

**CITY OF NEW ORLEANS
CHIEF ADMINISTRATIVE OFFICE**

POLICY MEMORANDUM NO. 113(R)

May 19, 2021

To: All Executive Branch Departments, Boards, and Commissions

From: Gilbert Montaña, Chief Administrative Officer



Subject: PROCUREMENT OF PUBLIC WORKS AND CONSTRUCTION

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I. Purpose and Use

- A. This policy memorandum states City administrative guidance for the procurement of public works. It reaffirms and supplements state procurement laws.
- B. This policy memorandum applies to all public works projects by Executive Branch Departments, Agencies, Offices, Boards and Commissions ("Departments").
- C. This policy memorandum is issued pursuant to City Charter Section 4-302(5). It replaces Policy Memorandum 113 (R), dated December 14, 2016, which is hereby cancelled.

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II. Legal Authority

A. Public Bid Law.

1. La. R.S. 38:2211 through 2296 is the set of laws that governs contracts for Public Work and the purchase of materials and supplies by public entities that meet certain threshold requirements.

B. City Charter.

1. Section 6-308(3) requires that the contract for the construction of public buildings comply with all applicable state or municipal laws.
2. Section 6-308(5)(a) requires competitive bids for construction.
3. Section 6-308(6) authorizes the City's Director of Finance to require that successful bidders provide a performance bond and a payment bond.

C. CAO Policy Memoranda.

1. CAO Policy Memorandum 8(r) establishes the competitive selection process and methodology for professional services contracts.
2. CAO Policy Memorandum 42(r) governs emergency bids for Public Work.
3. CAO Policy Memorandum 46(r) memorializes and governs the City's Disadvantaged Business Enterprise ("DBE") Program.
4. CAO Policy Memorandum 122(r) governs the contract routing process and requirements for all city contracts.
5. CAO Policy Memorandum 130 governs the City's policy and procedures for procurement protests.

III. Definitions

- A. "**Change Order**": Any contract modification that includes an alteration, deviation, addition, or omission as to a preexisting public work contract, which authorizes an adjustment in the contract price, contract time, or an addition, deletion, or revision of work. This definition can be found in La R.S. 38:2211(A)(3)(a).
- B. "**City**": The City of New Orleans.
- C. "**City Charter**": Home Rule Charter of the City of New Orleans.
- D. "**Contractor**": Any person or other legal entity who enters into a public contract. This definition can be found in La R.S. 38:2211(A)(4).

- E. **'Federal Contracts'**: Federal contracts relates to Grants by the Federal Government, e.g., FEMA, HUD, Treasury etc.
- F. **"Formal Bid"**: A solicitation submitted in a sealed envelope and in conformance with a prescribed format to be opened in public at a specified date and time in accordance to Public Bid Law.
- G. **"Informal Bid"**: A solicitation that is conveyed by a letter, fax, e-mail, telephone call, or other written document that does not require a formal sealed bid, public opening or other formalities described under Public Bid Law.
- H. **"Job Order Contract"**: A contract delivery method used to accomplish a large number of individual projects under a single master contract with a bidder who is licensed, bonded and general liability insured. Bidder agrees to a fixed period, fixed unit price, and indefinite quantity contract that provides for the use of job orders for Public Work or maintenance projects.
- I. **"Procurement Office"**: A City department that serves as the central purchasing authority for all City departments and agencies.
- J. **"Public Bid Law"**: Louisiana Revised Statutes Title 38 Sections 2211 through 2296.
- K. **"Public Work"**: Erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a Public Entity. This definition can be found in La R.S. 38:2211(A)(12). Demolition of a public facility constitutes a Public Work. Debris removal is a service and not a Public Work.
- L. **"Solicitation"**: The invitation to bid, fax, e-mail, letter, or any written document used to obtain bids for the purpose of entering into a contract.
- M. **"Specifications"**: The performance, equipment, plans, materials requirements and related contract terms and conditions in a Public Works contract. The specifications are incorporated as part of the Formal Bid or Informal Bid once issued.
- N. **"Requesting Department"**: A City department that is responsible for obtaining the Public Work needed.

IV. Policy

- A. Formal Sealed Bid. The City shall procure by Formal Bid a Public Work with a total value at \$150,000.01 and over. The City determines that this dollar amount constitutes the threshold or "contract limit" for the application of the Formal Bid procedure.
- B. Informal Bid. For a Public Work with a total value of \$150,000.00 or less, the City shall procure it by Informal Bid.

- C. Lowest Responsive and Responsible Bidder. In accordance with Public Bid Law and the City Charter, the City must award the Public Work contract to the lowest responsive and responsible bidder who had bid in accordance with the Solicitation. Exception(s) may apply (see Emergency Procedures described below or Informal Bid Procedure specifically under Attachment 1).
- D. DBE Program. The City's DBE program (codified in the City Code at Sections 70-456 through 70-465 and governed by CAO Policy Memorandum 46(R)) applies to a Public Work with a total value of \$15,000.00 and over. Exception(s) may apply (See City Code).
- E. Hire Nola Program. The City's Hire Nola program (codified in the City Code at Sections 70-496 through 70-503) applies to a Public Work with a total value of \$150,000.01 and over. Exception(s) may apply (See City Code).

V. Procedures

- A. Independent Cost Estimate ("ICE").
 - 1. In General. The Requesting Department is responsible for obtaining construction cost estimates from the licensed Architect or Engineer assigned ("A/E on record") to the Public Work. When there is no A/E on record, the Requesting Department will be responsible for creating an ICE that will consist of cost estimates generated by "RS Means", State-provided fee curves, comparison of historical data or similar indicia, or any other nationally recognized cost estimating database.
 - 2. Rate Parameters and Estimate. Rate parameters selected in RS Means should be from the current quarter, set for the New Orleans region, and set to "open shop pricing." The Requesting Department must include in the estimate all known and needed elements of construction, all known and needed services, and all known and needed testing.
 - 3. Modification and Approval. Prior to modifying a contract in effect, the Requesting Department shall seek the approval from the City's Project Delivery Unit ("PDU"). PDU's approval is conditioned upon the Requesting Department submitting a new ICE, new contract terms, available funding source and the rationale for the modification(s) to the contract. The Requesting Department must include all possible factors in the new ICE.
 - 4. Form. See Attachment 2.

- B. Informal Bid Procedure. The City shall follow the Informal Bid procedure for Public Work with a total value of \$150,000.00 or less. Said procedure is described in more details under Attachment 1 to this policy.
- C. Formal Bid Procedure. The City shall follow the Formal Bid procedure for Public Work with a total value of \$150,000.01 and over. Said procedure is described in more details under Attachment 1 to this policy.
- D. Emergency Procedures. Under certain circumstances, the City shall be allowed to deviate from the Formal Bid procedure or the Informal Bid Procedure. Please refer to CAO Policy Memorandum 42(r)
 - a. Formal Bid Procedure: Emergency or Extreme Public Emergency. In accordance with Public Bid Law (La R.S. 38:2212(P)), the City Code (codified under Sections 70-428 and 70-429), and CAO Policy Memorandum 42(r), the City can waive the requirement for public advertisement as well as the requirement to award a contract for Public Work to the lowest bidder in case of an emergency or extreme public emergency. Despite those exceptions to the Formal Bid procedure, the City must still comply with certain obligations established under the aforementioned State law, City Charter sections and CAO Policy Memorandum.
 - b. Informal Bid Procedure: Threat to public health, welfare, or public safety, or in the City's best interests. The Requesting Department must prepare a memorandum addressed to the CAO, CPO, and the City Attorney. In the said memorandum, the Requesting Department shall explain the nature of the threat or the City's best interests justifying the emergency, the list of contractors who have been asked or will be asked to bid, the quotes from contractors (if obtained), the source of funds, the estimated cost, and the expected completion date of the work. The memorandum will be supported by all relevant documentation. The Requesting Department will then submit its memorandum to the CAO, the CPO, and City Attorney for review and approval. Once approved by the three (3) aforementioned City representatives, the Procurement Office will maintain copies of the memorandum and related documentation.
- E. Protests. CAO Policy Memorandum 130 establishes the administrative procedures according to which contractors can file a protest with the CPO. The Procurement Office shall be responsible to render a decision on all protests pursuant to said policy memorandum.

VI. Job Order Contract

- A. In General. The City shall procure a Job Order Contract (JOC) for the City's general repair and renovation needs.

- B. Procurement and Property Management. The City's Department of Property Management shall be responsible for the procurement of a JOC by following procurement procedures at its disposal (See said procedures under Attachment 1). The City shall use said procedure to select no less than two (2) but up to five (5) contractors to provide support of work orders for projects.
- C. Limitation. The City shall use JOC only for Public Work or maintenance projects with a total value of \$150,000.00 or less.

VII. Design Professional Service

- A. Procurement. The procurement and selection of design professionals (also commonly called "A/E") are governed by State law (La R.S. 38:2318.1) as well as CAO Policy Memorandum 8(R) and Executive Order MJL 10-05.
- B. Role of the A/E. Scope and Limitation. Public Bid Law (La R.S. 38:2212 and 38:2212.7) explain the scope and the limits of the role of the A/E for Public Work.

VIII. Contract

- A. In General. In accordance with Public Bid Law and the City Charter, the City shall memorialize the award of a Public Work to the lowest responsive and responsible bidder into a written contract. The Requesting Department shall be responsible to route the necessary documentation to the City Attorney's Office for the preparation and the approval of the written contract.
- B. Terms and Conditions. The Solicitation must contain certain terms and conditions that have been reviewed and approved by the City Attorney's Office. Those terms and conditions will be incorporated by reference into the written contract. See Section X.B. for federally funded Public Work.
- C. Duration.
 - 1. Initial Term. The initial duration of the contract may either be specified in the specifications of the Solicitation or in the written contract.
 - 2. Extension. If it becomes necessary to extend the duration of the contract beyond its initial term, the contract may be extended by written change order.
- D. Modification of the Scope of the Contract.
 - 1. Change Order.
 - a. Difference between In-Scope and Out-of-Scope. A change order is within or outside the scope of the contract depending

on whether the change order alters or not the nature of the thing to be constructed and whether it is or not an integral part of the project objective.

- b. Contractual Provision. A Capital or Public Work contract shall contain a provision authorizing the issuance of change order(s) within the scope of the contract as specified in Public Bid Law.
- c. Writing and Details. A Change Order shall be in writing or in electronic format. It will detail the change(s) to the work, and/or its impact on the work schedule, and/or its effect on the contract scope and price.
- d. Signature. The Contractor and the City, or its design representative, shall sign a Change Order.
- e. Approval of Change Orders/Plan Changes Within the Scope of the Contract.
 - i. Up to \$10,000.00. The head of the Requesting Department shall have the authority to approve in writing the in-scope change order to a total value up to \$10,000.00.
 - ii. \$10,000.01 and over. The head of the Requesting Department and the CAO or Deputy CAO shall both approve in writing the in-scope change order to a total value of \$10,000.01 and over and up to the limits of 20 percent of total contract value. Plan Changes above 20 percent of the total contract value will be routed to the Chief Financial Officer and the assigned Review Committee for resolution.
 - iii. The Review Committee for Change Orders will consist of a designee from the following offices: Mayor's, CAO's, Deputy CAO's, CFO's, Project Delivery Unit's (PDU), Law and Supplier Diversity.
 - iv. The Review Committee has the authority to 1) Approve the Plan Change as presented by the Requesting Department with a CFO waiver with no changes, 2) Approve the Plan Change with recommended committee corrections to be executed by the Requesting Department, 3) Deny the Plan Change and re-compete the work described in a smaller procurement focused on DBE participation, and 4) Deny the Plan Change and re-procure the work.

- v. Steps to Take to Prevent Plan Changes are as follows:
 - 1) Ensure the Architectural and Engineering A/E firm provides an adequate design that encompasses the total scope of work. This will require the A/E participating with the Project Manager to conduct several field visits of the project site, 2) request pre-approval of Federal and Bond funds by the Field Construction Manager prior to any authorization for the vendor to start work on relating to pending Plan Changes and Change Orders, 3) Set time frame of 10 calendar days for A/E approvals of Plan Changes and 10 calendar days for each approval phase for City staff, 4) ensure A/E reviews, signs and approves all invoices prior to forwarding to Program Manager for City approval.
- vi. Any review or approval of Change Orders/Plan Changes should include a determination of whether the A/E firm or contractor committed an error or omission that resulted in the need for a Change Order/Plan Change. If it is determined that an error or omission caused the need for a Change Order/Plan Change, then it must be referred to the Law Department.

f. Recordation.

- i. Applicable Limits. The Requesting Department shall record the Change Order when:
 - (1) The amount of a single change order is (1) at least 10 % of the original contract amount and (2) at least \$10,000.00; OR
 - (2) The aggregate amount of all change orders to one contract is (1) at least 20% or more of the original contract amount and (2) at least \$10,000.00.
- ii. Location. The Requesting Department must record the Change Order in the Office of the Recorder of Mortgages in Orleans Parish not later than 30 days after the approval date of the Change Order. In addition, the Requesting Department shall record the original contract with the Change Order(s) if it was not previously recorded.

2. Plan Change and Field Change.

- i. Plan Change. Definition. The City's Department of Capital Projects, Public Works, Property Management, and Office of

Business & External Services (OBES) uses the term "Plan Change" in lieu of "Change Order."

- ii. Field Change. Definition. A "Field Change" authorizes the Contractor to immediately (1) initiate emergency work that is authorized by City personnel and/or Grant Manager or Construction Manager can approve on the spot, and/or (2) perform additional work that will be paid for by another public agency. The Construction or Grants Manager will receive pre-approval by the funding agency (Federal or Bonds) prior to giving authorization to start work by the Contractor.
- iii. Part of Plan Change. A Field Change will become part of a Plan Change before the Contractor can invoice the City.

IX. Federally Funded Public Work

- A. In General. When federal funds are used to procure a Public Work, the City shall comply with all applicable federal laws.
- B. Contractual Terms and Conditions. The Requesting Department and the Procurement Office shall ensure that the solicitations contain all applicable terms and conditions required by a federal agency in a contract. The said departments shall confer with the City Attorney's Office to discuss questions and issues relating to the required terms and conditions.
- C. Recovered (Recycled) Materials. The Requesting Department shall include in the Specifications the use of fully or partially recovered (recycled) materials to the greatest extent consistent with reasonable performance standards and price.
- D. SAM.
 - 1. Definition. "SAM" stands for System for Award Management. SAM is the Federal government's verification tool to ensure the vendors are in good standing. Contractors must be in current good standing with SAM whenever Federal funds may be received.
 - 2. Responsibility. Prior to awarding a Public Work to a bidder, the Procurement Office shall check SAM to verify that the apparent lowest bidder is registered in SAM and in good standing. The Requesting Department shall perform the same task prior to the renewal of a Public Work contract.
 - 3. Registration Issue. If the bidder is not registered with SAM or the bidder's registration has expired, the Procurement Office shall notify in writing the bidder to register within three (3) business days from the date of the written notification. In the event the apparent lowest bidder fails to register (even after being notified in writing) or does

not remain in good standing, the Procurement Office shall recommend going to the next apparent lowest bidder who is actively registered and in good standing in SAM.

4. Debarment. No debarred bidder/contractor shall be eligible for any award or renewal of a Public Work contract. No debarred bidder/contractor is a responsible bidder for a Public Work contract. This determination is regardless of amount of the Public Work.

E. Cost Reasonableness or Cost/Price Analysis.

1. In General. The Requesting Department shall make and document a determination of cost reasonableness or cost/pricing in the procurement files in connection with the procurement action. The Requesting Department shall provide this documentation at the time of submitting the "Bid Procurement Authorization Form – Construction" (see form under Attachment 2).
2. Price Analysis. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices, historical data, and similar indicia, together with discounts. The licensed A/E design professional's Probable Construction Cost estimate satisfies this requirement. Subsequent bid contracts resulting from the licensed A/E design professional's Probable Construction Cost shall be analyzed in accordance with Section F(3) below.
3. Cost Analysis. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability and allowability. To satisfy this requirement, the Requesting Department shall prepare and submit a memorandum containing the cost analysis to the Procurement Office with the bid tabulation. Documentation of full and open competition resulting in at least two bidders shall also satisfy this requirement.
4. Form. See Attachment 2.

X. **Bonds**

- A. In General. Public Bid Law and the City Charter contain the requirements to determine the various types (bid bond, performance bond, and payment bond), purposes, and amounts that applicable to Public Work procurements.
- B. Federally Funded Public Work and Bond(s). To the extent permitted by law, the City shall comply with all requirement(s) established by a federal agency for bonding in the event that the Public Work is subject to federal fund.

- C. Recordation. The Requesting Department shall be responsible for the recording of bonds, if necessary.
- D. Retention and Return of Performance and Payment Bonds. Except for the bid bond for which the Procurement Office is responsible of, the Requesting Department shall keep any originals of the performance and/or payment bond(s), if applicable, until the Public Work is satisfactorily completed. Once the Public Work is completed, the Requesting Department shall return the original(s) to the Contractor.

XI. Contract Monitoring and Accountability

- A. In General. The Requesting Department shall monitor and document the progress of the Contractor. Further, in accordance with City Code Section 70-434, the Requesting Department shall file at minimum one evaluation report of the Contractor's performance upon completion of the contract. The Requesting Department should also complete periodic evaluation report(s) throughout the duration of the Public Work.
- B. Procurement Office. The Procurement Office will maintain copies of those evaluations reports and supporting documentation.
- C. Future Procurements. The Requesting Department and any other department may use those reports for future procurements.

XII. Waivers

Except under certain limited circumstances (emergency and/or informal bid procedure, or other applicable laws, regulations, or policies), the City cannot waive requirements subject to Public Bid Law.

XIII. Inquiries

All inquiries regarding federal, state and/or local laws shall be directed to the City Attorney's Office. All other inquiries shall be directed to the Procurement Office.

XIV. Notes

All references to any Louisiana statute, Home Rule Charter provision, City Code section, City ordinance, or City policy memorandum are to the correct versions in effect as of the date at the top of this Policy Memorandum.

XV. Attachments

- A. Attachment 1 – Informal and Formal Bid Procedures
- B. Attachment 2 – Forms