



Legislation Text

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Fiscal Note

Many of the requirements contained in this ordinance currently apply to public works contracts. This ordinance amendment would apply the current and additional requirements to all contractors and subcontractors bidding on City public works projects costing roughly \$43,000 for single trade projects and \$240,000 for multi-trade projects. Essentially, the ordinance adds contractor participation in defined apprenticeship programs, maintenance of employee substance abuse policies and disclosure of past violations of labor, environmental, antitrust or tax laws as prequalification requirements for bidding on City public works contracts. These higher prequalification requirements are expected to have an impact on the number and mix of bidders and the bid prices offered in response to public works bid solicitations. The nature of these impacts is, however, a matter of debate.

Some predict that the higher standard for prequalification will eliminate potential bidders, particularly small and newer businesses, from participating in the City public works bid processes. This will have the effect of reducing bid competition for City projects and result in higher prices paid by the City for public works construction. Others argue that the higher prequalification requirement will encourage participation by contractors who have avoided bidding in the past due to the unfair price advantage awarded contractors who do not participate in apprenticeship programs or adhere to the other additional requirements. In this view, greater competition may bring lower prices, better quality or both, and any higher prices which may be paid by the City are offset by the public benefit of encouraging and rewarding only those contractors that adhere to such practices.

The ordinance amendment will also result in additional administrative cost associated with administration of the prequalification process, enforcement of the ordinance requirements and the expansion of the public works prequalification process to include contractors hired by recipients of TIF, Capital Revolving Fund loans and other City and CDA financial assistance. The City Engineer estimates that effective enforcement and monitoring will require the equivalent of an additional one-half time Administrative Clerk position, which would cost approximately \$25,000 per year. No additional staff or funding is currently budgeted for this purpose and the administration of these new requirements would be accomplished through the reallocation of existing staff resources from other assignments.

Title
AMENDED SUBSTITUTE - Renumbering Subsections 23.01(2)-(3) as Subsections 3.10(5)-(6), and creating Sec. 3.10(7) of the Madison General Ordinances to establish a method of applying Best Value Contracting principles to certain public construction contracts and projects accepting TIF financing.

Body

DRAFTER'S ANALYSIS: This ordinance adopts certain procedures commonly known as Best Value Contracting to be used in certain City public construction contracts and to developments obtaining TIF financing or other loans or grants from the City. It codifies some existing prequalification practices of the City. It also makes a technical change by relocating several sections related to bidding procedure to the Public Works section.

Best Value Contracting (BVC) usually adopts a procedure where bids are weighted both on price and whether the contractor meets certain other desired criteria, such as providing apprenticeship programs, meeting certain wage scales or seeking to obtain certain levels of diversity in the workforce. The City Attorney's opinion (see Opinion #05-005) is that Wisconsin law does not allow direct weighting of bids in this manner, but likely would allow the City to include these factors in determining if the bidder was a "qualified bidder," so long as the City has evidence that such factors meet the test of being "for the protection and welfare of the public in the performance of public contracts." See Wis. Stat. sec. 66.0901(2).

Therefore, this ordinance makes such a finding and includes some of these factors in the City Engineer's evaluation of whether a contractor is qualified to bid on city public construction contracts. Some of these factors are already present in City requirements for Affirmative Action plans and to meet prevailing wage requirements.

The ordinance is limited in scope to those projects required to be bid under Wis. Stat. sec. 62.15, and, as to the specific BVC requirements, those that meet the single trade or multi-trade minimums of Wis. Stat. sec. 66.0903(5). The latter limits are currently about \$43,000 for a single trade project and \$240,000 for a multi-trade project, and are adjusted by the State for inflation. The ordinance requires that subcontractors also meet these requirements before they commence work

on a City contract.

This ordinance extends the requirement that only qualified bidders may be used on a City public construction project to any development that obtains TIF assistance from the City. The ordinance also requires that the City Engineer report on the effects of the ordinance after two years.

The Common Council of the City of Madison do hereby ordain as follows:

1. Subsections (2)-(3) of Section 23.01 entitled "Regulating Of Public Work" of the Madison General Ordinances are renumbered to new Subsections (5)-(6) of Section 3.10 entitled "Board of Public Works" of the Madison General Ordinances to read as follows:

"(25) Sanction Against Bid Rigging. Any corporation, firm or individual violating Section 133.01 of the Wisconsin Statutes (1971), or any subsequent amendment thereof, shall upon conviction thereof be thereby disqualified as a bidder on any City of Madison project for a period of three (3) years from the date of such conviction; however, nothing herein shall be interpreted to preclude such corporation, firm or individual from completing any and all contracts he may already have with the City at the time of such conviction, nor shall this ordinance be applied retroactively to violations occurring prior to the adoption and publication of this ordinance.

(36) Public Construction Allowed to be Done by the City Without Bids.

- (a) The installation and maintenance of irrigation equipment at municipal golf courses is hereby designated a class of public construction which may be done directly by the City without submitting same for bids, in accordance with Section 62.15(1), Wisconsin Statutes.
- (b) The installation of prefabricated bus shelters is hereby designated a class of public construction which may be done directly by the City without submitting same for bids, in accordance with Sec. 62.15(1), Wis. Stats. provided, however, this designation shall cease and be automatically repealed on July 17, 1989, unless further extended by the Common Council."

2. Subsection (7) entitled "Best Value Contracting" of Section 3.10 entitled " Board of Public Works " of the Madison General Ordinances is created to read as follows:

"(7) Best Value Contracting.

(a) Policy. When entering into contracts for public construction under Wis. Stat. sec. 62.15, the City of Madison requires bidders to prequalify pursuant to the provisions of Wis. Stat. sec. 66.0901, and procedures adopted by the City. The City of Madison finds that using the Best Value Contracting procedures set forth in this ordinance will provide the City with the best value for its public construction while also meeting requirements that contracts be awarded to the lowest responsible bidder, and that the requirements of this ordinance are for the protection and welfare of the public in the performance of public contracts.

(b) Definitions.

- 1. "Contractor" means a person, corporation, partnership or any other business entity that performs work on a public works contract as a general contractor, prime contractor or (subject to the limitations for subcontractors in secs. (j)3. and 4. and (l) of this ordinance) subcontractor at any tier.
- 2. "Class A Apprenticeship Program" means an apprenticeship program that is currently approved by the U.S. Department of Labor or a state apprenticeship agency and has graduated apprentices to journeyman status for three (3) years. In addition, a new apprenticeship program that has been registered with the federal or state government within the last three (3) years will be considered a Class A Apprenticeship Program, provided that such new program graduates apprentices to journeyman status within the indenture period.
- 3. "Engineer" or "City Engineer" means the City of Madison City Engineer.
- 4. "Public works contract" means a contract for the City of Madison for the construction, alteration, execution, repair, remodeling or improvement of a public work or building, where the contract is required to be bid pursuant to Wis. Stat. sec. 62.15.
- 5. "BVC Contract" is a public works contract where the value of the contract is more than the amount determined in any year pursuant to Wis. Stat. sec. 66.0903(5).

(c) Prequalification Requirement. As a condition of performing work on a public works contract for the City of Madison, a contractor shall first be prequalified by the City in accordance with the provisions of this ordinance and other policies of the City as adopted by the Board of Public Works. This section shall apply to general contractors, prime contractors and (subject to the limitations for subcontractors in secs. (j)3. and 4. and (l) of this ordinance) subcontractors of any tier.

(d) Additional Qualification Information. In addition to information specified in this ordinance, the City Engineer may request, in prequalification applications or separately on a project by project basis, any

other information he or she determines necessary to ensure that prospective contractors meet the contractor responsibility standards established by this ordinance and otherwise possess sufficient qualifications and capabilities in all respects to successfully qualify for and perform public works contracts.

- (e) Prequalification Term.
1. Any contractor or subcontractor that has prequalified under standards applicable on or after the effective date of this ordinance shall remain prequalified until January 31, 2008.
 2. For any public works contracts advertised for bid on or after January 1, 2008, a contractor or subcontractor must be prequalified under this ordinance.
 3. Once a contractor's prequalification application is approved by the City Engineer under this ordinance, it shall remain valid for a period of two years to expire on January 31, unless suspended or revoked pursuant to this section.
- (f) Renewal and Disclosure. It shall be the obligation of the contractor to timely renew its prequalification and to report information regarding any material changes to its business or operations that are relevant to its prequalification application, including information that would affect its ability to make the certifications required by this ordinance. Any such information must be reported within fifteen (15) days of the contractor's knowledge of the information. Failure to report information under this subsection may result in suspension or revocation of the contractor's prequalification, debarment from City contracts for a period of up to three years and other sanctions available under applicable law.
- (g) Prequalification Approval. The City Engineer shall review contractor prequalification applications and approve applications that comply with the requirements of this ordinance and other applicable standards developed by the City Engineer. If a contractor has been certified by the City as a DBE, MBE, SBE or WBE, and the City Engineer determines that the contractor fails to meet the prequalification requirements under this ordinance, the City Engineer will notify and discuss the determination with the Affirmative Action Division prior to issuing any notice of non-qualification.
- (h) Prequalification List. The City Engineer shall publicly post a list of prequalified contractors which shall include the names, addresses and prequalification numbers of contractors and applicable dates of prequalification approval. This list shall be updated on a monthly basis.
- (i) Prequalification Review. The City Engineer shall review the performance of contractors prequalified according to this section periodically, but at least once a year, to determine whether contractors are performing satisfactorily. This review shall examine all relevant areas of contractor performance, including but not limited to project cost and schedule, compliance with plans and specifications, quality of workmanship and compliance with applicable laws and regulations. For good cause shown, the Engineer may suspend or revoke a contractor's prequalification status at any time after providing the contractor with notice and the opportunity to be heard by the City Engineer.
- (j) Prequalification Enforcement. The City Engineer shall:
1. Take the necessary actions to ensure that all contractors and subcontractors on public works contracts and BVC contracts are properly prequalified in accordance with the requirements of this ordinance;
 2. Require general contractors or prime contractors to verify their prequalification as a condition of submitting bids on public works contracts and BVC contracts;
 3. Further require general contractors or prime contractors to submit a list of the subcontractors they intend to use in the performance of the contract with the names and prequalification numbers of such subcontractors. This information for subcontractors may be submitted at the time of the bid and must be submitted by the time specified in sub. (l). Firms identified on the subcontractor list may be substituted only for good cause shown and with the written approval of the City Engineer.
 4. Notify subcontractors that they may apply for prequalification under this ordinance.
- (k) Required Certifications. Prequalification applications submitted pursuant to this ordinance shall include all information as determined necessary and appropriate by the City Engineer. Such applications shall, at a minimum, require a sworn certification by the applicant attesting to the facts specified in this subsection. In submitting a prequalification application, the applicant shall certify that for any project it seeks to perform for the City during the term of its prequalification, it shall:
1. Possess all technical qualifications and resources, including equipment, personnel and financial resources, necessary to perform the work required for the project or will obtain same through the use of responsible, prequalified subcontractors.
 2. Possess all valid, effective licenses, registrations or certificates required for the contractor or its

employees by federal, state, county or local law necessary for the type of work it seeks to perform, including, but not limited to, licenses, registrations or certificates for any type of trade work or specialty work.

3. Meet all bonding requirements as required of it by applicable law or contract specifications.
4. Meet all insurance requirements as required of it by applicable law or contract specifications, including general liability insurance, workers compensation insurance and unemployment insurance requirements.
5. Maintain a substance abuse policy for employees hired for public works contracts that complies with Wis. Stat. sec. 103.503.
6. Pay all craft employees that it employs on public works projects the wage rates and benefits required under applicable prevailing wage law, sec. 23.01, MGO.
7. With respect to BVC contracts only, participate in a Class A Apprenticeship Program for each separate trade or classification in which it employs craft employees and continue to participate in such program or programs for the duration of the project. In applying this requirement, the City Engineer shall apply it to all crafts in the same manner as the State of Wisconsin applies the requirements of Wisconsin Executive Order 108 (June 29, 2005).
8. Fully abide by the equal employment opportunity and affirmative action requirements of all applicable laws, including City ordinances.
9. Provide in its prequalification application a detailed statement regarding related companies if, at any time during the past three (3) years, the contractor has controlled or has been controlled by another corporation, partnership or other business entity operating in the construction industry. This statement shall be included in prequalification application and shall explain the nature of the contractor relationship.
10. Disclose, whether for the past three years:
 - a. It has had any type of business, contracting or trade license, certification or registration revoked or suspended.
 - b. It has been debarred by any federal, state or local government agency.
 - c. It has defaulted on any project in the past three years;
 - d. It has committed a willful violation of federal or state safety laws as determined by a final decision of a court or government agency authority.
 - e. It has been found by a final decision of a court or government agency in violation of any other law relating to its contracting business, including, but not limited to wage and hour laws, prevailing wage laws, environmental laws, antitrust laws or tax laws, where the penalty for such violation resulted in the imposition of fine, back pay damages or any other type of penalty in the amount of more than \$10,000.

The applicant shall provide an explanation to the City Engineer of any disclosures under this subsection, and the City Engineer shall determine if such incidents are of such a nature as to disqualify the applicant.

11. Certify that the contractor prequalification application has been executed by a principal or person employed by the applicant who has sufficient knowledge to address all matters in the prequalification application and shall include an attestation stating, under the penalty of perjury, that all information submitted is true, complete and accurate.
 12. Understand that in performing under any City public works contract, it will be required to use as subcontractors only those entities that have been properly prequalified in accordance with the requirements of this ordinance.
- (l) Subcontractors. Subcontractors may, but are not required to, apply for and obtain prequalification status under this ordinance. At least ten (10) days prior to commencing work under any City of Madison Public Works Contract, a subcontractor, the value of whose work exceeds the single-trade minimum of Wis. Stat. sec. 66.0903(5), shall submit the information required under this ordinance to be qualified, and no such subcontractor may begin work on a City of Madison Public Works Project until the City Engineer determines that such subcontractor meets the qualification requirements herein.
- (m) Conditional Approval. The City Engineer may issue conditional approvals of any application for prequalification and shall set out the conditions thereof in writing.
- (n) Best Value Contracting in City Supported Projects. In order to achieve the goals set out in this ordinance, it shall be a condition of any City financial support of a development project, in the form of TIF financing, Capital Revolving Loan funds, industrial development bonds, or other City or CDA assistance as designated by the Common Council in the resolution granting such assistance, in an amount that

meets the requirements of sub. (7)(b)5., that the developer utilize for construction those firms that have met the prequalification requirements of this ordinance. This provision will be included as a developer obligation in any agreement between the City and the developer.

- (o) Appeal. Any applicant, contractor, or subcontractor aggrieved by a determination of the City Engineer under this ordinance has the right to appeal the City Engineer's determination to the Board of Public Works. The appeal shall be taken by delivery of a letter to the City Engineer within fifteen (15) days of the determination to be appealed. The Board of Public Works will schedule a hearing on the appeal promptly.
- (p) Report by City Engineer. After this ordinance shall have been in effect for two years, the City Engineer shall prepare a report to the Common Council on the effects of the ordinance.
- (q) Effective Date. This ordinance applies to any Public Works Contract advertised for bid, and any contracts under sub. (n) entered into, on or after January 1, 2008."