CITY OF NEW ORLEANS CHIEF ADMINISTRATIVE OFFICE

POLICY MEMORANDUM NO. 113(R)

October 12, 2009

To: All Departments, Boards, Agencies, and Commissions

From: Brenda G. Hatfield, Ph.D., Chief Administrative Officer

Subject: PROCUREMENT OF PUBLIC WORKS AND CONSTRUCTION

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1. PURPOSE AND USE:

- A. This policy memorandum states City administrative guidance for City Public works procurements. It does not restate or reference all City and Louisiana law applicable to Public Works procurements. It supplements City Public Works procurement law for practical City application (see Basic Requirements Table below).
- B. This policy memorandum applies to all Public works projects by Executive Branch Departments, Agencies, Offices, Boards and Commissions ("Departments"). It does not apply to Procurements for "Design-build" construction projects (Policy Memorandum 114) or Emergency procurements by City Council action (Policy Memorandum 42(R)).
- C. This policy memorandum issues pursuant to City Charter Section 4-302(5). It replaces Policy Memorandum 113, dated May 21, 2008, which is hereby cancelled.

2. **DEFINITIONS:** For the purposes hereof:

- A. "Designer's Estimate" is the total project cost estimated by the engaged design professional based on developed project plans and specifications and market conditions. Some Public Works projects do not engage a design professional or obtain a designer's estimate.
- B. "Disqualification" is the rejection of a lowest responsive bid for merit reasons such as demonstrated insufficient capacity, dishonesty, carelessness, inattention to contract requirements, incompetence, unreliability, untimeliness, unsatisfactory prior performance, and the like. A disqualification is a determination that the lowest responsive bidder is not "responsible."
- C. "Job Order Contracts" are requirements contracts by which a contractor renders discrete services for a calculable price at City request. They are essentially pre-priced requirements contracts for work or services, obtained by competitive bid. Job Order Contracts generally do not apply to complete construction projects but serve at specific repair or renovation need.
- D. "Public Works" is the erection, construction alteration, improvement, or repair (except as provided below) of any facility or immovable property owned, used or leased by the City, including streets work. It includes installations and connections of pre-built or partly pre-built facilities on City sites. Public Works also includes such work done by the City on non-City facilities and property in the interest of public safety or otherwise, for example, incident to a grant program by which the City obtains repairs to eligible private property. Public Works does not include demolition, it does not include regular maintenance to

City facilities and property. For the purposes hereof, Public Works does not include facility or immovable property repairs valued less than \$25,000. The City will obtain such repairs by non-professional services procurement according to Policy Memorandum 24 (R).

- E. "Requirements/Price Protection Agreement/Contract" is an agreement committing the contractor or vendor to supply the things or services at City request for the bid price during the agreement term. These are essentially options contracts and are distinguished from Fixed Price contracts.
- F. "Responsibility" is the lowest responsive bidder's practical ability to perform the specified work as reasonably determined by the sponsoring department before selection for award. Responsibility considerations include demonstrated capacity, honesty, diligence, attention to contract requirements, competence, reliability, timeless, satisfactory prior performance, and other merit-based factors. Subject to timely protest and City administrative review and decision, lowest responsive bidders determined not responsible are disqualified from selection for award.
- **G. "Responsiveness"** is a bid's satisfaction of all solicitation instructions. Responsive bids compete on an equal basis with other complying bids. They enable a fair and equal price comparison.
- H. "Specifications" are the performance, equipment, and materials requirements and related contract terms and conditions in a Public Works project. Specifications may include plans. The contract engages the Contractor to perform according to the specifications.
- I. "Sponsoring Department" is the operational City Department responsible to obtain the Public Work.

3. POLICY:

- A. <u>Competitive Bid:</u> Pursuant to City Charter Section 6-308, the City will obtain Public Works by competitive bid procurement with the contract awarded to the lowest responsible bidder. No threshold or exemption amounts apply.
- B. <u>Construction Compliance:</u> City Charter Section 6-308(4) states, "All construction of public buildings shall be done by contract in conformity with applicable state or municipal law."
- C. <u>Inherently Governmental Function:</u> Public procurement is an Inherently Governmental Function. All City procurements will issue, progress, select, and contract under direct City control and authority. The City may apply consultants to develop specifications for City review and approval.

- D. Project Responsibility: The Sponsoring Department is responsible to obtain the needed Public Work. It initiates the procurement, prepares or obtains specifications, estimates project cost, obtains Chief Administrative Officer approval, coordinates the solicitation with the Purchasing Bureau, budgets and funds the project, conducts bid conferences, approves solicitation amendments, selects the lowest responsible bidder, decides protests and challenges, obtains a City contract, approves commencement, oversees the work, obtains needed change orders and approvals, manages the contract, and approves payments and completion.
- E. <u>Solicitations:</u> Except for projects solicited from state or federal entities, the City's Purchasing Bureau will issue and manage all Public works solicitations. The Purchasing Bureau will receive project documents, prepare solicitations, issue all solicitation changes, obtain required publications and advertisements, attend and document bid conferences, receive and account for all bids, review and report bids for Sponsoring Department review, report awards and disqualifications to affected bidders, coordinate protests, and prepare award packages and submit them to the Law Department for contracting.
- F. <u>Committed Funding:</u> Sponsoring Departments will fund Public Works solicitations in advance. The City will release no Public works solicitation without approved requisition sufficient to cover the designer's estimate or, for projects without an engaged design professional, the sponsoring departments' confirmed estimate of project cost. The City will pay no invoices for Public Works without approved purchase order pre-dating the "Notice to Proceed and work performed".
- **G.** Online Publication: The City will publish all Public Works solicitations to the City's procurement website.
- H. Job Order Contracts: The City may solicit and competitively secure "Job Order" contracts. Job Order contract solicitations will require contractor licenses as though project costs exceed state licensing thresholds.
- I. <u>Disadvantage Business Enterprise Program:</u> The City's Disadvantaged Business Enterprise Program (City Code Section 70-432.1 and Chief Administrative Officer Policy memorandum 46 (R) ("DBE) applies to all Public Works projects valued \$15,000 or more.
- J. <u>Contracts:</u> The City will obtain written contracts for all Public Works projects. Except in emergencies with Chief Administrative Officer approval, the Sponsoring Department will issue no Notice to Proceed or Work Order and will permit no work to begin without an approved purchase order and signed contract according to the project solicitation.

- K. <u>Change Orders:</u> The City will not approve change orders beyond contract scope. Non-scope change orders are unprocured and do not satisfy City competitive bid requirements. (See related definitions at LRS 38:2211).
- 4. PROCEDURE: (Note: the following states basic City administrative guidance. It applies to all City Public Works procurements. Louisiana Public Bid Law (R.S. 38.2211 et seq.) applies many additional requirements at different dollar thresholds. See Basic Requirements Table below.

 Additional requirements and contract provisions may apply to federally-funded [FEMA, CDBG, etc.] contracts).
 - A. Advance Approval: All Public Works procurements require advance written approval from the Chief Administrative Officer. Requests will describe and justify the need, state how the procurement will satisfy the need, state the DBE requirement (if applicable), specify a funding source, and supply a preliminary cost estimate (not the designer's or confirmed cost estimate prepared later).
 - B. <u>Specification:</u> Public Works procurements require clear and complete specifications.
 - 1. The Sponsoring Department will determine and prepare or obtain specifications. For projects with an engaged design professional, the Sponsoring Department will obtain a designer's estimate of project cost. For projects without an engaged design professional, the Sponsoring Department will confirm a cost estimate based on the completed specification. For requirements contracts, the Sponsoring Department will confirm a cost estimate according to projected use during the first year.
 - 2. Specifications will describe the work and state related equipment, materials, and time period requirements. Specifications will detail related contract terms and conditions, including requirements for bonds, insurance, licenses, permits, job classifications and prevailing wages (construction contracts valued over \$25,000 see City Code Section 70-416) and DBE program compliance and participation, where applicable (see City Code Section 70-432.1 and contract requirements in Chief Administrative Officer Policy Memorandum 46(R)). The Sponsoring Department will consult the City Risk Manager to confirm correct insurance requirements for particular projects. Specifications will permit bidders to bid to the same requirement. General, vague, or incomplete descriptions are subject to misunderstanding and are not acceptable.
 - 3. Special Requirements: Without limitation, Public Works specifications will contain the Provisions or satisfy the requirements stated in Attachment A to this policy memorandum.

4. Specifications will contain no bid instructions or selection process explanations. Bid instructions and selection process explanations are not performance requirements or contract provisions. They will appear in solicitation documents separate from the specifications.

C. Bid Solicitation:

- 1. The Sponsoring Department will submit the complete solicitation package to the Purchasing Bureau for procurement. In cases where the designer's estimate or confirmed cost estimate exceeds the preliminary cost estimate by 25% or more, the submitted solicitation package will include a specific Chief Administrative Officer approval to the designer's estimate or confirmed cost estimate and specified project.
- 2. The City will solicit Public Works by means producing a competitive and documented result.
- 3. The City will issue no Public Works solicitation until and unless the sponsoring department has requisitioned funds for the project in an amount sufficient to cover the designer's estimate or The Sponsoring Department's confirmed estimate of project cost.

4. Solicitations will:

- a. Contain or reference the complete specification.
- b. State clear and concise bidding instructions and requirements such as those concerned with any pre-bid meeting, bid deadline, license, bid bond, amendment, acknowledgement, bid signature authority, EEO statement and questionnaire submission (Code 70-464), DBE notice (where applicable), Inspector General acknowledgment (see above) and post-bid contracting needs such as non-solicitation affidavit [Code 46-51]. Insurance certificates, tax clearance [Code 2-8], and recordation fees.
- c. Require bidders to submit bids to the Purchasing Bureau.
- d. Except for maintenance of a contractor's license, contain no experience or other bidder qualification requirements. Solicitations may require bidders to submit information useful to the City's later responsibility review.
- e. Specify and require the use of a bid form cast to identify a lowest bid. i
- 5. Solicitations will issue by written, fax, or e-mail Invitation to Bid published on the City's Procurement website, delivered to likely bidders, and distributed otherwise as suits the purpose. City

officials may invite attention to published solicitations by telephone or other notice. The Purchasing Bureau will report subject Public Work solicitations to the DBE Compliance Officer. (LRS 38:2212 A. states bidding period and additional publication requirements, including newspaper advertisement, for Public Works procurements valued more than \$150,000.)

- Solicitations with final specifications will appear on the City's procurement website at least seventy-two hours before the bid deadline.
- 7. The City may receive only written, Internet, or facsimile bids to published solicitations. Verbal or telephone bids are not acceptable. Bidders will submit required bid bonds by physical delivery to the Purchasing Bureau will safeguard bids against disclosure until the bid deadline.
- 8. The Purchasing Bureau will conduct formal public bid openings for solicitations for which the designer's estimate exceeds \$150,000.

D. Selection and Award:

- 1. Responsiveness Review: The Purchasing Bureau will carefully examine bid submissions after the bid deadline. The Purchasing Bureau will reject bids that modify specifications or bid forms or that fail solicitation requirements. Soliciting officials may waive minor bid discrepancies in Public Works solicitations valued \$150,000 or less. A bid discrepancy is minor if it does not compromise a fair and equal price comparison. Soliciting Officials may not waive the lack of a required license or bidbond. (See City Code 70-418)
- 2. <u>Bid Tabulation:</u> The Purchasing Bureau will prepare a written bid tabulation summarizing and <u>certifying</u> bid submissions (including alternates), bid responsiveness (including discrepancy waivers), and results. It will submit the bid tabulation and likely bids to the Sponsoring Department for responsibility review. The Purchasing Bureau will also submit the bid tabulation and likely bids to the DBE Compliance Officer for DBE validation according to City Code Section 70-432.1 and Policy Memorandum 46(R).
- 3. Responsibility Review: The Sponsoring Department will review responsive bids for responsibility in the need. The Sponsoring Department head will identify and report the apparent lowest responsive bidder to the DBE Compliance Officer. The Sponsoring Department (only) may disqualify responsive bids for merit-based reasons such as demonstrated insufficient capacity, dishonesty, carelessness, inattention to contract requirements, incompetence, unreliability, untimeliness, unsatisfactory prior performance,

and the like. It may cancel the solicitation for merit basis, such as insufficient funds, substantially changed need, or unsuited procurement process. (See LRS 38:2214B)

- 4. <u>Selection:</u> Except in cancelled solicitations, the Sponsoring Department will <u>select</u> the responsible bidder that submitted the lowest responsive bid validated by the DBE Compliance Officer (see City Code Section 70-432.1 and CAO Policy Memorandum 46(R)). The Sponsoring Department will report selections, disqualifications, and solicitations cancellations to the Purchasing Bureau will notify selected and disqualified bidders. It will report solicitation cancellations to bidders. It will document solicitation cancellations to the City's online solicitation system. The Purchasing Bureau will afford disqualified bidders an opportunity to hear and contest the disqualification basis. The Sponsoring Department will decide and document related contests and bid protests.
- 5. <u>Completion:</u> The Purchasing Bureau will return bid bonds to unsuccessful bidders. It will return any bid bond to the selected bidder after contracting. The Purchasing Bureau will document the procurement in a permanent file maintained in the Purchasing Bureau.
- E. <u>Contracting:</u> Operating through the City Law Department, the Sponsoring Department will obtain written contracts for all Public Works projects (See Charter Section 6-308(4) for construction of public buildings). The Law Department will record Public Works contracts requiring recordation. The Sponsoring Department will satisfy all other recordation requirements.

F. Change Orders:

- 1. All in-scope change orders require prior written approval by the Chief Administrative Officer. Approval applications will explain the need, in-scope character, and cost and schedule effects. Change orders needing additional funding require sufficient requisition and advance written approval by the Purchasing Bureau.
- 2. All approved change orders will be issued in writing, signed by the Chief Administrative Officer, sponsoring Department Head, and the contractor. Change orders will detail the change to the work and affects to the work schedule and contract price.
- 3. The Sponsoring Department will document all approved change orders to the permanent project file.
- 5. <u>LAWS AND REGULATIONS:</u> The following table references many City laws and regulations and state laws applicable to City Public Works procurements.

As noted, Louisiana Public Bid law applies significant requirements at different dollar thresholds to covered Public Works procurements. Such laws and regulations change frequently. Departments will consult the Law Department for current legal requirements.

BASIC CITY/LOUISIANA REQUIREMENTS

City	Law:
Req. &	-Public Works by contract obtained by competitive bid (Charter 6-308 [5])
Policy	-Construction of public buildings done according to state/municipal law.
_	(Charter 6-308[3])
	-No contracts w/o funding "availability" or beyond appropriation. (Charter 6-
	308[2])
	-Performance bonds required; payment bonds "where appropriate." (Charter 6-
	308[6])
	-License required. Failure=rejection. (City Code 70-418)
	-Disadvantaged Business Enterprise Goals (City Code 70-432.1)
	-EEO contractor and sub-contractor non-discrimination statement required (City
	Code 70-464)
	-EEO questionnaire bid submission requirement [>\$100K] (City Code 70-464[c])
	-No contracts with delinquent taxpayers (City Code 2-8)
	-Contracts will contain sworn non-solicitation affidavit. (City Code 46-51)
	-All contracts signed by Mayor (or Finance or Property Management Director, by
	authority). w/form & legality approved by Law (Charter 6-308[1])
	-Prevailing Wage stipulation and requirement >\$25,000 (City Code 70-416)
	Policy Memorandum 113R
	-Full specification
	-DBE applies above \$15K (See Code Sect. 70-431.1 and CAO PM 46R)
	-Advance CAO approval, incl. cost estimate
	-Funding before solicitation
	-All solicitations by Purchasing Bureau
	-3-day minimum publication
	-No newspaper publication required
	-Formal bid opening above \$150K
	-Responsiveness/responsibility reviews required
	-May waive insignificant bid discrepancies
	-Award to lowest R/R bidder
	-Contract according to bid specifications
	-CAO change order approval
La.	Solicitations/contract terms in violation of La. Bid law are unenforceable (RS
Req.	38:2216M)
	ALL:
	-50% Performance bond required (RS 38:2216). Reduced security permitted for
	contracts <\$50K (RS 38:2216I)
	-5% bid bond/security required (RS 38:2218)
	-Plans & Specifications prepared by an architect or engineer must contain
	equivalent products statement. (RS 38:2295A)
	-Equivalent product request procedure and deadlines (RS 38:2295C, 38:2212F)
	-No local preference; state preference allowed (RS 38:2225. AG 92-419, 87-
	223,94-444,87-510Am 91-154)
	-Non-solicitation affidavit required from all rendering paid Public Works
	services (RS 38:2224)
	-Experience requirements prohibited (AG Opinion 98-497)
	-Prompt payment required. Attorney fees for claims overdue by 45 days. (RS
	38:2191)
	\dSV: Gambooks nomined (DG 20:22417 ===== 75 20:2216)
	>\$5K: Contracts required (RS 38:2241A, see also RS 38:2216)
	ACCES. FOR Dermont hand computers and addition of the Access to the Acce
	>\$25K: 50% Payment bond, acceptance, recordation required (RS 38:2241)

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-Contractor Licensing Law threshold. (RS 37:2150.1)
-"Awarding authority" must classify public projects in the bid invitation (RS
-License certification required in bid submission (RS 37:2163 A[1])
-License number required on bid envelope or authentic digital signature for e-
bids (RS 37:2163 A)
>$150K:
-"All public work (>$150K)...shall be advertised and let by contract to the
lowest responsive bidder." (RS 38:2212)
-Newspaper publication (once each week, for three weeks; 1st at least 25 days
before bid opening. RS 38:2212 A[3])
-Maximum three alternates. (RS 38:2212A. [3][e])
-No change orders outside contract scope. Required contract provisions.
Document in-scope change orders. (RS 38:2212A [4-7])
-No closed specifications. Equivalent products acceptable. Required contract
provisions. (RS 38-2212 F, RS 38:2290 et seq.)
-Specification changes < 72 hours before bid opening require 7-21 day
extension (RS 38:2212 C[2][b])
-Bid signature authority required with bid submission (RS 38:2212A. [A][1][c],
RS 38:2212 O)
-No waiver of bid discrepancies; non-responsive=rejection (RS 38:2212 A[1][b])
-Electronic bidding/bid bonding permitted (RS 38:2212)
-Uniform bid required (RS 38:2212, by Acts 726, 727, 2008 Regular Session, La.
Legislature. Rule and form published in the August 20, 2009 La. Register, p
1521)
-Notice and hearing for disqualified bidders (RS 38:2212 J)
-Formal bid opening (RS 38:2214). Designer's estimate to be read aloud. (RS
38:2212 A [3][c][i])
-"Just cause" rejections permitted (RS 38:2214 B)
-Bidders may withdraw patently flawed bids w/I 48 hours after bid pending (RS
38L2214 C, D). No corrected bids permitted. Withdrawn bids may not
subcontract. Criminal penalties for violation
-MANDATORY AWARD w/i 45 days after bid opening unless extended by consent.
Does not apply if contingent funding "mentioned" in the bid specification. (RS
38:2215)
-Required Notice to Proceed w/I 30 days after contract execution unless
extended by consent. (RS 38:2215 C)
-Persons contracted to develop bid documents may not bid or subcontract (RS
38:2212.7)
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BGH,Ph.D./FW/rth

Attachment