

***El Dorado County
Chief Administrative Office
Interoffice Memorandum***

February 22, 2012

TO: Board of Supervisors

FROM: Laura S. Gill, Chief Administrative Officer

SUBJECT: Processes Pertaining to Public Works and Professional Services Contracting

Background

On February 13, 2007 (item #11, Fehr & Peers contract) the Board directed the Chief Administrative Officer and staff return to the Board on March 6, 2007 with an explanation of the processes pertaining to public works contracting.

Public works projects require two types of contracts: 1) *professional services* contracts for design, engineering, surveying, construction management and other services, and 2) *construction* contracts for actual project construction work. Professional services contracts and construction contracts are two distinct types of contracts and are governed by different sections of state code, county ordinance and county policies.

At the state level, construction contracts are governed by public contract code. By and large, construction contracts require formal or informal bidding and contracts are awarded based on low bid.

In contrast, professional services contracts for project design, engineering, surveying, construction management, etc. are governed by government code. Unlike construction contracts, professional service contracts are typically awarded based on demonstrated competence and professional qualifications where price is considered but is not the sole or primary basis for award. State law and county ordinance do not require any competitive process for the selection of professional consultant services in most cases. However, government code does allow for services to be bid and awarded solely on price when those services are of a more technical nature and involve little professional judgment (i.e. janitorial services), and nothing in county ordinance or procurement policy precludes the Purchasing Agent from soliciting bids if deemed in the best interest of the County to do so.

It should be noted that The Purchasing Ordinance and Board Policy C-17 establish requirements for County contracts that are above and beyond the requirements in Government Code or County Charter. The additional requirements are intended to improve County contract processes and ensure that services are procured competitively and wisely, but are also structured to provide the appropriate flexibility for a wide array of contracting needs. The intent of County contract requirements is to obtain the most advantageous contract terms for the County and to ensure that

contract processes include appropriate internal controls with accountability to the Board and the public.

Attachment 'A' is provided as a reference document and outlines several key state and local requirements for both construction and professional service contract processes. My staff will provide a brief presentation regarding these requirements and processes at the Board meeting.

The majority of concerns expressed by the Board regarding contract issues has centered around professional services contracts. I have attempted to identify these issues and provide recommendations to address them below.

CONTRACTING ISSUES

Consultant Selection Process

Government code, ordinance and Board procurement policy allow for the selection of consultants to be based on a formal or informal process (RFP or RFQ), or by considering only one provider. Contracts for services are typically awarded based on the demonstrated competence and professional qualifications of the consultant, not on "low bid" or cost. Price is always considered but is not the sole basis for awarding contracts for services.

The Purchasing Agent may also bid for services when the services are of a technical nature, involve little professional judgment and a bid process would be in the public interest. Such contracts for services are awarded based solely on price.

Procurement Policy section 7.5 states that:

"The Purchasing Agent shall review and evaluate requests for contracts and work with departments to determine the most appropriate method for selecting a contractor. The contractor selection method used may depend on such factors as the nature of services, when the services are needed, estimated cost of the services, whether it is an emergency situation, or the availability of an already existing contracting source."

There is no provision in policy to delegate this authority.

Recommendation: I recommend policy section 7.5 be revised to require the Purchasing Agent to review all department requests for contracts *over \$100,000* for the purpose of determining the most appropriate consultant selection process. This will allow the Purchasing Agent to focus on contracts where centralized contract expertise to determine the type of selection method used will provide the most potential benefit and cost savings to the County. Justification supporting this determination should be included in Board agenda items when contracts are submitted for Board approval.

Contracts over \$100,000

Procurement Policy section 7.10 currently states that:

“for any contract over \$100,000 the contractor selection process must include a review of the scope of services and the contractor’s professional qualifications. This review shall be performed by a group of individuals uniquely qualified to judge the contractor’s ability to perform the services. The group must include at least one representative from outside the department requesting the services.”

This requirement is straightforward for new contracts being contemplated. However, there are situations where this requirement may not apply or be appropriate.

Original Contract <\$100,000

If an original contract was issued for less than \$100,000, the review process outlined in policy section 7.10 is not required. If that original contract is subsequently amended to exceed \$100,000, it is unclear whether the review process outlined in policy section 7.10 is required.

Recommendation: I recommend that the Purchasing Agent review the nature of the contract to determine if an independent review by someone outside the department is appropriate. If that review is appropriate, the Purchasing Agent will coordinate the review by a qualified person from outside the department to validate the department’s original selection. The results of this review should be included in the Board agenda item for approval of the contract amendment. If it is determined that an independent review is not appropriate, justification supporting this determination should be included in the Board agenda item for approval of the contract amendment. I recommend the following language be added to policy section 7.10:

“For any original contract under \$100,000 that is subsequently amended to be over \$100,000, the Purchasing Agent shall review the selection process used for the original contract and when appropriate shall require a review of the scope of services and the contractor’s professional qualifications by a qualified individual from outside the department requesting the services.”

Consultant Selection Process Conducted Prior to New Policy Adoption

Procurement Policy section 7.10 requires that any process used for the selection of a consultant for contracts in excess of \$100,000 must have occurred within three years of the date of the proposed contract or contract amendment.

If a consultant selection process was initiated *prior* to the adoption of the new policy and the review of the scope of services and consultant’s qualifications did *not* include someone from outside the department requesting the services, and the consultant selection has not yet been made, I recommend the Purchasing Agent coordinate a review by a qualified person from outside the department to validate the department’s recommendations. The results of this review should be included in the Board agenda item for approval of the contract.

Recommendation: Since the use of a selection process is limited to three years, I do not recommend a revision to the procurement policy language as these processes will effectively

expire in October 2009. I do recommend that whenever feasible, departments initiate new selection processes that fully comply with the procurement policy rather than using prior processes.

Contracts with Multiple Contractors

There are times when a department may need to contract with multiple sources to provide the same or similar services so that sufficient contracted resources are available to handle the volume of work required, to ensure the availability of at least one contractor when required services may be urgent, when multiple contractors are necessary to cover different geographic areas, etc. Although the individual contract with each vendor may be less than \$100,000, if the aggregate total of work to be contracted exceeds \$100,000, departments should comply with policy section 7.10 and include a qualified person from outside the department in the review of the scope of services and contractor professional qualifications.

Recommendation: I recommend that policy section 4.4 “Splitting Purchase Orders or Contracts” to be revised as follows:

The County is committed to a program of purchasing competitively and wisely. Departments are prohibited from artificially dividing purchase requisitions or contract requests to circumvent any provision of this policy ~~competitive process or signature authority limitation~~.

Competitive Processes

Procurement Policy section 7.6 requires competitive processes be initiated by the Purchasing Agent. The Purchasing Agent may delegate authority (with CAO concurrence) for departments to conduct competitive processes independent of the Procurement & Contracts Division.

No departments have been delegated this authority. Some departments have been conducting their own competitive processes based on past practice.

Recommendation: The Purchasing Agent will work with departments that desire to conduct competitive processes independent of the Procurement and Contracts Division, review the departmental processes, provide recommendations for process improvement, and delegate such authority to departments when justified.

Amendments vs. New Contracts

In its discussion of contract issues, the Board has raised questions about when it is appropriate to amend an existing contract vs. initiate a new contract. Contract amendments are typically required to extend the term of the contract, revise the original scope, or revise the contract amount or fee schedule as a result of extending or revising the scope in the original contract.

In general, when a contract is issued to provide services that are “project specific” the original contract should be amended to provide continuity and establish a single document of record for those project related services. County Counsel has developed contract language that will allow a contract to terminate upon the completion of a project. This language should reduce the number of contract amendments required for an extension of time when project schedules are extended.

When contracts are established to provide “as needed” services over a period of time, it may be more appropriate to terminate the original contract and issue a new contract for services that are anticipated in a future period.

Recommendation: Each proposed contract amendment should be evaluated by the department and the Purchasing Agent to determine whether an amendment or new contract is appropriate. Justification supporting this determination should be included in Board agenda items when contracts are submitted for Board approval, and included in the contract file for contracts executed by the Purchasing Agent.

Attachment 'A'

PUBLIC WORKS CONTRACTING PROCESSES

Public works projects require:

- Professional services contracts for services such as design, engineering, surveying, construction management, etc.
 - Governed by government code and contracts are typically awarded based on demonstrated competence and professional qualifications where price is considered but is not the sole or primary basis for award
- Construction contracts
 - Governed by public contract code and by and large are required to be awarded based on low bid

Professional service contracts are governed by:

- **Government Code**
 - Allows the Board to contract for services on behalf of the County (31000)
 - Allows the Board to employ a Purchasing Agent to purchase goods and contract for services within specified monetary limit (25500)
 - Requires the selection of architectural, landscape architectural, engineering, environmental land surveying or construction management consultants to be on the basis of demonstrated competence and on the professional qualifications necessary to perform the required services (4526)
 - Allows County to adopt by ordinance procedures that assure services are engaged on the basis of demonstrated competence and qualifications
 - Allows County to use a statement of qualifications process to select firms and negotiate contracts
 - Requires County to prohibit practices which might result in kickbacks or other unlawful activity (4527b)
 - Allows the County to bid for services when those services are of a more technical nature and involve little professional judgment and requiring bids would be in the public interest (4529)
- **County Charter**
 - 210b(6) allows the Board to enter into contracts for the performance of work when
 - More economical and feasible to contract out
 - Specialty skills are required outside County classifications
 - Ongoing aggregate of work is insufficient to warrant additional of staff
 - Allows the Board to enter into contracts

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- in cases of emergency
 - with or among other governmental entities
 - when service is mandated to be performed by independent contractors or to ensure independent, unbiased findings
- Requires the Board to adopt an ordinance specifying criteria for entering into such contracts and when competitive bidding procedures are required to award such contracts
- Requires written contracts for the payment of any service provided by a private entity (602)

- **County Ordinance 3.13—Contracting Out Ordinance**
 - Ordinance to comply with requirement of El Dorado County Charter section 210b.(6)
 - All contracts for work with independent contractors shall be accompanied by facts to enable the board to determine whether such contacts can be "more economically and feasibly" performed by independent contractors including:
 - A. Comparative cost analysis;
 - B. Special skills and qualifications involved in the performance of the work;
 - C. Availability of qualified county employees to perform the work;
 - D. Time frames and schedules in which to perform the work and the ability to satisfy these time frames and schedules;
 - E. Legislative authority or other mandates that the service be performed by independent contractors;
 - F. Legislative, administrative or legal goals and purposes that cannot be accomplished through the use of persons other than independent contractors;
 - G. Contracts necessary to protect against a conflict of interest or to ensure independent and unbiased findings where there is a need for an outside perspective; for example, contracts relating to litigation or potential litigation may require independent contractors;
 - H. The nature of the work involves temporary, occasional, urgent or emergency services;
 - I. The contractor will provide equipment, materials, facilities, administration or support services related to providing work that may not be feasibly provided by the county.
 - Requires written findings based on the criteria above that the work can be performed "more economically and feasibly"
 - Provides that competitive bidding procedures for contracts shall be governed by general law.

- **County Ordinance 3.12—Purchasing Ordinance**

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- Requires the Board to adopt comprehensive policies and procedures for the purchase of services, supplies and equipment.
 - Establishes the office of Purchasing Agent and duties
 - Prescribes a code of ethics for procurement
 - Establishes dollar thresholds for purchase of goods and authority to enter into contracts for services
 - Allows for delegation of some authority from the Purchasing Agent to departments with CAO concurrence
 - Defines competitive processes for the purchase of goods and exemptions from same
 - Establishes authority for the Board/Purchasing Agent to contract for services as authorized and provided in Government Code without advertising for bids or seeking proposals thereon (3.12.230)
- **Board of Supervisors Policy C-17—Procurement Policy**
 - Provides general requirements for procurement activities
 - Provides for centralized procurement and allows for delegation of some procurement authority
 - Provides detailed procedures for the purchase of goods
 - Establishes authority and requirements for surplus property
 - Provides authority and requirements for the procurement of services
 - Competitive process not required—Board or Purchasing Agent may contract for services without advertising for bids or seeking proposals (unless required by state/federal regulations)
 - Purchasing Agent shall determine the most appropriate method for selecting a contractor (7.5)
 - Method may be by
 - formal process (bid, RFP, RFQ)
 - informal process (advertising, quotes, interviews)
 - considering only one vendor
 - Defines RFP and RFQ processes
 - Competitive processes are handled by the Purchasing Agent unless that authority is delegated to a department by the Purchasing Agent with CAO concurrence
 - Contract award is made by Purchasing Agent (<\$50,000) or Board (>\$50,000)
 - Contracts over \$100,000 (7.10)

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- Contractor selection process must include a review of the scope of services and the contractor's professional qualifications
- Review shall be performed by a group of individuals uniquely qualified to judge the contractor's ability to perform the services
- The group must include at least one representative from outside the department requesting the services
- Any process used for the selection of a contractor(s) for contracts in excess of \$100,000 must have occurred within three years of the date of the proposed contract or contract amendment
- This requirement is not applicable to contracts for legal services

The Purchasing Ordinance and Board Policy C-17 establish requirements for County contracts above and beyond those required in Government Code or County Charter. The additional requirements are intended to improve County contract processes and ensure that services are procured competitively and wisely, but are also structured to provide the appropriate flexibility for a wide array of contracting needs. The intent of County contract requirements is to obtain the most advantageous contract terms for the County and to ensure that contract processes include appropriate internal controls with accountability to the Board and the public.

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Construction contracts are governed by:

- **Public Contract Code**
 - Public works project defined (1101)
 - Bidding and contract requirements defined
 - Landfill operations are exempt from contracting requirements in PCC (20121.1)
 - Allows pre-qualification of prospective bidders (20101)
 - Requires counties to adopt formal and informal bidding procedures
 - Contracts are awarded based on lowest bid
 - Provides for issuance of emergency contracts without bidding (22050)
 - Provides for change order authority (20142)
 - Provides for “alternative method” of the bidding of public works under uniform construction cost accounting procedures (22000)
- **County Ordinance 3.14 – Public Projects Informal Bidding Procedures**
 - Enacted to adopt procedure governing the bidding of public projects
 - <\$30,000 force account (county staff), negotiated contract or purchase order
 - <\$125,000 informal bid
 - >\$125,000 formal bid
 - Establishes informal bidding procedures
 - Authorizes CAO, purchasing agent, and directors of General Services, DOT, Env Mgmt to execute contracts under \$125,000
 - Requires County to maintain a list of qualified contractors for informal bids
 - Provides noticing requirements for informal bids
 - Provides emergency contracting procedure
 - Defines noticing requirements for formal bid invitations
 - Requires Board to adopt plans/specs for projects >\$125,000
- **Board Resolution #106-93—Change Orders and Additions to Work**
 - Authorizes CAO, purchasing agent, and directors of General Services, DOT and Env Mgmt to issue addenda to contract documents, issue individual change orders to construction contracts within monetary and time limitations (pursuant to PCC 20142)
- **Other Federal/State requirements depending on source of funding**