

(O-2000-41)
(COR. COPY)

ORDINANCE NUMBER O- 18696 (NEW SERIES)

ADOPTED ON OCT. 18 1999, 1999

AN ORDINANCE AMENDING CHAPTER II, ARTICLE 2, OF THE SAN DIEGO MUNICIPAL CODE BY ADDING A NEW DIVISION 34 TO PROVIDE ALTERNATIVE PROCUREMENT OF DESIGN-BUILD CONTRACTS FOR QUALIFYING COMPLEX PUBLIC FACILITIES, AND ADDING SECTIONS 22.3401, 22.3402, 22.3403, 22.3404, 22.3405, 22.3406, 22.3407, 22.3408, 22.3409 AND 22.3410, ALL RELATING TO DESIGN-BUILD CONTRACTS FOR QUALIFYING COMPLEX PUBLIC FACILITIES.

WHEREAS, the voters of The City of San Diego passed Proposition F on the ballot of November 3, 1998, adding Charter section 94.2, regarding design-build construction contracts; and

WHEREAS, Charter section 94.2 requires the City Council to establish by ordinance guidelines for the award, use, and evaluation of such design-build contracts; and

WHEREAS, on April 12, 1999, the City Council adopted Ordinance No. O-18631 which added Division 33 of Chapter II, Article 2 to the Municipal Code establishing general guidelines for the award, use, and evaluation of design-build contracts; and

WHEREAS, the City Council has determined that an alternative procurement method for design-build contracts can be of particular benefit to the City in effectively obtaining design and construction services in connection with the construction of complex facilities involving unique operational or other aspects of design; NOW, THEREFORE,

BE IT ORDAINED, by the Council of The City of San Diego, as follows:

Section 1. That Chapter II, Article 2, of the San Diego Municipal Code be and the same is hereby amended by adding Division 34, and Sections 22.3401, 22.3402, 22.3403, 22.3404, 22.3405, 22.3406, 22.3407, 22.3408, 22.3409 and 22.3410, to read as follows:

DIVISION 34

ALTERNATIVE PROCUREMENT OF DESIGN-BUILD CONTRACTS FOR QUALIFYING COMPLEX PUBLIC FACILITIES

SEC. 22.3401 Purpose and Intent

Division 33 of Chapter II, Article 2 of the San Diego Municipal Code establishes general guidelines for the award, use and evaluation of Design-Build contracts. The purpose of this Division is to provide alternative definitions and guidelines for the award, use, evaluation, administration and performance of Design-Build contracts in connection with certain complex public facilities. Nothing in Division 34 is intended to limit the City's ability to enter into Design-Build contracts in accordance with Division 33 of Chapter II, Article 2 of the San Diego Municipal Code.

SEC. 22.3402 Definitions

All defined terms in this Division appear in italics. For purposes of this Division, the following definitions apply:

"Design-Build" means a public works contract procurement method for a contract pursuant to which the party providing construction services for the project (a) also will provide certain design services in connection with the project or (b) will be engaged prior to completion

of the final design for the project and will be obligated to provide advice and input regarding the final design for the project.

“Design-Build Entity” means a person, partnership, corporation, or other legal entity (other than a *Procurement Consultant*) that is able to provide appropriately licensed contracting, architectural, and engineering services as needed for the design and construction of a *Qualifying Complex Public Facility*.

“Design-Build Entity Member” includes any person who provides licensed contracting, architectural, or engineering services.

“Procurement Agreement” means an agreement with a *Procurement Consultant* pertaining to the services to be provided by the *Procurement Consultant* in connection with a *Qualifying Design-Build Contract*.

“Procurement Consultant” means a person, partnership, corporation, or other legal entity that the Council has determined has the capability to provide negotiation, administration, or other professional services in connection with the negotiation, letting, administration, and performance of a *Qualifying Design-Build Contract*.

“Qualifying Design-Build Contract” means a *Design-Build* public works contract with a *Design-Build Entity* for a *Qualifying Complex Public Facility* that requires the *Design-Build Entity* to perform detailed design and construction of all or any portion of the *Qualifying Complex Public Facility* on a fixed price or guaranteed maximum price basis.

“Qualifying Complex Public Facility” means a facility (including without limitation libraries, educational facilities, administration facilities, parking facilities and facilities for the

public exhibition of music, visual art, spectator sports, flora or fauna) to be owned in whole or in part by the City and for which:

(a) the Council has determined that:

(1) due to anticipated unique operational, aesthetic or other attributes of the facility, use of the *Design-Build* alternative procurement method will enhance the design or construction of the facility; and

(2) effective procurement or performance of a *Design-Build* contract for the facility will be facilitated by the assistance of a *Procurement Consultant*; and

(b) the Council has established the following fundamental standards for the completion of the facility:

(1) a general program and design concept for the facility;

(2) a general timeline for completion of the facility; and

(3) a maximum amount of City funds to be applied to the design and construction of the facility.

SEC. 22.3403 Procurement Agreements

(a) In order to facilitate the negotiation, letting and administration of *Qualifying Design-Build Contracts*, the City Manager, with the approval of the Council, may enter into *Procurement Agreements* with *Procurement Consultants*. *Procurement Agreements* are Consultant agreements as otherwise set forth in the Charter or Municipal Code. Each *Procurement Agreement* shall obligate the *Procurement Consultant* to:

(1) administer the negotiation, letting, and performance of the *Qualifying Design-Build Contracts* pursuant to the procedures and terms established in the *Procurement Agreement*, which procedures shall be consistent with the requirements of Division 34;

(2) determine the scope of the design and construction services to be provided by the *Design-Build Entity*; and

(3) perform the services described in Section 22.3403(a)(1) and (2) in a manner which shall cause the *Qualifying Complex Public Facility* to be completed:

(A) such that the general program and design concepts for the facility established by the Council are incorporated into the *Qualifying Complex Public Facility*, provided that the City may permit the *Procurement Consultant*, in administering the design and construction of the *Qualifying Complex Public Facility*, to revise the general program and design concepts so long as the revisions do not materially detract from the anticipated experience to be obtained in the use of the facility; and

(B) such that the total expenditure of City funds is less than or equal to the maximum amount established by the Council for design and construction of the facility.

(4) endeavor in good faith to cause the completion of the facility within the general timeline for completion of the facility established by the Council, as the general timeline may be extended due to events of force majeure or other circumstances not reasonably within the control of the *Procurement Consultant*.

(b) The *Procurement Agreement* may include other provisions consistent with Division 34, including provisions to the effect that:

(1) the *Procurement Consultant* may be authorized to administer the *Qualifying Design-Build Contract*;

(2) the *Procurement Consultant* may be authorized to undertake any of the activities described in Sections 22.3404, 22.3405, 22.3406, 22.3409 or 22.3410 on behalf of the City, including, without limitation, administrating the preparation of the request for proposal, the prequalification of *Design-Build Entities*, the selection of the *Design-Build Entity*, the competitive negotiation of the *Qualifying Design-Build Contract*, and the letting of the *Qualifying Design-Build Contract*, all on behalf of the City as the City's authorized agent for such purpose;

(3) the *Procurement Consultant*, without additional approval from the City, may be permitted to enter into agreements related to the design and construction of the *Qualifying Complex Public Facility* so long as the *Procurement Consultant* enters into the agreements in its own name and without liability to the City;

(4) the *Procurement Consultant*, without additional approval from the City, may be authorized to enter into other agreements for the provision of other goods and services ancillary to the *Qualifying Complex Public Facility* or the *Qualifying Design-Build Contract* so long as the *Procurement Consultant* enters into the agreements in its own name and without liability to the City; and

(5) the City may pay directly or reimburse the *Procurement Consultant* for the costs incurred with respect to agreements described in Section 22.3403(b)(3) or (4) in addition to other provisions for the compensation of the *Procurement Consultant*. No payment or reimbursement shall be required or authorized if such payment or reimbursement would cause

the total expenditure by the City to exceed the maximum amount approved by the Council for the design and construction of the *Qualifying Complex Public Facility*.

(c) The agreements referenced in Section 22.3403(b)(3) and (4) may include, for example and without limitation, agreements with contractors, consultants or experts for the design, inspection and testing of portions of the *Qualifying Complex Public Facility* and agreements for the procurement of fixtures, furnishings and equipment to be provided to the *Qualifying Complex Public Facility*.

SEC. 22.3404 Procurement of Qualifying Design-Build Contracts

For purposes of Division 34 only, prior to procuring a *Qualifying Design-Build Contract*, the City shall prepare a request for proposals setting forth the scope of the project that may include, but is not limited to, the size, type, and desired design character of the buildings and site, performance specifications and drawings, specifications or other criteria. The performance specifications may describe the quality of construction materials, assemblies, and other information deemed necessary to adequately describe the City's needs. The performance specifications shall be prepared by a design professional designated by the City.

SEC. 22.3405 Competitive Prequalification and Selection Process

The City may establish a competitive prequalification and selection process for *Design-Build Entities* that specifies the prequalification criteria, if any, as well as recommends the manner in which the winning entity will be selected. At the City's option, the manner in which the winning entity will be selected may include a process pursuant to which the City may select, based on proposals submitted in response to a Request For Proposals, one or more *Design-Build Entities* with which to negotiate the definitive *Qualifying Design-Build Contract*.

Nothing in this Division precludes a *Design-Build* contract from being awarded to a Sole Source, if, in advance of the contract, the City Manager certifies in writing the Sole Source status of the provider.

SEC 22.3406 Prequalification Criteria

Prequalification may be limited to consideration by the City of all or any of the following criteria supplied by a *Design-Build Entity*:

(a) Possession of all required licenses, registrations, and credentials in good standing that are required for the *Design-Build Entity* to undertake the portion of the design and construction of the *Qualifying Complex Public Facility* that is to be performed by the *Design-Build Entity*.

(b) Submission of documentation establishing that the *Design-Build Entity* members have completed, or demonstrated the capability to complete, projects of similar size, scope, building type, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the *Qualifying Complex Public Facility*.

(c) Submission of a proposed project management plan establishing that the *Design-Build Entity* has the experience, competence, and capacity needed to effectively complete the *Qualifying Complex Public Facility*.

(d) Submission of evidence establishing that the *Design-Build Entity* has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance, as well as a financial statement assuring the City that the *Design-Build*

Entity has the capacity to complete the work required under the *Qualifying Design-Build Agreement*.

(e) Provision of a declaration that the applying *Design-Build Entity Members* have not had a surety company finish work on any project within the past five years.

(f) Provision of a declaration providing detail for the past five years concerning all of the following:

(1) Civil or criminal violations of the Occupational Safety and Health Act against any *Design-Build Entity Member*.

(2) Civil or criminal violations of the Contractors' State License Law against any member of the *Design-Build Entity Member*.

(3) Any conviction of any member of the *Design-Build Entity* of submitting a false or fraudulent claim to a public agency.

(4) Civil or criminal violations of federal or state law governing the payment of wages, benefits, or personal income tax withholding, or of Federal Insurance Contributions Act (FICA) withholding requirements, state disability insurance withholding, or unemployment insurance payment requirements against any member of the *Design-Build Entity*. For purposes of Section 22.3405(f)(4), only violations by a *Design-Build Entity Member* as an employer shall be deemed applicable, unless it is shown that the *Design-Build Entity Member*, in his or her capacity as an employer, had knowledge of a subcontractor's violations or failed to comply with the conditions set forth in Section 1775(b) of the State Labor Code.

(5) Civil or criminal violations of federal or state law against any *Design-Build Entity Member* governing equal opportunity employment, contracting or subcontracting.

(g) Provision of a declaration that the *Design-Build Entity* will comply with all other provisions of law applicable to the project. The declaration shall state that reasonable diligence has been used in its preparation and that it is true and complete to the best of the signer's knowledge.

SEC. 22.3407 Documentation of Outreach Programs

The *Design-Build Entity* shall provide documentation of its subcontractor and employment outreach program to all subcontractors in the required disciplines of the project.

SEC. 22.3408 False Declaration Unlawful

It is unlawful to submit any declaration under this Division containing any material matter that is false.

SEC. 22.3409 Selection Method

The City shall select one of the following methods as the process to be used for the selection of the winning entity:

(a) A *Design-Build* competition based on drawings, specifications, or other criteria set forth by the City in the request for proposals.

(1) Criteria used in this form of evaluation of proposals may include, but not be limited to, items such as proposed approach to complete (or to provide advice regarding the completion of) the design of the facility (based upon the drawings, specifications and other criteria set forth by the City in the request for proposals), initial and/or lifecycle costs, project features, financing, quality, capacity, schedule, the impact upon operational and functional performance of the facility of the proponent's proposed approach to complete the design of the

facility, and any of the prequalification criteria. However, any criteria and methods used to evaluate proposals shall be limited to those contained in the request for *Design-Build* proposals.

(2) Any architectural firms, engineering firms, specialty consultants, or individuals retained by the City to assist in the development of criteria or preparation of the request for proposals shall not be eligible to participate in the competition with any *Design-Build Entity*.

(3) Award shall be made to the *Design-Build Entity* whose proposal is judged as providing best value meeting the interests of the City and meeting the objectives of the project.

(b) A *Design-Build* competition based on program requirements, performance specifications, and a preliminary design or combination thereof set forth by the City in the request for proposals. Drawings and specifications detailing the requirements of the project may accompany the request for proposals.

(1) The City shall establish fundamental standards related to technical criteria and methodology, including price, to evaluate proposals and shall describe the criteria and methodology of evaluation and selection in the request for *Design-Build* proposals.

(2) Any architectural firms, engineering firms, specialty consultants, or individuals retained by the City to assist in the preparation of the preliminary design or request for proposals shall not be eligible to participate in the competition with any *Design-Build Entity*.

(3) Award shall be made to the *Design-Build Entity* on the basis of the technical criteria and methodology, including price, whose proposal is judged as providing best value in meeting the interests of the City and meeting the objectives of the project.

(c) A *Design-Build* competition based on program requirements and a detailed scope of work, including any design drawings and specifications set forth by the City in the request for proposals.

(1) Any architectural firms, engineering firms, specialty consultants, or individuals retained by the City to assist in the preparation of the design or request for proposals shall not be eligible to participate in the competition with any *Design-Build Entity*.

(2) Award shall be made on the basis of the lowest responsible and reliable bid.

(d) A "Sole Source" award as otherwise allowed by law.

SEC. 22.3410 Work Listing

The City recognizes that the *Design-Build Entity* is charged with performing both design and construction. Because a *Design-Build* contract may be awarded prior to the completion of the design, it is often impracticable for the *Design-Build Entity* to list all subcontractors at the time of the award.

(a) It is the intent of the City to establish a clear process for the selection and award of subcontracts entered into pursuant to this Division in a manner that retains protection for subcontractors while enabling *Design-Build* projects to be administered in an efficient fashion.

(b) All of the following requirements shall apply to subcontractors, licensed by the state, that are employed on *Design-Build* projects undertaken pursuant to this Division.

(1) The *Design-Build Entity* in each *Design-Build* proposal shall specify the construction trades or types of subcontractors that may be named as members of the *Design-Build-Entity* at the time of award. In selecting the trades that may be identified as members of

the *Design-Build Entity*, the *Design-Build Entity* shall identify the trades deemed essential in the design considerations of the project. All subcontractors that are listed at the time of award shall be afforded the protection of all applicable laws.

(2) All subcontracts that were not listed by the *Design-Build Entity* at the time of award in accordance with Section 22.3409(b)(1) shall be performed and awarded by the *Design-Build Entity*, in accordance with a bidding process set forth in the *Qualifying Design-Build Contract*.

Section 2. That a full reading of this ordinance is dispensed with prior to its final passage, a written or printed copy having been available to the City Council and the public a day prior to its final passage.

Section 3. That the City Manager shall report to the Rules Committee on the implementation of this ordinance after one year from its passage and thereafter as directed.

Section 4. That this ordinance shall take effect and be in force on the thirtieth day from and after its passage.

APPROVED: CASEY GWINN, City Attorney

By


Leslie J. Girard

Assistant City Attorney

LJG:js

09/21/99

09/24/99 COR. COPY

10/21/99 COR. COPY

Or.Dept:Atty

O-2000-41

Form=o&t.frm