



Board of Supervisors Memorandum

November 18, 2014

**Agenda Item #18: Procurement Department and Department of Transportation –
Policy and Procedures for Department of Transportation Projects**

Background

District 1 Supervisor Ally Miller has placed this item on the November 18, 2014 Agenda to discuss and recommend contractor prequalification requirements related to the award of construction contracts in Pima County. The stated intent is to ensure the County has a “robust process which facilitates documentation, efficient and auditable results.” The apparent cause for this activity relates to the current contract, timing and performance issues with Select Development for both the La Cañada Drive, River Road to Ina Road, and the Magee Road, La Cañada Drive to Oracle Road projects. Both projects are partially funded with federal aid monies that involve both the Arizona Department of Transportation (ADOT) and the Federal Highway Administration (FHWA). Specific performance-related issues regarding Select Development will be discussed with the Board under a separate agenda item.

Procurement Legal Authority

The procurement process in Pima County is conducted under the specific requirements of Arizona law (A.R.S. Titles 11 and 34), the Pima County Code (Title 11) and Board of Supervisors Policies. Further, federally funded projects are subject to federal law and regulations under the terms of the County’s Certification Acceptance Agreement and applicable funding agreements/grants.

A.R.S. Title 11 provides the authority for the County’s Board of Supervisors to adopt rules for the purchase of County requirements. Title 11 of the Pima County Code, subject to State Law, provides the specific controls and requirements for procuring materials and services, which are further defined by Board of Supervisors Policies. The procurement of construction services, inclusive of related professional services (architect and engineer), falls under A.R.S. Title 34.

ADOT procurements are conducted under A.R.S. Title 28 (Transportation) and Title 41 (State Government); hence, oftentimes there are suggestions made based on ADOT practice for which there is no county authority under our applicable laws. Certification Acceptance neither affects nor discharges any responsibility or obligation of the FHWA or ADOT under any law other than 23 USC 117(a), which provides for the administration of federal-aid funds using applicable State laws, regulations, directives, and standards on all federal-aid highways except the Interstate System.

The Honorable Chair and Members, Pima County Board of Supervisors
**Re: Agenda Item #18: Procurement Department and Department of Transportation –
Policy and Procedures for Department of Transportation Projects**
November 18, 2014
Page 2

In all instances, Pima County Policies and subordinate procedures either comply with these laws or are more restrictive.

Pima County Procurement is Robust

Pursuant to Title 11 of the Pima County Code, the Pima County Procurement Department serves as the central procurement agency of the County. The Department continues to be formally recognized as one of an elite group of organizations that represent the highest sustained standards of quality and efficiency in government. The National Purchasing Institute has awarded the department the ***Achievement of Excellence in Procurement*** award for nine consecutive years (2005 through 2014), and the National Institute of Governmental Purchasing has awarded the department the ***Outstanding Agency Award*** accreditation for the period 2005 through 2017. Pima County is considered to be in the top five percent of all public procurement agencies in the country and substantially higher if only counties are considered. In that regard, there does not appear to be a county procurement agency in Arizona that has come close to achieving the successes realized in Pima County, even Maricopa County.

Procurement Department processes and transactions are routinely audited by the Arizona Auditor General, and rarely are there any significant findings. Moreover, Pima County has been a leader in the development of Qualifications Based Selection principles and has worked with and advised other agencies and organizations as diverse as the Alliance for Construction Excellence (ACE/ASU) and Alliance of General Contractors (AGC). Additionally, earlier this year the Design and Construction Division of our Procurement Department published a Guide to Construction Manager at Risk.

Especially with regard to construction services, Pima County routinely assists other agencies in their development and refinement of procurement processes, and our policies and procedures are routinely shared with them for their use, such as in the case of Maricopa County. These cooperative efforts between subdivisions of the State and various trade groups such as ACE/ASU, AGC and others help to ensure a common interpretation and consistent compliance with state law, resulting in procurement processes that are nearly the same across governmental jurisdictions.

Exceptions can occur when counties, such as Pima, want to be more conservative than what state law allows. For instance, Board Policy D29.1, Contracting for Architectural and Engineering Related Professional Services and Alternative Project Delivery Methods Under A.R.S. Title 34, is more prescriptive and further scrutinizes procurement activity beyond the requirements of A.R.S. Title 34 by application of Qualification Based Selection (QBS) principles in the application of our Qualified Consultant List (QCL) program.

The Honorable Chair and Members, Pima County Board of Supervisors
**Re: Agenda Item #18: Procurement Department and Department of Transportation –
Policy and Procedures for Department of Transportation Projects**
November 18, 2014
Page 3

Clearly, our procurement processes and procedures are among the most robust in the State.

Construction Contractor Prequalification

There have been concerns raised recently about how to assess the qualifications of Pima County construction bidders, accompanied by the suggestion that Pima County initiate prequalification of contractors. Construction bidding by political subdivisions of this state, however, is governed by A.R.S. 34-201, an open competition statute that requires the project be publicly advertised and the award be made only to the lowest bidder that is a “responsible” contractor. In this context, “responsible” means “a person who has the capability to perform the contract requirements and the reliability and integrity that will assure good faith performance.” [Pima County Procurement Code, Section 11.04.030(U)]. Responsibility determinations are made after bid opening and before award and do not restrict who can bid. The concept of “prequalification” refers to a pre-bid qualification of contractors that contemplates allowing only prequalified contractors to bid. In this sense, prequalification is inconsistent with the open competition requirement of A.R.S. 34-201. **Prequalification restricts competition.**

Pima County has processes in place to ensure that contractors engaged with the County are responsible. These include reviews of bids, and inquiries to the Arizona Registrar of Contractors (AZROC); Arizona Corporation Commission (ACC); and in the case of federally funded projects, the federal System for Award Management (SAM), which identifies debarred and suspended contractors. In the majority of instances, Procurement’s responsibility determinations have been informal because the low bidder has been local, well-known to Procurement and the County, and with a history of satisfactory or better performance on County projects. In other instances, where the low bidder is less well known, Procurement has identified and interviewed owner and prime contractor references in making the responsibility determination.

Implementing prequalification is problematic. As noted earlier, the County’s procurement of construction is governed by A.R.S. Title 34. In the course of past explorations of implementing prequalification, Procurement noted there was no clear authority in A.R.S. Title 34 for prequalification. In response to this current inquiry, Procurement confirmed again, for itself and with the County Attorney’s Office, that there is no clear authority in A.R.S. Title 34 for the implementation or application of prequalification. Additionally, the Chief Procurement Officer for Maricopa County has confirmed that Maricopa County also does not prequalify contractors based on a County legal opinion that the current statutory language does not permit prequalification. Absent new and clear statutory authority in A.R.S. Title 34, implementation of prequalification does not appear permissible.

We are aware that ADOT maintains a prequalification program for their contracts. ADOT is governed by **different statutory authorities than are counties**, however, as noted above. For federally funded projects only, our ability to apply prequalification using the ADOT prequalified contractors list has only recently been introduced as an add-on condition of our most recent federal funding agreement (for Valencia Road: Wade Road to Mark Road) and is contemplated under the terms of our recently revised, but not yet final, Certification Acceptance Agreement (now called a Stewardship Agreement), which is expected to be ready for use in late 2015.

Select Development Responsibility Determination

In a recent instance of construction contracting, for example, we received favorable responses on a past County project involving the contractor and from three additional owners and prime contractors that used the bidding contractor on past projects. We also confirmed with the contractor's surety the contractor was ready and able to proceed. We have also requested lists of owned equipment anticipated to be used on the project, up to two supplier references, and surety confirmation for the project. This information collection is not structured, however, nor have past determinations of responsibility been formalized. Given these basic checks on Select Development, we had no reason to disqualify Select during the bidding process. In light of recent issues and in anticipation of upcoming projects, our Procurement Department is developing a more formal procedure to address post-bid determinations of contractor responsibility.

Contractor Debarment Process

Pursuant to Pima County Code Chapter, 11.28 and 11.32, Suspension and Debarment of Contractors, a contractor may be suspended or debarred from consideration for awards of Pima County contracts based upon any cause deemed to affect responsibility as a Pima County contractor. This may include certain types of criminal convictions, civil judgments or contract violations; but such would most likely be associated with failing to perform in accordance with the terms and specifications or within the time limits provided in one or more contracts.

If there are reasonable grounds for debarment, any contractor may be suspended for up to six months and may be debarred for up to three years.

Only the County Administrator has the authority to debar or suspend a contractor from participating in County procurements. Subsequent to an investigation of the possible cause, if the County Administrator has adequate evidence to believe a cause for debarment exists, then debarment may be proposed.

The Honorable Chair and Members, Pima County Board of Supervisors
**Re: Agenda Item #18: Procurement Department and Department of Transportation –
Policy and Procedures for Department of Transportation Projects**
November 18, 2014
Page 5

Subsequent to such a determination, notice must be provided, and the contractor must advise the County Administrator within 30 days of their intent to appear at a scheduled hearing. A hearing must be completed within six months of the initial notice. Subsequent to the hearing, the County Administrator shall make a final decision. Notice shall provide that any adversely affected party may request a rehearing. The contractor has a right to judicial review of any determination of the County Administrator under Chapters 11.28 or 11.32 of the Pima County Code (11.28.080).

If there are compelling reasons, a contractor pending debarment may be suspended to protect County interests. Given the existing Code that allows for debarment, there are sufficient safeguards to insure contractor performance and to address poor or unacceptable performance post-project completion.

Summary

Given the several hundred million dollar value of transportation improvements funded and successfully administered by the County, as well as the quality of our procurement processes, there is no need to alter these processes. One poor project out of several hundred successful projects is not a reason to overhaul, change or modify our processes, procedures or Code.

Respectfully submitted,



C.H. Huckleberry
County Administrator

CHH/mjk – November 12, 2014

c: John Bernal, Deputy County Administrator for Public Works
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