

CITY MANAGER INFORMATION REPORT9/14/09

DEPARTMENT: Finance & Business Services**NAME:** Kathy Rainey, Manager
Purchasing & Contracts**SUBJECT:** Overview of Bid and Bid Protest Process**1.0 PUBLIC BIDDING PROCESS**

The bid process for public procurement is governed by NRS 332 for Goods & Services and NRS 338 for Public Works Construction. The statutes vary but generally have similar requirements in several key areas such as advertising bid opportunities, defining bidder qualifications, determination of responsive and responsible bidders, and protest procedures that apply. NRS 332 requires formal bids for contracts valued over \$50,000 and NRS 338 requires formal bidding for contracts valued over \$100,000. NRS 338 authorizes three methods of delivering public work construction: design-bid-build, design-build, and construction-manager-at-risk. These methods are discussed in more detail below in the discussion of "Bidder Qualification Criteria." NRS 332 authorizes a 5% bidder's preference for recycled products and NRS 338 requires a 5% local bidder's preference for contracts valued over \$250,000. No other bidder's preferences are authorized in either statute.

Goods & Services Bids and Requests for Proposals

Bids are prepared by the Purchasing and Contracts Division with consultation from requesting City Department. The City Department provides technical specifications and/or a scope of work to initiate the project. Purchasing drafts the bid or RFP document and it is reviewed and approved by the Department before advertised to potential bidders.

Construction Bids

Bids are prepared by the Purchasing and Contracts Division with the assistance of the Public Works, Field Operations or Neighborhood Services Department, as applicable. Most projects are initiated by the Public Works Department who provide the Technical Specifications and permitted plans to Purchasing. Purchasing prepares the Instructions to Bidders (ITB) and General Conditions (GCs) to the contract. The ITB, GCs, Technical Specs and Plans are the bid document issued to contractors interested in bidding the work.

2.0 PRE-BID MEETINGS

The purpose of a pre-bid meeting is to discuss the bid document and any prospective bidder questions about the bid documents and bid process. The pre-bid meetings

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are recorded. The Purchasing Representative leads the meeting and reviews the ITB with the attendees to ensure the prospective bidder understand the bid instructions, the submittal requirements, all submittal forms and submittal deadline. The Department Representative provides an overview of the project scope and technical specifications.

Prospective bidders are given the opportunity to ask questions. If a firm is unfamiliar with the public bidding process, firms can obtain training upon request immediately following the pre-bid meeting. Bidders are notified in the pre-bid meeting and on the Invitation to Bid that questions regarding the bid should be referred in writing to the Purchasing Representative by a given deadline. To ensure a level playing field and prevent the potential for bid collusion, questions regarding the bid are required to be made to the Purchasing Representative. The Purchasing Representative coordinates with appropriate technical staff to obtain answers to technical questions regarding specifications. Questions received by bidders are answered in a formal addendum issued by the Purchasing Representative to all prospective bidders to ensure all prospective bidders have identical information on which to establish their bid pricing.

Mandatory Pre-Bid Meetings

City Council passed Resolution 109-98 on October 12, 1998, which established certain requirements for mandatory pre-bid meetings. The Resolution requires mandatory pre-bid meetings for public works construction projects with an estimated value of \$5 million or greater; any project with a time critical completion date; and other project for goods, services and public works construction as may be deemed appropriate. The Resolution further states that a bidder who fails to attend the mandatory pre-bid meeting will be deemed non-responsive and their bid will be returned unopened. In addition, the Resolution states the City Council will not entertain any protest submitted by a prospective bidder who does not attend a mandatory pre-bid meeting.

It is important to note that mandatory pre-bid meetings can limit competition because a bidder who misses a meeting is precluded from bidding. Bidders who are very familiar with the public bidding process and especially the City's bidding process, can find all of the information required to submit a bid in the bid document. In practice, bidders who have scheduling conflicts on the date of a pre-bid meeting, often send a staff member to sit in the pre-bid meeting in order to meet the "attendance requirement" to ensure they have the opportunity to bid. Bidders are provided a copy of the mandatory pre-bid attendees and they monitor the bid opening process to ensure the City only accepts bids from eligible bidders.

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3.0 BID CONTENT/CONTRACTS**Bids – Construction and Goods & Services**

Bid documents include the instructions to bidders, scope of work and technical specifications. In addition, the bid includes the contractual terms and conditions required if the successful bidder is awarded the contract. The contractual terms and conditions have been "approved to form" by the City Attorney's Office prior to incorporation in the bid. As a condition of bidding, the bidder is required to accept the contractual terms and conditions without exception and execute such acceptance on a bid submittal form. Upon award of the bid, no contract document is executed because the successful bidder has already executed the bid accepting the contract terms. The City issues a Purchase Order after the City Council awards the bid to the lowest responsive and responsible bidder. These actions constitute acceptance by each party and such acceptance consummates a contract between the parties.

Requests for Proposals (RFP)– Construction (Design-Build & CMAR) and Goods & Services

RFP documents include instructions for submittal of proposals, the scope of work, and performance specifications or requirements. In addition, the RFP includes a sample contract with the terms and conditions contemplated if a contract is awarded. The terms and conditions of the contract are subject to customization and negotiation. Prior to submitting the contract for City Council approval, the contract must be signed off by the City Attorney's Office as "approved to form" and the company recommended for award. After the City Council awards the contract, it is executed by the City's designee.

Competitive Bidding Exceptions (CBEs)

When contracts are awarded without soliciting bids or RFPs, a contract is prepared by Purchasing & Contracts staff in coordination with the applicable City Department providing the scope of work and technical specifications. The terms and conditions of the contract are subject to customization and negotiation. Prior to submitting the contract for City Council approval, the City Attorney's Office must sign off on the contract as "approved to form" and the company recommended for award. After the City Council awards the contract, it is executed by the City's designee.

Purchase Orders

In some circumstances, purchases are made without the use of a formal contract. In those cases, standard purchase order terms and conditions apply and no document is executed by both parties. The purchase order is issued after receipt of a quote or if of a dollar value requiring City Council approval, the purchase order is issued after

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City Council approved the purchase. The purchase order states, "the supplier's delivery against the order constitutes acceptance of the purchase order terms and conditions." These actions constitute acceptance by each party and such acceptance consummates a contract between the parties.

4.0 BIDDER QUALIFICATION CRITERIA**Goods and Services**

NRS 332 governs the procurement of goods and services and contains licensing and licensing limits as the minimum requirement for determining if a supplier is a responsible bidder. The statute states that local government may also consider financial responsibility, experience, adequacy of the equipment offered, past performance, delivery date and ability to perform the contract, and other criteria deemed in the best interest of the public. In practice, Purchasing works with the requesting Departments to develop the qualification requirements and evaluation criteria that will be incorporated in the bid documents and utilized in the bid evaluation process.

Construction – Design-Bid-Build

NRS 338 governs the procurement of public works construction and contains specific language in the statute for determining the qualification of bidders. The City Attorney's Office, Public Works Department and Purchasing & Contracts Division has chosen to utilize verbatim language from the statute in construction documents to state the requirement for determining if a bidder is responsible. Most of the criteria used to determine bidder qualification are verifiable; however, other criteria are more difficult to validate. City Attorney, Public Works and Purchasing is looking into supplemental methods of validation, which would provide a more comprehensive assessment of a bidder's qualifications and less likelihood of protests from other bidders. Areas under evaluation include effectively or efficiently verifying a bidder's claim of no prior breach of contract, no bankruptcy filing, and no discrimination complaint and safety program compliance to NRS 618. With regard to the contractor's project experience requirements, the bid document template has already been updated to include a section that will communicate to the bidders how their project experience will be evaluated. The bid document lists the criteria that will be considered in evaluating whether the bidder's submitted project experience is determined to be similar in scope to the bid.

Construction – Alternative Construction Delivery Methods

NRS provides for two alternative methods for delivering public works construction, which include design-build and construction-manage-at-risk (CMAR). The design-build team or CMAR is selected through a competitive RFP process on the basis of qualifications. NRS specifies a 2-step process and criteria which must be used for

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selecting the Design/Build Team and the CMAR. The selection criteria are assigned a relative weight and the proposals are scored by an evaluation panel.

The decision to use these alternative methods is typically a collaborative decision between Public Works and Purchasing based on the scope, complexity of the project and value of the project. NRS limits the use of design-build for building projects valued over \$10M; no limits are defined in NRS for CMAR projects. The benefit of these alternative methods is that both involve the general contractor in the design phase of the project to incorporate the constructability expertise of the contractor throughout design phase as a means of controlling cost and avoiding change orders during construction.

5.0 BID EVALUATION PROCESS**Goods & Services**

The criteria used to determine bidder responsibility includes licensing, financial responsibility, qualifications, experience, adequacy of equipment, past performance, conformance to specifications, delivery date and quality and utility of services and ability of the bidder to perform the contract. Bidder responsiveness varies and is subject to the bidder complying with the submittal requirements defined in the instructions to bidders. The contract is awarded to the lowest responsive and responsible bidder.

Requests for Proposals (RFP) Evaluation Process – Goods & Services

Requests for Proposal solicitations are used when the city is relying on the responding firms to propose solutions or specifications for consideration by the city. Though the same criteria are used for determining the responsibility and responsiveness of a company responding to an RFP, price is not the primary factor under consideration in determining contract award. The evaluation team is formed of cross functional members who independently review the proposals and then meet to discuss their evaluation results until a consensus is reached on the selection on the most responsive and responsible firm. Purchasing and Contracts establishes a negotiation plan with the applicable department procuring the services and then conducts the negotiation until contract terms and pricing is agreed. If the negotiation is not successful, negotiations may be canceled and Purchasing can either reconvene the evaluation team or at the direction of the evaluation team begin negotiations with the next most qualified company.

Construction Evaluation Process (Design-Bid-Build)

There are 13 criteria used to determine bidder responsibility and 6 criteria used to determine bidder responsiveness, subject to variation depending on the bid and discretion of the city to add additional criteria that is not prohibited by statute. The bid evaluation process commences after bid opening for the purposes of ensuring the

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low bidder meets all of the criteria stated in the bid document for determining responsibility and responsiveness. Purchasing and Public Works perform the bid evaluation and involve the City Attorney's Office when necessary.

6.0 PROTEST PROCESS

Protest regulations have been effect since 2003 for NRS 338 (construction) and since 2005 for NRS 332 (goods & services). City Council passed Resolution 89-2004 on May 19, 2004 adopting procedures for the protest of the proposed award of a contract. The requirement for the notice of protest submittal and bond are stated differently in NRS 332 and 338; however, the Resolution sets forth a consistent procedure for construction protests and goods & services protests.

Protest Statute – Goods & Services

NRS 332 permits the governing body to establish the timeframe to allow the protesting person to submit the notice of protest after the opening of the bids. The notice of protest must include a written statement setting forth with specificity the reasons the person filing the notice believes the applicable provisions of law were violated. If required by the public body the person filing the notice of protest must post, at the time of notice of protest, a bond in an amount equal to the lesser of 25% of the total value of the bid or \$250,000. The purpose of the bond is to reimburse the city for the cost of defending itself against the protest if the city prevails; otherwise, the bond is returned to the bidder.

Protest Statute – Construction

NRS 338 requires the protest submission within 5 business days after the bid opening date. The notice of protest must include a written statement setting forth with specificity the reasons the person filing the notice believes the applicable provisions of law were violated. If required by the public body the person filing the notice of protest must post, at the time of notice of protest, a bond in an amount equal to the lesser of 25% of the total value of the bid or \$250,000. The purpose of the bond is to reimburse the city for the cost of defending itself against the protest if the City prevails; otherwise, the bond is returned to the bidder.

COMPETITIVE AWARD & PROTEST HISTORY					
FY08 - YTD FY10					
	Competitive Awards	Awards to other than lowest bidder	NRS Compliant Protests	Protests where CLV prevailed	NRS Non-Compliant Protests
FY08	75	2	0	0	0
FY09	67	2	2	2	1
YTD FY10	14	4	0	0	1

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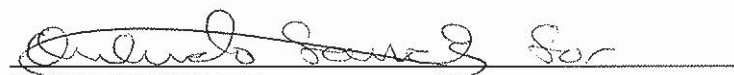
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Note that the increase in awards to other than lowest bidder for fiscal year 2010 to date (2 months) is directly related to unqualified bidders trying to get contracts because they need the work; for example we are seeing more construction bids outside the bidder's licensing classifications.

7.0 CONCLUSION

Purchasing has seen a two or three-fold increase in the number of bidders in this economic environment. This is very positive for driving competitive pricing and challenging because it attracts new bidders who are unfamiliar with the public bidding process. Purchasing has increased the time spent reviewing bid documents and the bidding process in the pre-bid meetings. Purchasing has also accommodated an increased number of requests for training on the bidding process by companies who are unfamiliar with the City's bidding process. The bid documents have continued to be enhanced to ensure ease of understanding of the documents and include a checklist of bid submittal items as a tool to increase a bidder's success in meeting the requirements as a "responsive" bidder. Bid opening dates have more frequently been extended due to the number of questions received by bidders and the City's commitment to ensure bidders clearly understand the specifications by having their questions answered prior to bid opening.

There will also be increased communication with City Council on the bid opening schedule, bid results, more details on any rejection of bidders, and protests, if any. Non-routine bid results will be discussed in Council Briefings. Contracts that are executed by both parties will be added as backup to agenda items (RFPs and CBEs) as defined in Section 3.0 above.



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