



Mind Your [RF] Ps & Qs

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JARVIS FAY & GIBSON, LLP

LOCAL GOVERNMENT LAW

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MIND YOUR [RF] Ps & Qs

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I. INTRODUCTION

In the wild west of public contract procurement, requests for proposals (RFPs) and requests for qualifications (RFQs) are the outlaws—or at least they often seem to be treated that way. Unlike public bidding requirements which are specified in numerous statutes, there are few specific statutory requirements for when an RFP or RFQ must be used, the required contents of an RFP or RFQ, or how an RFP or RFQ process must be conducted.¹ Perhaps that explains why RFPs and RFQs are often treated—by both attorneys and laypersons alike—as though they are really not “legal documents.” As a result, in many cities, RFPs and RFQs are prepared and issued without adequate legal consultation or review. And the negative consequences that can and do ensue from that lack of legal oversight can be costly.

A. Overview

We wish to make the case that RFPs and RFQs are indeed full-fledged legal documents, and that RFP/RFQ documents and procedures should be subject to legal review and guidance. And we hope that our paper and presentation will provide practical information and resources to help city attorneys ensure that RFP and RFQ procurements are used under appropriate circumstances and in accordance with applicable law and best practices. Part I examines some threshold considerations, including terminology and general legal principles. Part II of this paper discusses when—and when not—to use an RFP or RFQ. Part III provides general recommendations of what to include in an RFP or RFQ, including the information and instructions for respondents, and the applicable procedures and legal limitations.

B. What are RFPs and RFQs and what’s the difference?

What do we mean by an RFP or RFQ, and what’s the difference between the two? Either an RFP or an RFQ—or both—may be used for a competitive procurement process, usually for services other than construction services, but they are not *bidding* procedures. An RFP generally invites proposals for providing services, where price may be one of several selection criteria. An RFQ invites statements of qualifications (SOQs), where choosing the most qualified service provider is the city’s paramount objective.² RFP/RFQ procurement allows for consideration of multiple,

¹ One noted exception are the RFQ and RFP requirements that apply to design-build procurement, including the provisions of Public Contract Code section 22160 et seq., which govern local agency design-build delivery (discussed further below).

² Understandably, and yet regrettably, informal requests for quotes are also referred to as “RFQs.” Obviously, this can create some confusion. If an “RFQ” is referenced, make sure it’s clear whether the subject is a request for *qualifications* or a request for *quotes*. In this paper, it only means a request for qualifications.

and sometimes subjective, selection criteria. By contrast, with public bidding it all boils down to submitting a bid—i.e., a lump sum price—and selection of the responsive bid from responsible bidders is based solely on the best price.

Sometimes, particularly for significant, high-profile procurements, a city may use a two-step process, by first using an RFQ process to narrow a pool of qualified respondents, then inviting only the qualified respondents to submit proposals pursuant to an RFP process. More often, we see combined hybrid RFQ/RFP procurements, in which an RFQ and RFP are combined in a single document which might request a price, proposal, and information on experience and qualifications. Sometimes that is clear from the title of the document (e.g., “RFQ/RFP”), but often a hybrid might be called an RFQ, even if it also functions as an RFP, or vice versa. For purposes of this paper, however, we will distinguish between RFPs and RFQs.

A simple at-a-glance comparison of the primary public contract procurement methods, including RFPs and RFQs, is attached as **Appendix A**.

C. Legal concerns and principles

There are numerous statutes governing public bidding requirements and an abundant body of case law construing those statutes. By comparison, neither the Legislature nor the courts have had quite so much to say about RFPs and RFQs. However, there are a few legal limits and principles that city attorneys should consider when reviewing a draft RFP or RFQ.

1. Don’t use RFP/RFQ forms and procedures if public bidding is required.

If public bidding is required by statute or the city’s own municipal requirements, an RFP or RFQ should not be used. While this may seem obvious, use of RFP or RFQ forms and procedures instead of bidding forms and procedures occurs *frequently*, but generally (we think) due to a lack of understanding of the substantial difference between these procurement methods rather than an intentional failure to comply with public bidding requirements. However, the consequences of using the wrong procurement forms and procedures can be significant. It is well-established under California law that if a public contract is not awarded in compliance with the applicable legal requirements, it is void as a matter of law:

“Certain general principles have become well established with respect to municipal contracts, and a brief statement of these principles will serve to narrow the field of our inquiry here. The most important one is that **contracts wholly beyond the powers of a municipality are void**. They cannot be ratified; no estoppel to deny their validity can be invoked against the municipality; and ordinarily no recovery in *quasi* contract can be had for work performed under them. It is also settled that the mode of contracting, as prescribed by the

municipal charter, is the measure of the power to contract; and a contract made in disregard of the prescribed mode is unenforceable.”³

There are two intertwined takeaways from this frequently cited statement. First, a municipal contract is void and unenforceable if it is not awarded in compliance with generally applicable state laws. Second, if a city’s own charter or municipal code requires public bidding for a given type of procurement, that has the same effect as a statutory requirement.

If *bidding* is required for a procurement, whether pursuant to state law or a city’s own municipal requirements, a contract awarded by use of an alternative procurement method, e.g., RFP or RFQ procurement, will be void and unenforceable as a matter of law. And any bidding should be implemented with proper bid forms and bidding procedures. RFP/RFQ forms and procedures should not be treated as an interchangeable alternative when bidding is required.

2. Proposals and SOQs must be evaluated based on the stated criteria.

While RFP and RFQ procurement allows for some degree of subjective criteria, e.g., “best value” or “best qualified” selection, the evaluation process itself cannot be open-ended. Only the stated criteria for selection may be considered when proposals or SOQs are evaluated and ranked. In *Eel River Disposal & Resource Recovery, Inc. v. County of Humboldt* (2013) 221 Cal.App.4th 209 (*Eel River*), the county improperly deviated from its own stated evaluation criteria and procedures in its RFP by adding a *new* criterion (local preference) during the evaluation process.

3. Submittals in response to an RFP are not subject to immediate disclosure.

Unlike bids, which generally must be opened and announced in public, and which are subject to immediate disclosure as public records,⁴ the California Supreme Court has held that proposals submitted to a public agency in response to an RFP are not subject to disclosure under the California Public Records Act⁵ until the agency has completed negotiations with proposers.⁶ The court applied the “catchall” exception set forth in Government Code section 6255, and concluded that the public interest in protecting an agency’s bargaining position during contract negotiations outweighs the public interest in disclosing proposals before the negotiations are

³ *Miller v. McKinnon* (1942) 20 Cal.2d 83, 88 (emphasis added); see also *Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104 (holding that an oral amendment to a consulting services contract was not enforceable because the city charter required that all contracts be in writing).

⁴ In *Bid Protests: Minimizing and Managing Liability*, presented at the City Attorneys’ Department Spring Conference on May 6, 2015, cities were advised to respond promptly to requests for copies of bids in the very different context of public bidding for public works contracts. See <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2015/2015-Spring-Conference/5-2015-Spring-Claire-Gibson-Bid-Protests-Minimizing.aspx> [last accessed July 31, 2019].

⁵ Govt. Code section 6250 et seq.

⁶ *Michaelis, Montenari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1072-75.

concluded. This is an important exception since it is not unusual for a respondent to ask for copies of its competitors' proposals, often for purposes of trying to improve its relative bargaining position.

II. WHEN—AND WHEN NOT—TO USE AN RFP OR RFQ

A. Check general legal and municipal requirements.

As a starting point, city staff should comply with both generally applicable state law and the city's own municipal requirements to determine whether an RFP or RFQ could or should be used. As stated above, RFP/RFQ forms and procedures should *not* be used for a procurement that is subject to public bidding requirements, e.g., the general municipal requirements for public bidding of "public projects,"⁷ the requirements for formal or informal bidding under the Uniform Public Construction Cost Accounting Act (UPCCAA),⁸ or a city's own charter or municipal code.

In most cases, while it is not unlawful, it is likely to be overkill to use an RFP or RFQ for routine procurement of supplies or equipment, where the best price is the only objective. A well-written (i.e., reasonably clear and specific) request for price quotes or even a public bidding procedure is often the most efficient procurement method for obtaining the best price for goods. Government Code section 54202 provides the following regarding procurement of supplies and equipment:

"Every local agency shall adopt policies and procedures, including bidding regulations, governing purchases of *supplies and equipment* by the local agency. Purchases of supplies and equipment by the local agency shall be in accordance with said duly adopted policies and in accordance with all provisions of law governing same. No policy, procedure, or regulation shall be adopted which is inconsistent or in conflict with statute."

Obviously, in keeping with section 54202, a city should follow its own policies and procedures for procurement of supplies and equipment. However, sometimes it's a good idea to revisit policies and procedures that have been enacted pursuant to section 54202 to make sure that they comply with current laws and make sense as a practical matter.

So when *should* an RFP or RFQ be used?

⁷ Public Contract Code section 20160 et seq.

⁸ Public Contract Code section 22000 et seq., including section 22034 (informal bidding) and section 22037 (formal bidding).

B. An RFQ and RFP must be used for statutory design-build procurement.

An RFQ *and* an RFP *must* be used—and in that order—pursuant to the local agency design-build requirements set forth in Public Contract Code section 22160 et seq. Section 22164(b) specifies what must be included in the RFQ, and section 22164(d) specifies what must be included in the subsequent RFP.

A city using design-build procurement for a public project must ensure that: (1) the project qualifies for design-build procurement;⁹ (2) that it first uses an RFQ, as specified, to pre-qualify or short-list design-build entities;¹⁰ and (3) that it next issues an RFP, as specified, to solicit proposals from pre-qualified or short-listed design-build entities.¹¹ Even if a city already has generic RFQ or RFP templates for general use, these templates should be carefully adapted when used for a design-build procurement to ensure that they fully comply with these detailed statutory requirements.

A guide for preparing an RFQ and RFP for design-build services in compliance with Public Contract section 22160 et seq. is attached as **Appendix B**.

C. An RFP and/or RFQ should be used for “architectural and engineering services.”

In 2000, California voters approved Proposition 35, amending the State Constitution to make it easier for state and local agencies to contract out with private entities for architectural and engineering services. Known as the “Public Works Project Act of 2000” (the 2000 Act), this ballot initiative added Article XXII to the State Constitution, and added Government Code section 4529.10 et seq. For purposes of applying these provisions, “architectural and engineering services” is defined broadly to include “all architectural, landscape architectural, environmental, engineering, land surveying, and construction project management services.”¹²

The core requirements under the 2000 Act for public procurement of private architectural and engineering services (as defined above), are set forth in Government Code section 4529.12, which states (emphasis added):

All architectural and engineering services shall be procured pursuant to a fair, competitive selection process which prohibits governmental agency employees from participating in the selection process when they have a financial or business relationship with any private entity seeking the contract, and the procedure shall require compliance with all laws regarding political contributions, conflicts of interest or unlawful activities.

⁹ See Public Contract Code section 22161(g)(1) regarding qualifying projects, and section 22162 regarding prior authorization of governing body and \$1,000,000 project threshold.

¹⁰ See Public Contract Code section 22164(b) regarding RFQ requirements, and section 22164(c) regarding the “enforceable commitment” to use a “skilled and trained workforce.”

¹¹ See Public Contract Code section 22164(d) regarding RFP requirements.

¹² Government Code section 4529.10; emphasis added.

Interestingly, the 2000 Act makes no mention of bidding, RFPs, RFQs, or of any particular procurement method, other than the general requirement that the selection process be both “fair” and “competitive.”¹³ However, an RFP or RFQ procurement procedure which complies with the minimal requirements of the 2000 Act, is generally regarded as both appropriate and sufficient for compliance. While public bidding *could* be used instead of RFP or RFQ procurement, as a matter of practice, an RFP or RFQ procedure affords much greater flexibility to the awarding agency, including the ability to include subjective criteria, e.g., “best value” instead of the lowest price.

It is important to note that the “fair, competitive selection process” is required for “all” of the listed services. Unlike most public bidding laws, there is no minimum dollar threshold for these procurement requirements.

Whether a city seeking “architectural or engineering services” uses an RFQ, an RFP, a two-step RFQ and RFP, or a hybrid RFQ/RFP, is going to be a matter of preference that may be informed by the nature of the services needed, the magnitude of the project, and the city’s own charter or municipal code requirements. For example, for architectural services required on an on-call basis and not limited to a single project, an RFQ which focuses on the relevant types of experience and available staffing might be an ideal option. Alternatively, for design services required for a particular project where lump sum price comparisons are an important consideration, an RFP might be a better choice. For major, high-profile projects, a two-step RFQ/RFP process, similar in general terms to the approach required for design-build procurement, may be appropriate for casting a wide net for the RFQ stage, then narrowing it to the best-qualified for the RFP stage. A single, hybrid RFQ/RFP process can provide a more expedient approach to getting the benefits of both an RFQ and an RFP.

D. RFP or RFQ procurement may be appropriate for services not subject to bidding laws.

An RFP and/or RFQ procurement is often appropriate for other types of services that are not subject to public bidding requirements, e.g., consulting services, other professional services, and even maintenance services. It bears emphasizing that cities should follow their own requirements (charter, municipal code, or purchasing policy) even when there are no specific statutory requirements.

Government Code section 37103 (last amended in 1949) confers broad authority on cities with respect to certain professional services (emphasis added):

¹³ Curiously, even though the 2000 Act has been in effect for nearly 20 years, many private firms and even some public agencies labor under the mistaken impression that procurement of architectural and engineering services must comply with the more restrictive two-step qualifications-based procedures set forth in Government Code section 4525 et seq. (known as the “little Brooks Act”). See *Professional Engineers v. Kempton* (2007) 40 Cal.4th 1016 for further discussion of the impact of the 2000 Act on Government Code section 4525 et seq.

“The legislative body may contract with any specially trained and experienced person, firm, or corporation for special services and advice in financial, economic, accounting, *engineering*, legal, or administrative matters.

It may pay such compensation to these experts as it deems proper.”

Unless the city’s own requirements require use of a particular procurement procedure for the services encompassed under section 37103, any of these services could be awarded *without* using an RFP, RFQ, or any other type of competitive procurement procedure—with the noted exception of “engineering” services (emphasized above), which are subject to the later-enacted 2000 Act, as previously discussed, which applies to “architectural and engineering services.”

However, even though section 37103 does not require any particular procurement procedure, cities often elect to use an RFP or an RFQ for these types of consulting services—even when it is not required under the city’s own requirements. There’s nothing wrong with that. In fact, use of a basic RFP or RFQ procedure, even if it is not expressly required, can ensure that a city is making an informed choice and can also provide transparency, including evidence of the basis for selection.

E. An RFP or RFQ should be used if required by a funding source.

Grant funding for professional services, including federal funding for local projects, may require use of an RFP and/or RFQ procurement process. If so, a city should ensure that it fully complies with all of the funding agency requirements *in addition to* any applicable state law or municipal requirements. In the event of a conflict or inconsistency between federal, state, or municipal requirements, the most restrictive requirements will generally apply. However, it is always best to check with the funding agency representative in the event of a potential conflict between different agency requirements. For example, for street and transit projects funded by state or federal funds administered under the Caltrans’ *Local Assistance Procedures Manual*, the procurement procedure may depend on the scope of services.¹⁴

F. Choosing between an RFP and an RFQ.

If there are no statutory, municipal, or funding condition requirements that specify use of an RFP or RFQ, selection between these two related procurement methods will likely be based on the nature of the procurement itself. For example, an RFP is often the preferred option for a *project-based procurement* where the specific scope of services is known in advance and one of the primary criteria will be the best *lump sum price* for providing the specified services (although experience and qualifications may also be considered). By comparison, an RFQ is often preferable for *ongoing or on-call* professional or consulting services, e.g., legal or financial

¹⁴ See Chapter 10 of 2019 *Local Assistance Procedures Manual*, available from the Caltrans Division of Local Assistance, at <https://dot.ca.gov/programs/local-assistance/guidelines-and-procedures/local-assistance-procedures-manual-lapm> [last accessed July 31, 2019].

services, where there is no single, defined project and the *qualifications and experience* of the consultant are the primary criteria (although hourly rates may also be considered).

III. WHAT TO INCLUDE IN AN RFP OR RFQ

Given that there are very few legal limitations or requirements for RFPs and RFQs, cities have some flexibility in terms of what to include in the request. However, just as RFP/RFQ documents and procedures should not be used for bidding, bidding documents and procedures should not be used for an RFP or RFQ. It is not advisable to convert public works bidding documents into an RFP or RFQ by the simple expedient of changing “bid” to “proposal” or “SOQ,” and “bidder” to “proposer” or “respondent.” Bidding and RFP/RFQ procurement are simply too different for this to work well; the end result is inevitably a clunky, confusing mess. We recommend that cities develop (or improve) their own RFP and RFQ templates that can be tailored depending on the nature of the particular procurement. There are some basic, essential provisions that should be included in both RFPs and RFQs, and this Part III will provide some general recommendations, including sample provisions.

At the outset, there are some general considerations to keep in mind when drafting an RFP or RFQ. First, RFPs and RFQs should include all information that will inform potential respondents about the project or services and how to submit a response. Second, an RFP or RFQ should be structured to allow for an apples-to-apples comparison of responses. Third, the nature of the procurement will play a large role in what to include in an RFP or RFQ. For project-based procurements that will be awarded for a lump sum price, it is especially important to be specific about the project and required services, and to provide relevant information that may affect pricing. Otherwise, the service provider may later claim—and with good reason—that it is entitled to additional payment for services or tasks that were not mentioned in the RFP, and therefore not included in the original price.

RFPs and RFQs are typically structured in the following manner:

1. Introduction and Information
2. Scope of Services
3. Contents of the Response
4. Submittal Instructions
5. Evaluation Criteria
6. Selection and Award
7. Disclaimers, Reservation of Rights, and Conflicts of Interest

Following this standard organization, Subpart A, below, addresses the information and instructions that should be included in an RFP or RFQ (Items 1 through 4). Subpart B then addresses procurement procedures and administration of the procurement, as well as legal limitations (Items 5 through 7).

For purposes of illustration, we will use two examples from the fictional California city of Hometown. Hometown is issuing a project-based RFP for architectural services to design its new Recreational Center. Hometown is also issuing an RFQ for ongoing services for recreational program development.

A. Information and Instructions for Respondents

An effective RFP or RFQ should inform the potential respondent. It should specifically identify the type of services it is seeking, and if it is project-based, provide information about the project. It should also ensure that potential respondents are provided or have access to all relevant information. And as a practical matter, it should specify what must be submitted, how, and by when.

1. Introduction and Information

Respondents need to know what the city is seeking by way of the request. They should not have to guess or rely on assumptions. And it is in the city's best interest to ensure that potential respondents have the information necessary to provide quality responses.

a. Introductory Provisions

An RFP or RFQ should start with an introduction that clearly identifies the general purposes of the RFP or RFQ, including the type of services required, such as the following introductory paragraph for a project-based RFP:

SAMPLE PROVISION – RFP INTRODUCTION

The City of Hometown, California ("City"), requests proposals ("Proposals") from qualified architectural firms ("Respondents") to provide architectural design services ("Services") for the City's planned new Recreational Center Project ("Project"). The Project location, including the planned size, siting, and required components is more fully described in Attachment A, Project Description, which is attached hereto and incorporated herein.

This sample introductory paragraph is packed with information, including the type of services needed and the specific purpose. A similar approach should apply to an RFQ for ongoing services:

SAMPLE PROVISION – RFQ INTRODUCTION

The City of Hometown, California ("City"), requests statements of qualifications ("SOQs") from qualified recreational program consultants ("Respondents") for providing recreational program development services on an as-needed basis ("Services") at the City's new Recreational Center. The Services and the general

programming needs are more fully described in Attachment A, Scope of Services, which is attached hereto and incorporated herein.

Again, this simple introduction includes some of the key basic information. Subsequent introductory provisions may include additional general information that is relevant to the procurement, e.g., the size of the City or pertinent history, the budget for the project or financial constraints, and specific needs or concerns. For example, in its RFQ for a recreational programming consultant, the City of Hometown may wish to specify that it operates a year-round recreational program, and that the program needs range from preschool classes to senior center activities. Relevant details matter.

Relevant background information for an RFP/RFQ may also include staff reports, geotechnical reports, preliminary scoping documents, maps, diagrams, environmental documents, and so on. In its RFQ for architectural design services, the City of Hometown could provide information on relevant Council approvals and direction regarding the new Recreational Center Project, the City's design review requirements, required environmental mitigations, etc. Relevant information may either be attached to the RFP or RFQ or made accessible online via a city's website, with access information provided in the RFP or RFQ.

b. Additional Information

(1) Pre-Submittal Meetings

In addition to the written information provided in the RFP or RFQ, a city can also schedule a meeting with prospective respondents in advance of the submittal deadline, so they can meet directly with responsible city staff and ask questions about the RFP or RFQ, the project, or the services. Often this can be an opportunity for the city to identify gaps or ambiguities in its RFP or RFQ, and to then amend the RFP or RFQ by addendum. It's best if potential problems can be addressed before the responses are due.

If a pre-submittal meeting is scheduled, it is important to specify whether the meeting is mandatory or optional. The advantage of mandatory attendance is that all respondents will have the same information. The disadvantage is that it could limit the field of qualified respondents, if an otherwise qualified respondent is unable to attend. Unless there is a compelling reason to require mandatory attendance, it may be preferable to simply *encourage* attendance, as shown in the sample provision below. But if attendance is mandatory, the RFP or RFQ should clearly state the consequence of non-attendance.

SAMPLE PROVISION – RFP PRE-PROPOSAL MEETING

A Pre-Proposal Meeting will be held on March 11, 2020, from 2:00 to 3:00 p.m., in City Hall Conference Room B at 1234 Pleasant Street. Prospective Respondents are strongly encouraged to attend and will have the opportunity to

ask questions about the RFP, including the submittal requirements and procedures, the Services, and the Project.

Staff should ensure that each attendee at a pre-submittal meeting signs in with their name and the name of the party they represent. That can be useful if an attendee later claims it was unaware of information specifically addressed at the pre-submittal meeting. In addition, the city should establish a protocol to make sure that all potential respondents receive or know how to access subsequent addenda, e.g., by posting addenda on the city's website.

(2) Requests for Information

Even if a pre-submittal meeting is scheduled, it is also advisable to establish a required procedure for potential respondents to submit requests for information or objections to the RFP/RFQ requirements or procedures. In order to maintain a level playing field, and to ensure that respondents are not questioning individual staff members (and receiving disparate information), the procedures should require that all requests for information be submitted in writing to a single point of contact, as indicated in the following sample provision:

SAMPLE PROVISION – REQUESTS FOR INFORMATION AND ADDENDA

Questions or objections relating to the RFQ, the RFQ procedures, or the required Services may only be submitted via email to JSmith@Hometown.ca.us by March 18, 2020. Any questions or objections that are not submitted within the time and manner specified will be deemed waived. The City will not be bound by the oral representations of any City employees or officials. The City reserves the right to issue addenda responding to such questions or objections, which will become part of the RFQ. Addenda will be posted on the City's website at: <http://www.Hometown.gov/BusinessOpportunities/RecreationalProgrammingSOQ>. Each Respondent is solely responsible for reviewing any and all addenda before submitting its SOQ.

Of course the city should ensure that it has a clearly established *internal* protocol for reviewing and responding—in writing—to the written requests for information or objections, including a clear record of all inquiries and chain of authority as needed for responses.

2. Scope of Services

In addition to an understanding of the city's needs and relevant background information, respondents need a clear understanding of what will be expected of them. A well-thought-out and carefully written scope of services is the heart of any RFP or RFQ for services. Obviously, each scope of services is going to differ depending on the services and/or the project, so it is not possible to create a generic template for the scope of services. However, an RFP or RFQ template can include prompts to assist staff in fleshing out the specifics for a given scope of services. This can include suggestions for identifying the various stages that may be involved,

e.g., for design development, or specific tasks or subtasks that may be required, including deliverables.

Often the scope of services that is attached to the RFP or RFQ is later attached to and incorporated into the resulting agreement, so it is important that the scope of services is reviewed as if it is a contract document. As such, it is preferable if the scope of services is written using clear and complete sentences, that specify what the consultant must do and by when. While this requires slightly more effort than a bullet-point list of sentence fragments, it is generally worth the effort to ensure that it clearly communicates the city's requirements.

Again, for agreements that will be awarded for a lump sum price, respondents must be fully informed of what services and tasks are included in the services. Otherwise, the selected consultant can later claim that it is entitled to additional compensation for requirements or limitations that were not provided in or with the RFP or RFQ.

3. Contents of the Response

While the specific information requested may vary from one procurement to another, the required contents for a response should be tailored to serve two closely related objectives: (1) obtaining the information necessary to make an informed decision, and (2) obtaining information that closely corresponds with the stated selection criteria (discussed below in Subpart B).

For example, an RFP or RFQ will usually seek basic information about the respondent, e.g., the name, location, and type of business; the business structure, including owners and management. An RFP will often request a lump sum price for providing the services, whereas an RFQ might require submission of an hourly rate schedule. RFPs and RFQs often ask for information about the key personnel that would be assigned to provide the services, using a provision such as the following:

SAMPLE PROVISION – KEY PERSONNEL INFORMATION

In part E of your SOQ, list each of the key personnel who will be assigned to provide the Services, including the following information for each:

1. Name and title
2. Years with your firm
3. Education and qualifications, including degrees, certifications, and licenses (provide license numbers)
4. Summarize relevant experience in relation to the Services
5. Identify proposed role in providing the Services, e.g. project manager, primary architect

An RFP or RFQ might require information on some or all of the following areas, depending on what is important to the city (though this list is by no means exhaustive):

- General information about the responding firm
- Summary of qualifications, e.g., education, training, licensing
- Summary of experience with similar services and/or projects
- Proposed approach to providing the services
- References and contact information
- Evidence of financial stability and insurance
- Lump sum price and/or hourly rate schedule

It is generally not helpful to ask for information that is of limited interest or importance: padding an RFP or RFQ with requests for details that are not germane to the city's review and selection process will make it more laborious for potential respondents to prepare a response, and more tedious for the city to review and compare the responses.

4. Submittal Instructions

Respondents need to know exactly what they must do and by when in order to submit a response. The RFP or RFQ should include submittal instructions that address the *what*, *when*, and *how* for submitting the response.

a. *What* must be submitted?

Apart from specifying whether a proposal (for an RFP) or an SOQ (for an RFQ) must be submitted, the RFP or RFQ should identify exactly what information must be provided in the response, and in what order to facilitate comparisons during the review phase. For example, the city may want to require a cover letter that summarizes the key elements of the proposal or SOQ, or completion of a proposal form provided by the city. The following sample provision is fairly typical for an RFP that also seeks information on experience and qualifications.

SAMPLE PROVISION – RFP PROPOSAL CONTENTS

Proposal Contents. Each Proposal must be submitted in compliance with the requirements of this RFP. Clarity and brevity are preferable to volume. Each Proposal must include the following, organized as Sections A through E:

A. Cover Letter. Section A of the Proposal must be a cover letter containing a summary of the Proposal. It must also include the name, address, phone and email of Respondent's representative.

B. Executive Summary. Section B must summarize the key provisions of the Proposal, including proposed key personnel, price, and proposed schedule for providing the Services.

C. Respondent's Qualifications. Section C must include the number of years Respondent has been in business and a description of Respondent's qualifications, including contact information for general references.

D. Project Experience. Section D must identify projects Respondent has completed in the last 10 years that are similar in scope and nature to the City's Recreational Center Project. For each project, provide the project name, project owner, location, description of the services provided, final project cost, and contact information for reference.

E. Proposal. Section E must include Respondent's proposal for performing the Services identified in the Scope of Services, including proposed schedule and sequencing, assignment of key personnel, and planned measures to ensure cost-effective delivery of the Services and Project completion.

b. *When are submittals due (and other key dates)?*

Often the date and time for submitting responses will be featured prominently on the cover page of an RFP or RFQ. But other dates and deadlines may be relevant as well, e.g., a pre-submittal meeting (if applicable), the last date to submit a request for information, when the city will announce its selection, when the agreement is likely to be awarded, and even when the services must be provided. Often an RFP or RFQ will include a schedule—and ideally, such as in the following sample provision, it should be identified as the *planned* schedule, and one that may be subject to change, just to leave some wiggle room for when things do not go as planned.

SAMPLE PROVISION – PLANNED RFP SCHEDULE

The following schedule is provided for planning purposes based on current information. However, all dates are subject to revision, including the Proposal Deadline, and may be amended by addenda to this RFP:

Activity	Planned Date
RFP Issued	March 4, 2020
Pre-Proposal Meeting	March 11, 2020
Request for Information Deadline	March 18, 2020
Proposal Deadline	April 1, 2020
Interview Finalists	Week of April 13, 2020
Notice of Selection	April 20, 2020
Council Award of Agreement	April 28, 2020
Commence Design Services	May 15, 2020

c. How are responses to be submitted?

Clear information should be provided for how hard copy and/or electronic copy responses should be submitted, including identifying information, as shown in the following sample provision. Whether to require a hard copy and/or an electronic copy is a matter of preference.

SAMPLE PROVISION – SOQ SUBMITTAL INSTRUCTIONS

The Respondent must submit five paper copies of the SOQ in a sealed envelope AND email an electronic (PDF) copy of the SOQ. The paper copies and the electronic copy must be received by the City by or before the SOQ Deadline, as defined above. “Recreational Programming SOQ” should be written in the subject line for the email submittal AND on the lower left of the sealed envelope for the hard copy submittal, with the submittals addressed as follows:

For Electronic Submission:
JSmith@Hometown.ca.us

For Hard Copy:
City Hall
1234 Pleasant Street
Hometown, CA 94444
Attn: City Clerk

B. Procurement Procedures and Legal Limitations

The second major component in drafting an RFP or RFQ includes determining and specifying the procurement procedures, including evaluation criteria and the process for selection and award. This also includes adding all necessary disclaimers and legal limitations to protect the city and ensure effective administration of the procurement process from request to award.

1. Evaluation Criteria

The city should first determine what criteria it will use to evaluate and compare responses to an RFP and RFQ, and the resulting RFP or RFQ should clearly identify that criteria. The evaluation criteria should be tailored to the specific services and concerns and should reflect what matters most for a particular procurement. Is it price? Hourly rates? Experience with similar projects? It is important to make these determinations in advance because an RFP or RFQ can only be

evaluated based on the stated criteria and procedures.¹⁵ A city should not apply any criterion that is not specifically stated in the RFP or RFQ.¹⁶

Before drafting the evaluation criteria, the city should consider the extent to which either *objective* or *subjective* criteria—or both—should be used. Objective criteria include price, hourly rates, and possession of required credentials or licensing. Subjective criteria might include consideration of relevant experience or proposed approach to project delivery. Use of strictly objective criteria can reduce exposure to challenges based on alleged favoritism. However, subjective criteria can potentially allow for a greater degree of flexibility and nuanced considerations. The following are fairly typical criteria:

- Price/rates
- Qualifications, e.g., degrees, training, certifications, or licenses
- Experience providing similar services
- Responsiveness
- References

The evaluation criteria should be sufficiently detailed to enable meaningful comparisons, as reflected in the following sample provision:

SAMPLE PROVISION – EXPERIENCE CRITERION

Experience: Describe the Respondent’s experience designing recreational facilities. For each relevant past project, provide the following information:

1. The title, size, location, cost, and nature of the project
2. Respondent’s role (e.g., whether it was the architect of record or a subconsultant, and the design phases that were involved)
3. Respondent’s key personnel for that project
4. Green building or LEED standards used for the project

While an agreement awarded pursuant to an RFP or RFQ process could be awarded based on price or rates alone, inclusion of additional relevant selection criteria can provide more flexibility in making the best choice when cost is not the sole concern.

¹⁵ *Eel River, supra*, 221 Cal.App.4th at 236-40.

¹⁶ *Cypress Security, LLC v. City and County of San Francisco* (2010) 184 Cal.App.4th 1003, 1011-15 [holding that a public entity’s failure to use correct and exclusive criteria to award a public contract pursuant to an RFP may constitute an abuse of discretion].

2. Selection and Award

a. Basis for selection

An RFP or RFQ will often indicate how the stated criteria will be applied in order to rank the responses. While this is not a legal requirement, it is a sensible practice to ensure a fair, competitive process that will not be tainted by favoritism or even the appearance of favoritism. This is typically accomplished by assigning a value to each criterion either in terms of a raw score or a weighted percentage.

To determine the relative value to assign to each criterion, the city should first prioritize and rank the criteria based on the city's specific priorities. For example, if the city has a tight budget, the price or hourly rates could be paramount. If the city is seeking a consultant with specific niche experience, the respondents' relative experience might be the primary criterion.

Tables 1 and 2 below are examples of how a response might be scored using raw scores and weighted scores, respectively.

Table 1 - Raw Score

General qualifications	1 - 10 points
Experience with similar projects	1 - 10 points
Price	1 - 10 points

The benefits of a raw score approach is its relative simplicity and ease of application. Each submittal is scored in each category using the assigned point range. For example, if five proposals are submitted, the proposal with the lowest price will get the highest number of points for the "price" criterion, and the proposal with the highest price will get the lowest points for that criterion. The submittal with the highest total score is the winner.¹⁷

Table 2 - Weighted Score

General qualifications	20%
Experience with similar projects	35%
Price	45%

¹⁷ It is important to determine the scoring scale relative to the specific review process that will be used. For example, scoring responses based on a 1-5 or 1-10 scale can be useful if multiple reviewers are going to individually review responses and then average or total the results. If a panel is going to score as a group on a consensus basis or if the city expects numerous responses, a wider range (e.g. 1-25) might be helpful to avoid ties.

Using a weighted score can be trickier and somewhat less transparent. A typical approach is to rank each response in each category on a 1-10 basis, then multiply the raw score by applicable weight and total the results. For example, if Respondent A receives a raw score of 1 for price (because its price was highest), that will be multiplied by 45 to produce a weighted score of 45 points for price. If Respondent B received a raw score of 5 for price (because its price fell squarely in the mid-range), its weighted score for price will be 225. Weighted scoring can operate to amplify minor differences between responses, which can be useful if the criteria and assigned weights are carefully considered in advance.

b. Review and Award

The city's planned process for review of the submittals and award of the agreement should also be included in the RFP or RFQ. Again, disclosure of the review and award process ensures transparency and avoids opportunities for or the appearance of favoritism. This should include identifying *who* will evaluate the responses and *when* the contract will be awarded, if at all. For a major, high-profile procurement, the city may appoint a panel of evaluators that includes experts in the field from outside the city. For more routine, small-scale procurements, city staff can usually handle the evaluation.

Regardless of who is doing the reviewing, the process can be limited to review of the written responses, or the city can also short-list the top contenders based on the submittals, then conduct interviews with the finalists in order to make the final selection. Interviewing the finalists can be particularly helpful if city staff are not already familiar with the respondents and want to get a better sense before making a final recommendation for award. The potential pitfalls of an interview stage are (1) introducing a subjective element to the scoring, and (2) providing disparate information to the competing respondents, either of which can subject a city to allegations of favoritism. Therefore, it is important to establish clear parameters for such interviews, and to instruct the reviewer(s) to ensure consistency for each interview.

SAMPLE PROVISION – RFP SELECTION PROCESS

Proposals will be reviewed on April 2, 2020, by a five-person panel made up of four members of City staff and the Director of Parks and Recreation, using the scoring method described above. Each of the three Respondents whose Proposals receive the highest scores will be invited to participate in a 30-minute interview to be conducted by the review panel during the week of April 13, 2020. To ensure fairness during the interviews questions from the Respondents will not be considered with the sole exception of any questions that are intended to clarify questions from the review panel. An additional 1-10 points may be added to each Proposal score following the interviews, based on the Respondent's demonstrated understanding of the City's needs and evidenced ability to provide Services within the City's planned schedule. The Agreement will be awarded, if at all, by City Council resolution at the regular Council meeting on April 28, 2020.

The city should also consider documenting its scoring process using simple scoresheets that exactly track the criteria and scoring instructions provided in the RFP or RFQ. If the results are challenged, the scoring sheets can provide evidence that the city complied with its stated criteria.

3. Disclaimers, Reservation of Rights, and Conflicts of Interest

Like any other legal document an RFP or RFQ should include appropriate disclaimers and reservations of rights, such as the following:

SAMPLE PROVISION – DISCLAIMERS AND RESERVATION OF RIGHTS

Upon receipt, each Proposal becomes the sole property of the City and will not be returned to the Respondent. Each Respondent is solely responsible for the costs it incurs to prepare and submit its Proposal. The City reserves, in its sole discretion, the right to reject any and all Proposals, including the right to cancel or postpone the RFP or the Project at any time, or to decline to award the Agreement to any of the Respondents. The City reserves the right to waive any immaterial irregularities in a Proposal or submission of a Proposal. The City reserves the right to reject any Proposal that is determined to contain false, misleading, or materially incomplete information.

Conflict of interest limitations should also be addressed in the RFP or RFQ. For those involving procurement of “architectural and engineering services” pursuant to the 2000 Act, the RFP/RFQ should include a provision such as the following to comply with Government Code section 4529.12 (quoted on page 5, above):

SAMPLE PROVISION - CONFLICT OF INTEREST

City of Hometown employees are prohibited from participating in the selection process for this RFQ if they have any financial or business relationship with any Respondent. This RFQ process will be conducted in compliance with all laws regarding political contributions, conflicts of interest, or unlawful activities, including, but not limited to, the City’s Conflict of Interest Policy.

In addition, it is important to be aware of potential Government Code section 1090 violations in the RFP/RFQ context. Section 1090 provides that public agency officers and employees “shall not be financially interested in any contract made by them in their official capacity....” However, case law—including some recent published decisions—and Fair Political Practices

Commission opinions have construed this prohibition to apply to *consultants* who have the potential to exert considerable influence over contracting decisions.¹⁸

The fact pattern to watch for is one in which a consultant that is involved in preliminary activities that will affect a future contract. For example, an architect involved in preliminary scoping for a planned project will not be eligible for award of the future contract because that architect was involved in determining the scope of the future contract. The consequences of running afoul of the 1090 prohibition, is that the resulting contract will be void as a matter of law.¹⁹ Applying this to our hypothetical, if Hometown had awarded an earlier contract to an architectural firm to assist with the preliminary planning and scoping for the Recreational Center Project, that firm should have been advised at the outset that it would be barred from consideration for the future full design contract.

4. Protest Procedures

While contract awards pursuant to an RFP or RFQ are less likely to be subject to protests than conventional bidding, protests can occur, usually involving an unsuccessful respondent who claims that the successful respondent is less qualified, or that the city failed to follow its stated procedures, or both. While there's an argument that including protest procedures in an RFP or RFQ may actually encourage protests, the counterargument is that if the city doesn't already have protest procedures in its municipal code, it will have little leverage to manage the protest, including timing deadlines. A streamlined protest provision, such as the following, can make it easier to deal with any protests that do arise, and to do so without derailing or delaying the award process:

SAMPLE PROVISION – PROTEST PROCEDURES

Any protest challenging the City's selection or the selection process must be submitted within five business days following the City's issuance of the Notice of Selection. The protest must be submitted in writing via email to JSmith@Hometown.ca.us, and must clearly specify the basis for the protest. The protest will be reviewed by the Director of Parks and Recreation in consultation with the City Attorney, and their determination on the protest is final. No public hearing will be held on the protest. Time being of the essence, the City reserves the right to proceed with award of the Agreement and commencement of the Services notwithstanding any pending protest or legal challenge.

¹⁸ See, e.g., *California Taxpayers Action Network v. Taber Construction, Inc.* (2017) 12 Cal.App.5th 115; *McGee v. Balfour Beatty Construction, LLC* (2016) 247 Cal.App.4th 235; and *Davis v. Fresno Unified School Dist.* (2015) 237 Cal.App.4th 261.

¹⁹ At this writing, Assembly Bill 626 is currently pending to amend Government Code section 1091.5 to provide an exception for engineers, architects, landscape architects, land surveyors, and planners under specified circumstances.

If a protest procedure is used, it is best to structure it so that the protest can be fully resolved before the city council is scheduled to take action to award the contract based on staff's recommendation. While issuance of a "Notice of Selection" (or similar notification) is not a legal requirement, it can be of practical use for (1) informing the respondents of the intended recommendation, and (2) establishing the applicable time period for submitting a protest.

5. Form of Agreement

Finally, the RFP or RFQ should attach the form of the agreement using a provision such as the following:

SAMPLE PROVISION – FORM OF AGREEMENT

A copy of the City's standard Consulting Services Agreement ("Agreement") is attached as Exhibit C to this RFQ and incorporated herein. By submitting a Proposal, the Respondent agrees that it will enter into the Agreement using the attached form with no exceptions to the form of the Agreement.

This streamlines the procurement by providing the contract terms up front and eliminating the possibility of protracted contract negotiations with the selected respondent. In addition, all respondents are fully informed as to the contract requirements, including insurance and indemnity requirements.

V. CONCLUSION

While this paper addresses many of the most frequent issues that arise in the context of RFPs and RFQs in the wild west of public contract procurement, it is by no means exhaustive. The authors hope that the specific recommendations and sample provisions prove to be useful resources, and that the primary takeaways include (1) a recognition that RFPs and RFQs should be subject to legal review like any other legal document; (2) a better understanding of how RFPs and RFQs can and should be used for procurement of non-construction services; and (3) an appreciation of the importance of tailoring each RFP and RFQ to the particular procurement based on the city's objectives and priorities. RFPs and RFQs really do not have to be outlaws after all.

APPENDICES:

A - Public Contract Procurement Methods Compared

B - Design-Build RFQ and RFP Requirements

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Public Contract Procurement Methods Compared

This at-a-glance comparison of the primary procurement methods available for municipal contracts is intended solely as a *general* reference based on applicable state law, in order to illustrate the differences between procurement methods. *A city should always follow its own procurement requirements, even if they are more restrictive than general state law requirements.*

	Typically used for:	Award based on:	Notice:
Bidding	Public works projects*	Lowest responsive bid/lowest responsible bidder	Newspaper publication may be required per statute, e.g., Public Contract Code sections 20164 and 22037
Request for Quotes	Goods	Lowest price	Generally requires selection of enough qualified vendors to ensure competitive quotes
Request for Proposals	Non-public works services (often project-based)	Usually best price and other factors	Generally sent to known potential respondents; no newspaper publication required or needed
Request for Qualifications	Non-public works services (often for ongoing or on-call services)	Usually best qualified and other factors	Generally sent to known potential respondents; no newspaper publication required or needed
Discretionary selection (non-competitive)	Certain professional services, e.g., financial, economic, accounting, legal, or administrative services per Govt. Code section 37103	City discretion	N/A - Discretionary selection; may be sole sourced

* General law cities that are not subject to the Uniform Construction Cost Accounting Act (Public Contract Code section 22000 et seq.) (“UPCCAA”) should use the definition of “public project” in Public Contract Code section 20161. Cities that are subject to UPCCAA should use the definition of “public project” provided in section 22002(c). The two definitions are similar, but not *exactly* alike.

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Design-Build RFQ and RFP Requirements

The current procurement requirements for local agency design-build projects are set forth in Public Contract Code section 22160 et seq.¹ This statutory scheme requires a two-step process which includes issuing a request for qualifications (RFQ) followed by a request for proposals (RFP), each of which must meet certain mandatory requirements, mostly set forth in section 22164. This Appendix summarizes the basic statutory requirements for local agency design-build RFQs and RFPs—based on laws current as of August 2019.

When drafting an RFQ or an RFP for a design-build project, the city should consider all of the generally applicable recommendations in Part III of *Mind Your [RF] Ps and Qs*, in addition to the statutory requirements outlined in this Appendix.

A. Threshold Requirements

There are three threshold matters that should be addressed well in advance of preparing the RFQ and RFP.

1. Qualified Project

First, the project itself must qualify for design-build procurement. For cities, that means the project must (a) be a council-approved project, (b) in excess of \$1,000,000, that (c) meets the definition of “project” in section 22161(g)(1), which applies to city and county design-build procurement:

“(1) Except as specified in subdivision (h), for a local agency defined in paragraph (1) of subdivision (f), ‘project’ means the construction of a building or buildings and improvements directly related to the construction of a building or buildings, county sanitation wastewater treatment facilities, and park and recreational facilities, but does not include the construction of other infrastructure, including, but not limited to, streets and highways, public rail transit, or water resources facilities and infrastructure. For a local agency defined in paragraph (1) of subdivision (f) that operates wastewater facilities, solid waste management facilities, or water recycling facilities, ‘project’ also means the construction of regional and local wastewater treatment facilities, regional and local solid waste facilities, or regional and local water recycling facilities.”

2. Conflict of Interest Guidelines

Second, the city must establish conflict of interest guidelines, as specified in section 22162(c):

¹ All statutory references in this Appendix are to the Public Contract Code unless otherwise specified.

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“The local agency shall develop guidelines for a standard organizational conflict-of-interest policy, consistent with applicable law, regarding the ability of a person or entity, that performs services for the local agency relating to the solicitation of a design-build project, to submit a proposal as a design-build entity, or to join a design-build team. This conflict-of-interest policy shall apply to each local agency entering into design-build contracts authorized under this chapter.”

The key requirement to note here is that any outside consultant that prepares the preliminary project documents that are used for the RFQ and RFP—the “bridging documents” discussed below—is ineligible to submit a proposal as a design-build entity (DBE) or to later join the design-build team.

3. Project Requirements (Bridging Documents)

Finally, the city must prepare a set of documents setting forth the scope and estimated price of the project.² The documents—informally referred to as “bridging documents”—may include the size, type, and desired design character of the project, performance specifications covering the quality of materials, equipment, workmanship, preliminary plans or building layouts, or any other information necessary to describe the city’s needs.³

These bridging documents are critical, since they serve as the basis for the RFQ/RFP procurement and will subsequently serve as the basis for the design-build contract. Typically, this includes preliminary designs and outline specifications at the 25% stage relative to design development, and should include all of the “must haves” for the project, including size, site requirements, performance standards, green building standards (if applicable), etc. Failure to fully specify the mandatory project requirements at this stage can lead to costly change orders at the design-build stage.

B. Design-Build RFQ

Once the threshold requirements are met, the city must issue an RFQ to prequalify or short-list responding DBEs.⁴ Therefore, before it even begins preparing the RFQ, which invites statements of qualifications (SOQs), the city must decide whether it will prequalify or short-list DBEs. Typically for prequalification, an SOQ must achieve a predetermined minimum score in order to be eligible to participate in the RFP stage. By contrast, for short-listing, the top scoring respondents (typically the top three or five depending on the number of SOQs expected) become eligible to participate in the RFP stage without applying a minimum score requirement.

² § 22164(a)(1).

³ *Ibid.*

⁴ § 22164(b).

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The theoretical advantage of prequalifying is the ability to weed out unqualified DBEs, but a process that is too restrictive could result in limiting competition. With short-listing the top scoring DBEs can submit proposals without having to achieve a minimum score. Regardless of whether the city uses prequalification or short-listing, the following minimum statutory requirements apply to a design-build RFQ:

- ✓ The RFQ must identify the basic scope and needs of the project or contract, the expected cost range, the methodology that will be used by the city to evaluate proposals, the procedure for final selection of the design-build entity, and any other information necessary to inform respondents of the opportunity. (§ 22164(b)(1).)
- ✓ The RFQ must also state the significant factors that the city reasonably expects to consider in evaluating qualifications, including technical design and construction expertise, acceptable safety record, and all other non price-related factors. (§ 2164(b)(2).)
- ✓ Pursuant to section 22164(b)(3), the RFQ must include a standard template request for SOQs prepared by the city that requires the following information from respondents:
 - For certain types of entities, a listing of all of the shareholders, partners, or members known at the time of SOQ submission who will perform work on the project;
 - Evidence that the members of the design-build team have completed, or demonstrated the experience, competency, capability, and capacity to complete projects of similar size, scope, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the project, and a financial statement that ensures that the design-build entity has the capacity to complete the project;
 - The licenses, registration, and credentials required to design and construct the project, including, but not limited to, information on the revocation or suspension of any license, credential, or registration;
 - Evidence that establishes that the design-build entity has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance;
 - Information concerning workers' compensation experience history and a worker safety program;
 - For certain types of entities, a copy of the organizational documents or agreement committing to form the organization; and
 - An acceptable safety record.

Section 22164(c) sets forth the “skilled and trained workforce” requirement that applies to *all* statutory design-build projects, and provides the alternatives for meeting this requirement (emphasis added):

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“(c) (1) A design-build entity shall not be prequalified or shortlisted unless the entity provides an *enforceable commitment* to the local agency that the entity and its subcontractors at every tier will use a *skilled and trained workforce* to perform all work on the project or contract that falls within an apprenticeable occupation in the building and construction trades, in accordance with Chapter 2.9 (commencing with Section 2600) of Part 1.

(2) This subdivision shall *not* apply if any of the following requirements are met:

(A) The local agency has entered into a project labor agreement that will bind all contractors and subcontractors performing work on the project or contract to use a skilled and trained workforce, and the entity agrees to be bound by that project labor agreement.

(B) The project or contract is being performed under the extension or renewal of a project labor agreement that was entered into by the local agency prior to January 1, 2017.

(C) The entity has entered into a project labor agreement that will bind the entity and all its subcontractors at every tier performing the project or contract to use a skilled and trained workforce.

(3) For purposes of this subdivision, ‘project labor agreement’ has the same meaning as in paragraph (1) of subdivision (b) of Section 2500.”

For cities that do not have a project labor agreement in place pursuant to subdiv. (2)(A)-(3), one approach to establishing the required “enforceable commitment,” is to require each responding DBE to warrant that submission of an SOQ constitutes an enforceable commitment to use a skilled and trained workforce as required by section 22164(c). We think it is questionable whether any such “commitment” can be legally binding and enforceable before the parties have entered into a contract, but until the courts provide guidance on this provision, this may be a reasonable approach for cities that are not and will not be using a project labor agreement.

C. Design-Build RFP

After the city has prequalified or short-listed entities through the RFQ process, the city must prepare an RFP that invites the qualified DBEs to submit competitive sealed proposals. Before preparing the RFP, the city must decide if it will award the contract on the basis of “low bid” or “best value.”⁵ If “low bid” is used as the final selection method, the competitive bidding process must result in lump-sum bids by the DBEs, and award must be made to the lowest responsible bidder.⁶ However, if “best value” is used as the final selection method, competitive proposals must be evaluated by using only the criteria and selection procedures specifically identified in the RFP.⁷ In our experience, most cities opt for “best value,” since that affords greater flexibility

⁵ § 22162(a).

⁶ § 22164(e).

⁷ § 22164(f).

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during the selection process, and is one reason design-build procurement is attractive in the first place. Depending on which selection method is used, the RFP must meet the following requirements:

- ✓ It must identify the basic scope and needs of the project or contract, the estimated cost of the project, the methodology that will be used by the city to evaluate proposals, whether the contract will be awarded on the basis of low bid or best value, and any other information necessary by the city to inform the entities of the contracting opportunity. (§§ 22162(a), 22164(d).)
- ✓ The RFP must also state the significant factors that the city reasonably expects to consider in evaluating proposals, including cost or price and all non price-related factors, and the relative importance or weight assigned to each of the factors. (§ 22164(d).)
- ✓ If a best value selection method is used, the city may reserve the right to request proposal revisions and hold discussions and negotiations with responsive DBEs, in which case the city must specify in the RFP and publish separately or incorporate into the RFP applicable procedures to be observed by the city to ensure that any discussions or negotiations are conducted in good faith. (§ 22164(d).)

Clearly, the “best value” selection method includes some additional requirements. The city must evaluate and weigh, as deemed appropriate by the city, the following minimum factors:

- price, unless a stipulated sum is specified;
- technical design and construction expertise; and
- life-cycle costs over 15 or more years.⁸

The city may also hold discussions or negotiations with entities using the process articulated in the RFP.⁹ When the evaluation is complete, the city must rank at least three entities based on a determination of value provided.¹⁰ Award must be made to the responsible DBE whose proposal is determined by the city to have offered the best value to the public.¹¹

D. Conclusion

While this outline is not exhaustive as to all requirements that can and should be included in a design-build RFQ or RFP, we hope it will provide guidance for cities that are contemplating design-build procurement by providing a summary narrative of the minimum requirements and general sequencing.

⁸ § 22164(f)(1).

⁹ § 22164(f)(2).

¹⁰ § 22164(f)(3).

¹¹ § 22164(f)(4).