

COUNTY COUNSEL
LOUIS B. GREEN

CHIEF ASS'T. COUNTY COUNSEL
EDWARD L. KNAPP

PRINCIPAL ASS'T COUNTY COUNSEL
PATRICIA E. BECK

DEPUTY COUNTY COUNSEL
JUDITH M. KERR
REBECCA C. SUDTELL
PAULA F. FRANTZ
MICHAEL J. CICOZZI

**EL DORADO COUNTY
OFFICE OF
THE COUNTY COUNSEL**



COUNTY GOVERNMENT CENTER
330 FAIR LANE
PLACERVILLE, CALIFORNIA 95667
(530) 621-5770
Fax (530) 621-2937

DEPUTY COUNTY COUNSEL
BETH A. McCOURT
DAVID A. LIVINGSTON
SCOTT C. STARR
TERI M. MONTEROSSO
LESLEY B. GOMES

April 9, 2007

Board of Supervisors
County of El Dorado
330 Fair Lane
Placerville, CA 95667

2007 APR 10 PM 12:30
RECEIVED
BOARD OF SUPERVISORS
EL DORADO COUNTY

Re: **Overview of Issues Related to DOT Contract Selection Process
Form of Contracts, and Contract Administration**

Honorable Chair and Members of the Board of Supervisors:

During the March 6, 2007 Board meeting, Board members had questions and voiced continuing concerns regarding both the contract selection process (through direct selection or the request for proposal process) and the contract administration process. At the March 13, 2007 meeting, questions were also posed regarding the practice of issuing task orders under "as-needed" contracts. Following each meeting, we had the opportunity to address some of the questions of individual Board members. However as a follow-up we believe it would be helpful to the full Board to distill the issues that have been identified relative to the contract selection process, task orders under "as-needed" contracts, and the contract administration process, and outline the policy and practical considerations you may wish to consider in your further deliberations on the Department of Transportation ("DOT") requests at the scheduled workshop on April 17, 2007.

I. THE CONSULTANT SELECTION PROCESS

One primary area of discussion at the March 6, 2007, Board meeting centered on the request for proposal ("RFP") process under the Purchasing Ordinance for contracts for Professional Services. The Chief Administrative Officer's report set forth an excellent summary of the Purchasing Ordinance and Policy requirements for selection of a vendor for professional services and we did not duplicate that material here. Rather, our focus was to pull all the information from the materials, the DOT presentation, and

Board of Supervisors

April 9, 2007

Page 2

Board questions into a focused outline of the legal and practical principles for consideration.¹

Generally, there are three approaches to the consultant selection process--a request for proposals ("RFP"), a request for qualifications ("RFQ") and "sole sourcing" (*i.e.* negotiations with a single provider). These approaches can be combined or used in conjunction with each other. There are other variations such as formal versus informal solicitations. A request for proposals is usually issued in connection with a project-specific contract. It would request proposers to submit a range of information including items such as the consultant's qualifications, cost and project-specific details regarding implementation of the contract. Once proposals are received and the review process is complete, the County can select the consultant who best meets all of the County's needs. Selection is made on overall qualifications and suitability for the project, not on a "low bid" basis, although cost is a legitimate consideration.

A request for qualifications is substantially different from an RFP. It focuses on the qualifications of the consultants rather than project-specific details, although it can be used in conjunction with a project specific process such as an RFP. An RFQ is most appropriate when used either in conjunction with services that are general in nature and might be used on a number of different projects under an "as-needed" contract (*e.g.* geotechnical services that might be used on an as-needed basis for a variety of projects) or as a preliminary screen for a subsequent RFP or sole source negotiation. An RFQ can be used either in conjunction with an RFP or sole source negotiations, or as a stand-alone selection process. It should be used in conjunction with one or the other. The real choice is between RFP and sole-sourcing a contract, although a RFQ may be viewed as a supplement to the sole-sourcing process.

"Sole-Sourcing" simply refers to negotiation with an individual consultant without a competitive process. As noted, however, a sole-source negotiation may be preceded by a RFQ.

At the outset, it should be stated that neither the County's Purchasing Ordinance nor state law mandates the County to use a competitive process to select consultants to provide professional services. In some instances where the County receives federal or state funding, the funding sources may require a competitive process. (Conversely, these same federal and state regulations may affect the way that cost is considered in the selection process. Thus, the selection process on federally or state funded projects must be reviewed carefully for compliance with federal and state requirements.) Section 7.5 of the Procurement Policy states that "[t]he Board of Supervisors and the Purchasing Agent may contract for services without advertising for bids or seeking proposals." *However,*

¹ For the most part, decisions as to the process used in selecting consultants, whether by an RFP process or sole source negotiation, is not a legal issue. Professional services contracts are not required to be let through a competitive process. However, the Procurement Policy recently adopted by the Board expresses a preference for some form of competitive process and vests that discretion in the Purchasing Agent. Thus, it is more a matter of policy and good business practices guiding these decisions rather than legal constraints.

that same section imposes an affirmative duty upon the Purchasing Agent to review and evaluate requests for service contract exceeding \$100,000 "to determine the most appropriate method for selecting a contractor." That section goes on to state that "[t]he contractor selection method used may depend on such factors as the nature of the 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."

It is not the intention of this memorandum to suggest that an RFP is always the proper selection method for professional consultants. Nor is it intended to suggest that in order to use a selection method for a consultant staff must demonstrate some compelling reason to use a method other than an RFP. The purpose of this memorandum is to emphasize the need to carefully review the selection methods available for a particular contract, to consider the advantages and disadvantages of each available selection method in light of the specific circumstances of the contract under review, to select the "best" method in light of all relevant facts, and to be able to articulate the reasons for using the selection method chosen. A crucial element of this process is the involvement of the Purchasing Agent in an active role at the earliest possible stage.

This memorandum is intended to prevent the use of broad generalizations like "it takes too long to do an RFP" without analyzing the amount of additional time required to complete an RFP (and more importantly, by how much that time exceeds that of other selection methods available) and the demands of the particular project. Although the discussion in this memorandum is applicable to all consultant contracts, it should be kept in mind that the memorandum was prepared in the context of a specific discussion involving large consultant contracts totaling in the tens of millions of dollars. This fact, rather than any insistence on the use of RFPs, is the reason for the lengthy discussion on RFPs.

Simply in terms of getting the most competitive product possible, taking into account all relevant factors such as qualifications, cost and tailoring of the services to the project, an RFP, in the absence of other competing factors, would often be the preferred approach, almost by definition, because it is the most competitive process. Some of the key advantages of the RFP process include:

- The most qualified and competent consultant at a fair and reasonable price may be chosen after a comparison of interested persons and their proposal for a specific project.
- A proposing consultant knows there is competition and is more apt to give a proposal for a superior effort, at their best price. The process promotes healthy competition within that consultant pool. Absent that competition, the County starts off in a difficult negotiating position since the consultant is aware that they are the "first pick" and may hold firm on points of negotiation that are not in the County's interest. Departments may be unwilling to stop negotiating with their first pick if their price is not met and move to the second consultant on the list;

- The process meets federal and state procurement requirements for professional service contracts. (Subject to the limitations discussed above.)
- Often, delays attributable to the RFP process over the direct selection and negotiation process can be minimized and are not likely to be substantial, especially in cases involving large projects that can be anticipated in advance. Any delays are likely to be over issues that would also affect a sole source process.

In short, an RFP provides a level of marketplace competition among the consultants responding to the request, while still allowing the County to select from the most qualified and competent consultants. It is designed to solicit proposals from a greater pool of consultants to foster competition to produce for the County a superior work product. It also fosters a more competitive approach to the cost side of the proposal. As a consequence, it is usually the preferred selection approach over a sole source selection process where the consultant is first selected and then the terms, conditions, and costs of the contract are negotiated.

There are circumstances under which an RFP may not be the best process to use. Factors that may gravitate in favor of using direct negotiation, with or without an RFQ, include the following:

- Amount of the contract. An RFP does require some time and effort not required in a direct negotiation. An RFP must be drafted, time allowed for proposals to be prepared and submitted, and time for a review process must be allowed. Although in the context of large projects we believe that substantial delays arising out of the RFP process can be minimized and can be anticipated, the RFP process may not be warranted for contracts involving relatively small sums of money. The Procurement Policy establishes an initial threshold of \$100,000 at which consideration must be given to a competitive process. However, this factor may also have relevance in the case of contracts over that amount. (This is unlikely to be an issue with respect to the contracts that the Board will be reviewing on April 17, 2007.)

Where a particular consultant is uniquely qualified to perform the services sought, an RFP may not be beneficial to the County.

- Where the proposed services consist of general services under an "as-needed" contract which is not project-specific, an RFP may not be an appropriate selection method because a major benefit of an RFP is that it allows the proposals to be tailored to a specific project.
- Time factors may be a consideration. Especially where there is an immediate, unforeseen need to accomplish the work in a short time, a request for proposals

may be counter-productive. One clear example is the case of emergency repair projects. On larger, more predictable projects, the avoidance of the RFP process based on timing considerations should be subject to case-by-case review based not only on the nature of the project and the need for expeditious action, but also on an evaluation of how much delay would actually be incurred by undertaking an RFP process. A two month delay on a contract to do environmental analysis that is itself anticipated to take only two months may represent a much more significant delay than a two month delay on a design project anticipated to take over a year in the context of a multi-year CIP project.

Clearly, there are elements of an RFP process that will require some time and effort not required of direct negotiation. Some of these include preparation of written request for proposals, a period of time to circulate the request and allow for written responses by proposers, and time for review of the proposals by staff. However, particularly on larger projects where some of the more time consuming elements of the process, such as preparation of a detailed scope of services, are required regardless of the selection process chosen, an RFP need not consume substantially more time than alternatives such as direct negotiation, with or without an RFQ.

1. Absent unusual circumstances and based on the complexity of a project, it should be possible to accomplish an RFP process within a period of time ranging from several weeks to several months. Many RFPs can be accomplished in a time frame of about 8-10 weeks. More complex projects may require significantly more time. However, the analysis should be project-specific rather than being based on generalities about how long an RFP takes. Also, it is important to focus not only on how long it would take to complete an RFP, but also a comparative analysis showing how much time can be saved by using an alternative selection method. An RFP process should only be avoided based on time considerations where analysis shows that the project is time sensitive and that substantial time can be saved by using direct negotiation (with or without an RFQ) instead of an RFP. Consideration should be given to whether advance planning can avoid adverse impacts, if any, of any delay associated with the RFP process.
2. Both the RFP process and direct selection and negotiation require the scope of work to be well defined by the department in advance to insure that the process is most effective. This is often a time-consuming element of both processes.

3. A draft agreement can be included with the RFP, so that all that is left to be done after selection is to import the scope of work and compensation that is proposed and refined.
 4. Indemnity is no longer an issue in design contracts. Design indemnity is now set by State law. Prior to the first of January of this year when AB 573 became effective, County Counsel developed and circulated to all departments a revised indemnity that complied with this new statute. At that time, the revised indemnity provision was also circulated to the design community and CELSOC without complaint. In any event, indemnity issues must be addressed whether or not an RFP process is used.
 5. "Publication" of the request for proposals adds some, but not a significant, time to the process. There is no required minimum time under state law or the ordinance. As a practical matter, the departments do a significant portion of the notification through direct telephone communication, direct mailing, and posting through trade organizations.
 6. There are strategies to expedite the RFP process even further. A department may develop a yearly annual request for qualifications for different types of work. The RFP may then be provided to all consultants on the short list for that type of work, and proposals together with costs proposals may be sought from each of those consultants.
- A Request for Qualifications (RFQ) is Not the Same as an RFP.
 1. An RFQ requests the consultant to submit his qualifications in a particular area (i.e. bridge design, interchange design). It does not request a proposal for a specific project. Development of a "short list" of consultants most qualified is analogous to a pre-qualification of potential bidders for construction. It is not a substitute for an RFP; rather, it may be used in connection with an RFP or sole source negotiations where pre-qualification is desirable.
 2. Negotiating directly with one consultant on a "short-list" does not necessarily provide the type of marketplace competition that may be fostered by an RFP process.

In applying all of these considerations, it should be kept in mind that there is no absolute standard or criteria that dictates a particular outcome. Some comparative standard can also be applied. Although an "RFP" may be the "best" approach in terms of maximizing competition, the Board can consider the additional cost in terms of schedule, staff time and monetary cost in comparison to the degree of benefit the Board believes will be derived from using the more extensive process.

Recommendation:

In determining whether to require an RFP on any particular consultant contract, or whether to allow direct negotiation, with or without an RFQ, it is recommended that the Board consider the following factors:

1. Is the proposed consultant (if direct negotiations are recommended) uniquely qualified to perform the work requested? "Uniquely qualified" means not only that the consultant is qualified to do the work, but that his or her qualifications are so unique or superior that it is unlikely that other consultants are available who could perform the work to the standards that the County seeks. If so, it may be determined that no purpose is served by doing an RFP. In some instances, prior work done by a consultant on a specific project may afford advantages in using that consultant rather than seeking proposals. However, this is not always the case. The specifics of each project must be reviewed to determine whether different design phases can stand alone or should be dealt with as a single design project.

2. Are the services to be provided generic and uniform and intended to be used on an immediate basis in a variety of situations not susceptible to precise definition because circumstances may vary (*e.g.* soils testing required by conditions found during construction)? If so, an RFP may not be appropriate because there is no specific project that can be defined for an RFP beyond the type of generic services the consultant may provide.

3. Is the project time sensitive *and* will the use of a process such as direct negotiation rather than an RFP save substantial time in the context of the particular project? This should be considered on a contract-by-contract basis with specific attention given to the elements of an RFP that would extend the time required and how substantial that delay would be. The focus should be on the *additional* time needed to complete an RFP when compared to a sole source negotiation. Obviously, the proposed timing of a project in the CIP should be considered in determining whether delay associated with an RFP can be absorbed without affecting project delivery. Given the need to be prepared to pursue available funding sources as they become available, consideration may be given to the impact of any anticipated delay resulting from using an RFP on the County's ability to have "shelf ready" projects.

4. Is the proposed contract so small that the benefit that might be derived from doing an RFP is outweighed by the cost of conducting the RFP?

5. Are there other unusual factors associated with the project that would render an RFP infeasible or unlikely to achieve results superior to other available selection methods.

There is an additional consideration for the Board at its workshop on April 17, 2007 workshop. The factors listed above are intended for use *initially* in determining the selection process to be used on a contract. Most, if not all, of the contracts that DOT will

be presenting to the Board on April 17, 2007, already have been through some form of selection process. In some instances, the issue of consultant selection is now before the Board because contracts have expired or will expire shortly. In other instances, it is under consideration because contracts were never entered into pursuant to the initial selection process. It is our understanding that DOT may recommend that contracts be approved in some cases based on the prior selection process rather than instituting RFPs where they were not previously held. In determining the best selection procedure to use for those contracts, we believe the all of the criteria set forth above remain relevant. However, it is also reasonable for the Board to take into consideration the status of the project and the activity that has occurred previously. In some instances an RFQ may have been used rather than an RFP. Rather than simply revisiting the issue of what process should have been used *initially*, it is appropriate for the Board to consider whether the potential benefits (*e.g.* likelihood of obtaining additional proposers, better terms, lower cost) of reopening the process to use the "best" selection method (*e.g.* an RFP) warrant the additional costs (*e.g.* time, money, staff resources).

II. TASK ORDERS UNDER "AS-NEEDED" CONTRACTS

Much confusion also surrounds the use of "as-needed" contracts and the issuance of task orders under those contracts. "As-needed" contracts were originally designed to address the circumstance where a department needs immediate (often times same-day) services from a consultant. Because of the urgency involved in these situations, County Counsel drafted an "as-needed" contract that could be utilized by departments to address this need.

Under the agreement, the consultant may be retained on an annual, "as-needed" basis, and the department may authorize services against that contract. The "as-needed" agreement is in fact a contract at the time the Board enters into it, although Supervisor Sweeney's comment at the March 13, 2007 meeting was correct that no work is actually performed under the contract until a task order or notice to proceed is issued. It contains all of the protections of the County's standard agreements including a "not-to-exceed" provision for compensation, and a general scope of work. The specific scope of each task is then defined by the individual task orders. Authorization to perform a particular task is through a written task order that must be signed by the contract administrator. The task order is typically limited to a more specific scope, compensation for the particular task, and deliverables for the particular task.

Thus, it was originally intended that "as-needed" contracts would be utilized to provide limited support services to a department where those services were needed immediately. In practice, departments originally utilized these contracts sparingly. For instance, annual "as-needed" contracts were used by the Sheriff's office to address plumbing and electrical issues at the jail and juvenile hall. The Public Defender used "as-needed" contracts to ensure the availability of interpreters or expert medical witnesses who might be needed immediately for specific cases. DOT originally utilized "as-needed" contracts for construction inspection support, appraiser support services, and for

consultants to augment staff in routine functions such as plan checking. Typically, such contracts limited the compensation amount to \$50,000.00.

In recent years, however, this practice was significantly expanded such that large "as-needed" contracts were processed for approval and substantial task orders for stand-alone services were issued under them. Most notably, this has occurred with respect to DOT's design contracts. This practice avoids the RFP process since the "as-needed" contract did not cover a specific project and selection of a consultant was not done through a request for proposal process. Further, the task order itself was not subjected to the same approval process as a stand-alone contract, and as a consequence, often-times did not contain all of the protections that the County would require in a stand-alone design contract. After some of these concerns came to light, steps were taken to formalize and standardize the task order process to address some of those concerns.

At the Board hearing on March 13, 2007, several suggestions were made on how to increase department accountability under this process. They included limiting the types of situations where "as-needed" contracts are appropriate, providing monetary limits on task orders, subjecting task orders to the same review and approval process as stand-alone contracts, and imposing reporting requirements. The Chief Administrative Officer, County Counsel, DOT and the Auditor met and, by separate cover, have identified several interim requirements to implement pending a full discussion on this issue. Action was taken by the Board on March 27, 2007, to approve those recommendations.

There are several issues the Board needs to address in its consideration of a final policy with regard to the use of "as-needed" contracts. One is simply accountability. How much discretion is the Board willing to delegate to an individual department head under the umbrella of a large "as-needed" contract. There are competing considerations here. One is the need for some flexibility on the part of the department head in managing a program that is rapidly expanding to the point of involving tens of millions of dollars annually. Under such a program, increased flexibility over that allowed in the past may be appropriate. But, it is for the Board to determine whether, and the degree to which, such flexibility must be balanced with accountability to the Board. It is also necessary to consider the degree to which the Board maintaining oversight (*e.g.* requiring Board approval of task orders over a certain amount) actually delays a project, if at all.

A second factor to be considered is that the Board may wish to be aware of the expenditure of substantial sums for specific projects even though blanket authorization may have been given previously. An "as-needed" professional services contract often runs for two years. Up to two years after the award of such a contract the department may authorize substantial work on a project without Board review of whether that project still retains the priority it previously did in the view of the Board. This can be addressed either by requiring project specific contracts where feasible in lieu of "as-needed" contracts, or by requiring Board review and/or approval prior to issuance of task orders exceeding specified amounts.

Recommendation:

In determining whether to use an "as-needed" contract, the Board should consider the following:

1. Are the services sought foreseeable, but not predictable as to the time at which they might be needed? (*e.g.* services for emergency plumbing work, or geotechnical services that might be needed in the course of a construction project, depending upon conditions encountered, as opposed to design work for a major project that can be scheduled in advance.) If so, an "as-needed" contract may be appropriate.

2. Are the services, or any portion of them, project specific? If so, it may be more appropriate to do a stand-alone contract for that project that may or may not be awarded subject to an RFP.

3. Are the services "subordinate" in nature? By "subordinate" we are referring to services that actually would be rendered only once a project is otherwise approved and in process. For example, construction inspection services are not utilized unless construction is already under way. The use of construction inspection services follows commencement of construction and does not itself initiate the construction. "As-needed" contracts for such subordinate services may be more appropriate than for other types of services.

4. The Board should consider whether, even in cases where "as-needed" contracts are appropriate, the Board wishes to have tasks orders under such contracts approved by the Board if they exceed specified amounts.

III. CONTRACT ADMINISTRATION ISSUES.

Board members have also voiced continuing concerns regarding ongoing issues of contract administration, and what training has been or should be done to improve the County's overall management of its professional services contracts. More recently, some have suggested a possible need to revise existing policies, procedures and forms used in contract administration.

Over time, a number of issues have been identified that arose in connection with the administration of DOT's contracts, contract amendments, and/or task orders, including failure of the consultant to meet performance terms, failure to adequately document the issuance and scope of task orders, and requests by the consultant mid-term for changes in negotiated terms of the contract that would not benefit the County.³

In our view, this is not a situation arising out of lack of policy direction, needed revisions to forms and procedures, or lack of training Charter provisions, ordinances and

³ Many of the instances occurred, in fact, during a specific time period and related to a limited number of contracts managed by a single individual who is no longer with the County. Nevertheless, these issues remain a concern and efforts are needed to ensure that contract administration is maintained at a high level.

policies exist to guide departments in complying with their obligations and extensive County-wide training on these rules and policies was previously provided. Training was provided on an individual basis and County Counsel remains available to resolve questions or provide assistance.

At the very outset, the County Charter already requires that each County contract identify the person who is responsible for managing and administering the County contract. This necessarily requires the department head to consider and identify who within their department is best qualified and most knowledgeable regarding the subject matter of the individual contract, and then designate that person as the contract administrator. In 2005, the Board also adopted Board policy B-13, which set forth the requirements for contract administration for special projects. That policy, while not expressly applicable to DOT capital projects, provided guidance to departments including DOT on the minimum requirements that apply universally to all contract administrators. It is also reflective of best management practices common to all contracting agencies as well as private companies.

Many of these contract management issues arose in the context of issuing task orders under "as-needed" contracts. Since these issues came to light, various steps have been taken to minimize the likelihood of their recurrence. Internal controls have been established by DOT, such as requiring approval of task orders at a level higher than project manager and internal confirmation of the sufficiency of funds under a contract to issue a proposed task order. Elevating the level of approval for task orders came at the urging of the County Auditor and concurrence by the Board. The Board currently is considering additional limitations on the use of "as-needed" contracts and task orders without Board oversight. Task orders issued by DOT are now being reviewed by County Counsel for adherence with the contract terms and these Board considerations and policies. *So long as all of these controls and review processes remain in place*, we do not believe that further policy modifications are needed. Nor do we feel that there are inadequacies in the forms for either contracts or task orders that need to be addressed.

Further, we do not believe that training is in issue. A short historical approach may be helpful here. In the late 1990's, the Chief Administrative Office, Purchasing, County Counsel, Risk Management, and Board Clerk staff collaborated to create a Contract Manual and provide County-wide training on the contracting process. Areas of interest that were addressed in the training included the ordinances and policies that influence contracting, the County's requirements for contracting, and the method of processing contracts through the review process to approval by the Board of Supervisors. Departments were required to send designated representatives to attend. Individualized training was also offered to departments upon request of the department. DOT was provided both County-wide and individualized training. On March 2, 2007, County Counsel also provided to DOT an outline of those same duties and responsibilities of a contract administrator relative to DOT's contracts as are set forth here. In that memorandum, County Counsel identified in more detail the specific issues that have been encountered in DOT's management of contracts, whether it involved a contract or a task order issued under a contract.

Rather, we believe that what is needed is a re-emphasis on the importance of contract administration, especially in the context of design professional services. Simply stated, in order for DOT, or any other County department, to successfully manage their professional services agreements, they must be diligent in clearly authorizing and defining the obligations of the consultant and in holding the consultant accountable to the terms and conditions of the consultant's contract with the County. Such contract administration is as important in the case of professional services as in the case of construction contracts. Often it can be difficult to differentiate roles of being a professional colleague engaged in a shared project and that of a contract administrator. This is true not only in the case of engineers, but also lawyers, accountants, planners and similar professional consultants. But, the role of contract administrator must take precedence over the professional relationship between staff and consultants. This is essential to protect not only the interests of the County, but also those of the consultants. Failure to strictly administer contracts and adhere to policies and procedures applicable thereto can lead to contract disputes and situations where the County may be compelled to withhold payment for work not properly authorized.

For each County contract, in order to insure that the County receives that to which it is entitled under the terms and conditions of the contract, for the cost contracted for, the County Charter requires that the department designate an individual to act as contract administrator for that contract. The duties of a contract administrator, while in large part governed by knowledge, diligence, and common sense, specifically include the following:

- Reviewing the contract and being familiar with all terms and conditions of the contract itself, and the surrounding circumstances that may influence the successful completion of the contract:

Reading and understanding the terms and conditions of the contract;

Identifying, and understanding the funding source that will be utilized to pay consultant;

Where the funding source is a state or federal agency, whether by grant, reimbursement, etc, reading and understanding all of the requirements of the state or federal agency funding to insure against false claims from the County to the funding agency. (The submission of a request for payment to a governmental agency which is untrue, whether "knowingly" or in reckless disregard, constitutes a false claim for which criminal and civil penalties may accrue to the individual making the claim. This includes "pass-through" claims that are received from the consultant and are passed through by the contracting agency to the funding agency for payment or reimbursement);

Identifying any related documents, facts and circumstances that may influence the successful completion of the contract (i.e. other agreements such as development agreements, developer reimbursement agreement, Caltrans cooperative agreements, utility relocation agreements, etc);

Setting up a contract file, appropriate database, payment processes, etc.

- Managing the scope of the project pursuant to the contract terms by monitoring and measuring the consultant's performance:

Directing the consultant in all aspects, such as issuing the notice to proceed, communicating on key issues with the consultant;

Maintaining and being familiar with all project correspondence and records;

Reviewing, processing and approving all contract amendments, task orders and other contract documents. An amendment of the contract should not be used to cure the failure to perform by the consultant. An amendment is a change in the terms to an *existing* contract to address events that were not anticipated when the contract was entered into, and should be used to add new work or address other unanticipated needs during the term of the contract.

Ensuring that the project proceeds in the manner anticipated under the terms and conditions, and that all deliverables are adequate and delivered within the timeframe required under the contract;

Ensuring that all of the terms and conditions of the contract are met;

Reviewing for accuracy and adequacy all progress payment requests;

Preparing close-out of the contract.

- Issuing task orders in full compliance with the contract:

Identifying and writing a clear scope, deliverables, time for performance, and cost of the task order in advance of the work. Including a "not-to-exceed" provision with each task order, and if the task order is large, with each component of the work for each task order.

Ensuring that a notice to proceed is not issued to the consultant by and until a complete, written, and fully executed task order is prepared.

- Resolving problems that occur during the term of the contract:

Identifying issues in a timely fashion;

Coordinating resolution with the department head, and if necessary with County Counsel;

Documenting the resolution of the issue in an appropriate fashion – confirming the resolution in writing, processing a task order amendment, or where necessary, processing a contract amendment.

- Preparing for contract close-out:

Auditing the payment and performance of the consultant;

Ensuring that all state/federal requirements have been met, and that all funding/reimbursement requests to State and Federal agencies are accurate and complete.

- Reviewing and managing claims:

Identifying and reviewing delays in performance, cost overruns, and claims;

Obtaining/preparing and evaluating all relevant documents pertaining to the claims;

Coordinating with the department head, Risk Management and County Counsel if a claim is presented.

The County's contracts give DOT's contract administrators all of the tools that they need to effectively manage the relationship with the consultant. For instance, all contracts are required to have well written, complete descriptions of the scope of work to be performed, not-to-exceed compensation provisions, and timelines tied to deliverables and compensation. Design contracts in particular typically have within the contract timelines for performance tied to a percentage of design completion. The percentage rate of compensation is then tied to that progress to make sure that the County only pays for what is complete at each stated deadline, and to further insure that the consultant cannot use up all available funds under the contract before the design is 100% complete. Each contract also has an overall "not-to-exceed" provision for the prime consultant, and provides "not-to-exceed" amounts for specific tasks (whether performed by the prime or a sub-consultant) within the contract. They also provide that the County will not be directly liable for payment of any sub-consultants authorized under the contract, and that the prime consultant must be solely responsible for that payment.

When an "as-needed" contract is entered into, these same requirements should be provided in the task order, and it is the responsibility of the contract administrator to do so at the time that the task order is written. Since DOT issues single task orders in significant amounts approaching or even exceeding \$1,000,000.00 (subject to any interim limitations adopted by the Board), we have recommended to the department that large task orders contain not only a "not-to-exceed" provision for the entire task order, but for included tasks within the order. We have also recommended that the "firewall" be maintained between and among the prime consultant and sub-consultants, so that each consultant or sub-consultant must stay within the stated amounts for each task.⁴

County policy, best management practices, and the County's standard contracts also require that DOT's contract administrator be responsible for the communication between County and consultant. By requiring the contract administrator to personally direct the consultant's work, and issue the notices to proceed, past problems where notices to proceed were issued absent compliance with contract provisions requiring a fully identified scope, cost, and deliverables may also be avoided.

In summary, the County has the necessary rules and procedures in place, and has appropriate contract provisions, to contain costs, secure deliverables, and foster the successful outcome for all of its contracts, including DOT contracts. Review of task orders internally by DOT, and by County Counsel, is now required, and large task orders will now have more visibility to the Board. The issues that have arisen can be avoided through continued emphasis on the need for consistent and diligent contract administration at the department level, continuing this interdepartmental cooperation and continuing Board oversight. We do not recommend any additional changes to County procedures, policies or document forms to address this issue.

Please let us know if we can provide any further information and answer any additional questions for you.

Respectfully submitted,



LOUIS B. GREEN

County Counsel

cc: Laura Gill, Chief Administrative Officer
Richard Shepard, Dir. of Transportation
Joe Harn, Auditor-Controller
s:\County Counsel\contract RFP board memo v4-1

⁴ Although several departments use "as-needed" contracts, most do not approach the complexity or size of major DOT consulting agreements, nor do many involve the use of frequent task orders of the level of detail needed in DOT. Nevertheless, the principles of sound contract administration apply to all.