep't of Transp., 656 So. 2d 940, 944 (Fla. App. 1995) (petition for writ of mandate denied where contractor failed to show agency had an "indisputable legal duty" to deny contract award to asserted nonresponsible bidder).

97. Declaratory and injunctive relief operate in a similar manner but the legal requirements for securing such relief may differ in a particular case. Declaratory relief consists of a legal ruling by a court resolving a dispute concerning the parties' rights and obligations under a specific set of facts. Injunctive relief operates to enforce a declaration of rights but may be granted with or without declaratory relief. A contractor initiating a lawsuit challenging denial of prequalification status or the award of a contract to another contractor typically will request a temporary restraining order on an emergency basis or an award of preliminary injunctive relief. Such relief, if granted, is operative immediately and remains in place pending further legal proceedings or for a specified period of time. Depending on the law of the state in which the proceeding is initiated, to obtain injunctive relief, a contractor usually must demonstrate a likelihood of success on the merits of its claims and the presence of irreparable harm. Frontier Traylor Shea, LLC v. Metro. Airports Comm'n, 132 F. Supp. 2d 1193, 1197 (D. Minn. 2000) (motion for permanent injunction denied where plaintiff failed to show actual success on merits in prequalification dispute); John Gil Constr., Inc. v. Riverso, 72 F. Supp. 2d 242, 251 (S.D.N.Y. 1999) (motion for preliminary injunction denied for lack of probable success on merits of contractor's claim that agency improperly revoked contractor's prequalified status), *appeal dismissed*, 2001 U.S. App. LEXIS 6187 (2d Cir. 2001); Sciaba Constr. Corp. v. Massachusetts Turnpike Auth., 412 Mass. 606, 608, 591 N.E.2d 190, 192 (1992) (motion for preliminary injunction denied for lack of probable success on merits where contractor sought to enjoin use of prequalification program); Louisiana Gen. Contractors v. Calcasieu Parish Sch. Bd., 586 So. 2d 1354, 1360 (La. 1991) (permanent injunction granted precluding use of prequalification programs for school construction absent statutory authorization for such programs); Modern Cont'l Constr. Co. v. City of Lowell, 391 Mass. 829, 837, 465 N.E.2d 1173, 1178 (1984) (affirming issuance of preliminary injunction where plaintiff established reasonable likelihood of success on merits and irreparable harm that outweighed harm to defendants that injunction would cause).

98. *See*, *e.g.*, White Constr. Co. v. Div. of Admin., 281 So. 2d 194, 197 (Fla. 1973) (failure of owner to follow its own rules for suspending prequalified status of contractor required owner to consider contractor's bid).

99. *See, e.g.*, Ruby-Collins, Inc. v. Cobb County, 237 Ga. App. 517, 519, 515 S.E.2d 187, 189–90 (1999); *John Gil Constr.*, 72 F. Supp. 2d at 253–54; Ray Angelini, Inc. v. City of Philadelphia, 984 F. Supp. 873,

884–85 (E.D. Pa. 1997).

100. S. California Underground Contractors, Inc. v. City of San Diego, 108 Cal. App. 4th 533, 543, 133 Cal. Rptr. 2d 527, 534 (2003) (debarment affirmed following administrative hearing); Golden Day Schs., Inc. v. State Dep't of Educ., 83 Cal. App. 4th 695, 703, 99 Cal. Rptr. 2d 917, 923 (2000) (same).

101. *See, e.g.*, CAL. PUB. CONT. CODE § 20101 (West 2006); 21 N.Y. COMP. CODES R. & REGS. § 9600.5 (2006); *John Gil Constr.*, 72 F. Supp. 2d at 251.

102. *See, e.g.*, Coachella Valley Mosquito & Vector Control Dist. v. Cal. Public Employment Relations Bd., 35 Cal. 4th 1072, 1080, 29 Cal. Rptr. 3d 234, 239 (2005) (" 'The exhaustion doctrine is principally grounded on concerns favoring administrative autonomy (i.e., courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary).' . . . The exhaustion requirement applies to defenses as well as to claims for affirmative relief . . . and we have described exhaustion of administrative remedies as 'a jurisdictional prerequisite to resort to the courts." (citations omitted)).

103. *See*, *e.g.*, *Coachella Valley*, 35 Cal. 4th at 1081–82, 112 P.3d at 629, 29 Cal. Rptr. 3d at 241 (exhaustion not required where "the agency lacks authority, statutory or otherwise, to resolve the underlying dispute between the parties"); Kaiser Found. Hosps. v. Superior Court, 128 Cal. App. 4th 85, 26 Cal. Rptr. 3d 744 (2005) (exhaustion excused where administrative remedy would result in irreparable harm, is inadequate or unavailable, or is futile).

104. *But see* Balfour Beatty Constr. v. Dep't of Transp., 783 A.2d 901, 906 (Pa. Commw. Ct. 2001) (failure to file permissive reply to order suspending prequalification status did not waive appellate rights where filing of the reply was optional).

105. 877 A.2d 550 (Pa. Commw. Ct. 2005).

106. *Id*. at 552.

107. *Id*.

108. *Id*.

109. *Id*.

110. *Id*. at 551.

111. *Id*. at 553 n.9.

112. *Id*. at 554–55.

113. A court could view the question of whether a public owner is entitled to adopt a prequalification program as purely one of law. *See, e.g.*, Louisiana Assoc. Gen. Contractors, Inc. v. Calcasieu Parish Sch. Bd., 586 So. 2d 1354, 1364 (La. 1991).

114. 132 F. Supp. 2d 1193 (D. Minn. 2000).

115. *Id*. at 1194–95.

116. *Id*.

117. *Id*. at 1197; *see also* Textar Painting Corp. v. Delaware River Port Auth., 296 N.J. Super. 251, 259, 686 A.2d 795, 799–800 (N.J. Super. 1996). In *Textar*, the court upheld a requirement for certification by an industry trade group even though the complaining contractor had past experience performing the type of work for which the certifications were required. *Id*. In dismissing the contractor's complaint there, the court observed that the owner's staff did not have the resources to audit contractors and thus depended on certification by the industry group. *Id*.

118. *See*, *e.g.*, Bucko Constr. Co. v. Indiana Dep't of Transp., 850 N.E.2d 1008, 1017 (Ind. App. 2006) ("The judicial review proceeding is not intended to be a trial de novo, as the role of fact finder rests with the ALJ."); Bhatt v. State Dep't of Health Servs., 133 Cal. App. 4th 923, 928, 35 Cal. Rptr. 3d 335, 339 (2005) ("Where, as here, the trial court was called upon to decide whether an agency's administrative decision was supported by substantial evidence, the function of the appellate court is the same as that of the trial court, that is, to review the administrative decision to determine whether it is supported by substantial evidence.").

119. In one case, factors such as those identified in the text played a role in the trial court's decision to set aside the resolution of a public agency that disqualified two contractors from bidding on construction work for that agency. *See In re* Caristo Constr. Corp. v. Rubin, 221 N.Y.S.2d 956, 966 (N.Y. Sup. Ct. 1961), *appeal dismissed*, 221 N.Y.S.2d 979 (N.Y. App. Div.), *modified and aff'd as modified*, 222 N.Y.S.2d 998 (N.Y. App. Div. 1961), *aff'd*, 225 N.Y.S.2d 502 (N.Y. 1962). However, illustrating the deference often accorded to public agencies in their factual determinations, the appellate division's opinion vacated the judgment with a terse admonition that rejected the trial court's detailed factual findings: "[I]n our opinion, there was a substantial factual basis for the making of the subject resolution; hence, the court may not substitute its judgment for that of the Board of Education[.]" *Caristo*, 222 N.Y.S.2d at 998.