

Article 2: Administrative Code

Division 38: Construction Manager at Risk Contracts

(“Construction Manager at Risk Contracts” added 3-15-2010 by O-19934 N.S.)

§22.3801 Purpose and Intent

The purpose of Division 38 is to provide definitions and guidelines for the award, use, and evaluation of *construction manager at risk* contracts for *public works* projects.

(Added 3-15-2010 by O-19934 N.S.; effective 4-14-2010.)

§22.3802 Definitions

All defined terms of Division 38 appear in *italics*. For purposes of Division 38, the following terms apply:

Construction manager at risk means an entity which holds a California General Engineering Contractor’s License Class A; a General Building Contractor License Class B; or a General Specialty Contractor License Class C, and undertakes construction of *public works* pursuant to a *construction manager at risk contract*.

Construction manager at risk contracts means a successive combination of written agreements relating to a single project between the City and a *construction manager at risk entity* where the latter agrees to perform (1) *preconstruction services* and (2) *construction services* for the City at or under a *guaranteed maximum price*.

Construction manager at risk entity means a partnership, corporation, joint venture, or other legal entity that is able to provide appropriately licensed *preconstruction services* and *construction services* as needed.

Construction services means that portion of the scope of work in a *construction manager at risk contract* relating to the physical construction of a project, including all labor, equipment, and materials necessary for construction and all management, supervision, administration, quality control, safety, and risk management related to construction, and all services required by the City at the completion of construction.

Construction services agreement means a separate agreement among construction manager at risk contracts relating to construction services.

Guaranteed maximum price means a price expressed in dollars agreed upon by the City and a construction manager at risk entity following a competitive solicitation by the City that is included as a necessary term of construction manager at risk contracts, and is a maximum and not a minimum price for a defined scope of work involving preconstruction services and construction services.

Preconstruction services means that portion of the scope of work within construction manager at risk contracts which relates to tasks performed in the project design phase in advance of or in staged coordination with construction services, including design review, value engineering, cost estimation, solicitation of subcontracted trades and materials, bidding, and preparation of a final guaranteed maximum price proposed for construction services.

Preconstruction services agreement means a separate agreement among construction manager at risk contracts relating to the performance of preconstruction services.

(Added 3-15-2010 by O-19934 N.S.; effective 4-14-2010.)

§22.3803 Construction Manager at Risk Procurement; Competitive Prequalification and Selection Process

The City Manager shall establish a competitive prequalification and selection process for construction manager at risk entities that specifies the prequalification criteria and provides the manner in which the winning entity will be selected.

- (a) Request for Qualifications. Prior to procuring a construction manager at risk contract, the City Manager shall prepare a Request for Qualifications setting forth the scope of the project and requesting statements of qualifications from interested construction manager at risk entities. The Request for Qualifications shall be the basis for prequalification pursuant to Section 22.3805 and shall be noticed in the City's official advertising newspaper not less than twenty calendar days before statements of qualification are due. The Request for Qualifications shall state the qualifications that will be required, the criteria for prequalification, and the maximum number of firms that will be placed on a short list for consideration of selection pursuant to a competitive Request for Proposals. The short list shall be established by the Selection Committee appointed by the City Manager pursuant to section 22.3804, which shall rank statements of qualifications using criteria provided in Section 22.3805.

- (b) Request for Proposals. Before letting *construction manager at risk contracts* the City Manager shall issue a Request for Proposals to those firms on the qualifications short list provided for in subsection (a) of this section. The Request for Proposals shall reference an engineering design for the work prepared by City engineers or by third party design professionals. The engineering design is not required to be complete at the time a Request for Proposals for *construction manager at risk* services is issued, but shall be sufficiently developed as to the size of the project, its site, and an anticipated construction cost and schedule to allow for meaningful proposals to be tendered and to permit assessment of those proposals. The Request for Proposals shall indicate the scope of *preconstruction services* and *construction services* for which proposals are sought and shall identify the criteria that will be used for selection.

(Added 3-15-2010 by O-19934 N.S.; effective 4-14-2010.)

§22.3804 Selection Committee

- (a) For each project where *construction manager at risk* proposals are sought, the City Manager shall appoint a qualified Selection Committee composed of at least five but no more than seven members. The City Manager may determine the number and qualifications of the Selection Committee members and shall ensure that at least one member has managerial experience in construction contracting for projects of similar size and character, and that at least one member is a registered architect or engineer. Selection Committee members and any firm with which any member is affiliated or interested shall be ineligible to submit a proposal for the project. The Selection Committee shall evaluate and rank submitted statements of qualifications and shall rank submitted proposals for *construction manager at risk contracts* and make recommendations for award to the City Manager.
- (b) Except as provided by Section 22.3102(a), award of *construction manager at risk contracts* shall be authorized by the City Council.

(Added 3-15-2010 by O-19934 N.S.; effective 4-14-2010.)

§ 22.3805 Prequalification Criteria

Prequalification shall include consideration of the following criteria submitted by a *construction manager at risk entity*:

- (a) Possession of all required license, registration, and credentials in good standing that are required to perform *preconstruction services* and *construction services*.

- (b) Documentation establishing that the *construction manager at risk entity* members have completed, or demonstrated the capability to complete, projects of similar size, scope, building type, or complexity, and that the proposed key personnel have sufficient experience and training to competently manage and complete the *preconstruction services* and *construction services* of the project.
- (c) A proposed construction management plan establishing that the *construction manager at risk entity* has the experience, competence, and financial capacity needed to effectively perform the project.
- (d) Evidence establishing that the *construction manager at risk entity* has the capacity to obtain all required payment and performance bonding from acceptable sureties, liability insurance, and professional liability insurance.
- (e) A declaration that the applying members of the *construction manager at risk entity* have not had a surety company finish work on any project within the past five years.
- (f) A declaration setting forth details for the past five years of the following:
 - (1) Civil or criminal violations of the Occupational Safety and Health Act against any member of the *construction manager at risk entity*.
 - (2) Civil or criminal violations of the Contractor's State License Law against any member of the *construction manager at risk entity*.
 - (3) Any conviction or judgment against any member of the *construction manager at risk 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 *construction manager at risk entity*. For purposes of this subsection, only violations by a *construction manager at risk entity* member, as an employer, shall be applicable, unless it is shown that that the *construction manager at risk entity* member, in his or her private 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 *construction manager at risk* entity member governing equal opportunity employment, contracting, or subcontracting.
- (g) A declaration that the *construction manager at risk 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 correct to the signer's knowledge.
- (h) A declaration by the *construction manager at risk entity* that it has a record of timely payment to subcontractors and suppliers and that it has not been the subject of mechanics liens, stop notices, or lawsuits by subcontractors or suppliers while acting as a general contractor in the preceding five years, or alternatively, if any such claims have existed the declaration shall list them.

(Added 3-15-2010 by O-19934 N.S.; effective 4-14-2010.)

§22.3806 Outreach Programs

The *construction manager at risk entity* shall fully and satisfactorily document to City its subcontractor and employment outreach efforts to all subcontractors in the required disciplines of the project prior to being awarded a *construction services agreement*.

(Added 3-15-2010 by O-19934 N.S.; effective 4-14-2010.)

§22.3807 Selection Method

The Selection Committee shall rank all proposals submitted pursuant to a Request for Proposals in order of preference and recommend that the City negotiate with the highest ranked *construction manager at risk entity*. The City Manager shall approve the criteria used for ranking and include those criteria in a Request for Proposals. Selection criteria may include the following:

- (a) Price of proposed fee and *construction services* general conditions
- (b) Successful experience with projects of similar size and complexity
- (c) Financial capacity, bonding, and insurance
- (d) Equal Opportunity and Small Business Plan
- (e) Value Engineering Plan
- (f) Key personnel dedicated to the project

- (g) Construction Management Plan
- (h) Proposed Construction Schedule

In preparing a Request for Proposals for a *construction manager at risk contract* the City Manager need not prioritize selection criteria in the order listed in this Section and shall have discretion to assign relative weights to selection criteria which serve the best interests of the City and the project. All proposals shall be evaluated by the Selection Committee using the selection criteria contained in the Request for Proposals.

(Added 3-15-2010 by O-19934 N.S.; effective 4-14-2010.)

§22.3808 Separate Agreements for Preconstruction Services and Construction Services; Essential Terms

- (a) Except as provided in this subsection, *construction manager at risk contracts* shall be entered into with the same entity for *preconstruction services* and *construction services*. To optimize the advantages of the *construction manager at risk* project delivery method, *construction manager at risk preconstruction services* should be retained early in the design stage of projects for which construction documents and specifications have not been completed. The letting of a *preconstruction services agreement* shall not bind the City to enter into an agreement for *construction services*, but shall provide for a priority basis of negotiation for a *construction services agreement* with the same *construction manager at risk entity* through the good faith development of a *guaranteed maximum price*. Only in the event that City and the *construction manager at risk entity* which performed *preconstruction services* cannot reach agreement on a *construction services agreement*, as determined by the City Council, may the City award a *construction services agreement* or other public works contract to another entity for the project which was the subject of the *preconstruction services agreement*.
- (b) *Preconstruction services agreements* and *construction services agreements* shall contain a *guaranteed maximum price* and their award shall conform to the procedures provided in this Division. Certain business terms for a *construction services agreement* may be conditionally agreed upon in a *preconstruction services agreement* but shall be limited to costs for contract general conditions, hourly labor rates, overhead, and the *construction manager at risk entity's* proposed fee.

- (c) Costs for labor, equipment, and materials to be provided by subcontractors or self-performed by the *construction manager at risk entity* shall not be agreed upon in a *preconstruction services agreement*, and shall be reserved for proposal, negotiation, and agreement on a *guaranteed maximum price* in a *construction services agreement* as provided in this Division.
- (d) All *construction manager at risk contracts* shall be open book among the City, the *construction manager at risk* and subcontractors, and shall provide for full disclosure to the City of all documents and information by the *construction manager at risk entity*, including but not limited to estimates, schedules, records of direct and indirect costs, field and home office overhead calculations, subcontracts, records of payment, and any other data or document deemed by the City to be relevant to the project.

(Added 3-15-2010 by O-19934 N.S.; effective 4-14-2010.)

§22.3809 Subcontracting Conditions for Proposed Construction Services Agreements

The City Manager shall provide in the Request for Proposals for *construction manager at risk contract* services the method by which subcontracts shall be obtained for *construction services* and the general terms under which the construction shall be performed.

- (a) The *construction manager at risk entity* shall, as part of a *preconstruction services agreement*, obtain bids for subcontracts for proposed *construction services agreements* and at the direction of the City Manager commit in its proposal for a *guaranteed maximum price* to award all subcontracts according to:
 - (1) lowest responsible bid; or
 - (2) highest qualifications as proposed by the *construction manager at risk entity* and agreed to by the City; or
 - (3) best value for price and qualifications as proposed by the *construction manager at risk* and agreed to by the City.

- (b) Except for management and project administration, a *construction manager at risk entity* shall not perform any *construction services* with its own forces or the forces of any affiliated entity unless the City Manager expressly allows for self-performance by the *construction manager at risk entity* in the Request for Qualifications. If the Request for Qualifications indicates that proposals of self-performance of part of the work by a *construction manager at risk entity* will be acceptable, any subsequent Request for Proposals shall require that all trades proposed to be self-performed by the *construction manager at risk entity* shall be obtained pursuant to competitive bidding under subsection (a)(1) of this section.
- (c) All bids for subcontracts in any *construction services agreement* shall be open and published and provided to the City without reservation or redaction as part of the proposal and negotiation process for any *construction services agreement*.
- (d) The City may administer bidding itself for any subcontracted work, or direct the bidding procedures to be used by the *construction manager at risk entity*.

(Added 3-15-2010 by O-19934 N.S.; effective 4-14-2010.)

§22.3810 Conditions for Entering Agreement for Construction Services

- (a) A *guaranteed maximum price* for *construction services* shall not be negotiated or agreed upon unless the project design is substantially complete to permit bidding of subcontracts by the *construction manager at risk entity* as provided in Section 22.3811(a).
- (b) Notwithstanding Section 22.8310(a), *construction services agreements* for limited parts of the construction work may be awarded before the entire project design is complete, provided that:
 - (1) the construction documents are complete for that part of the work that is the subject of the agreement,
 - (2) all labor, material, and equipment is competitively bid, and
 - (3) the City Manager certifies that the project schedule requires staged coordination of design and construction.

(Added 3-15-2010 by O-19934 N.S.; effective 4-14-2010.)

§22.3811 Listing of Work and Protection of Subcontractors

- (a) The provisions of the Subletting and Subcontracting Fair Practices Act [Act], California Public Contract Code Sections 4100 through 4114 as amended, shall be applicable to *construction services* under all *construction manager at risk contracts*.
- (b) In preparing its proposal for a *guaranteed maximum price* for *construction services*, the *construction manager at risk entity* shall provide a written list of all proposed subcontractors who will perform work in costing equal to or greater than one half of one percent of the total *guaranteed maximum price*. The list of subcontractors shall include names of the subcontractors, the value of each subcontract, and a description of the scope of work to be performed by each listed subcontractor.
- (c) Upon the parties' agreement to a *guaranteed maximum price* and execution of a *construction services agreement*, all subcontractors listed pursuant to this Section shall be afforded all the protections of the Act, and the *construction manager at risk entity* shall not substitute any other person to perform the scope of work listed for each listed subcontractor, except as provided in the Act.

(Added 3-15-2010 by O-19934 N.S.; effective 4-14-2010.)

§22.3812 False Declaration Unlawful

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

(Added 3-15-2010 by O-19934 N.S.; effective 4-14-2010.)