

Date February 12, 2007

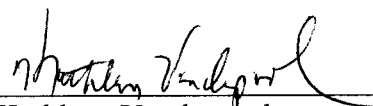
APPROVING THE SUMMARY OF BIDDING/CONTRACTING PROCESS CHANGES
FOR CONSTRUCTION OF PUBLIC IMPROVEMENTS
FEBRUARY 2007

WHEREAS, at the request of the City Council, Engineering and Legal Department Staff have reviewed City bidding and contract policies for public improvements and recommend the revisions detailed in the attached Summary of Bidding/Contracting Process Changes for Construction of Public Improvements February 2007.

NOW, THEREFORE, BE, AND IT IS HEREBY RESOLVED BY THE CITY COUNCIL OF THE CITY OF DES MOINES, IOWA: That the revisions to City of Des Moines bidding and contract policies for public improvements as included in the attached Council Communication and detailed in the attached Summary of Bidding/Contracting Process Changes for Construction of Public Improvements February 2007, which includes the competitive bid process revisions, new competitive quotation process, revised change order administration policy, updated contract compliance program, new early release of retainage policy, proposal revisions to simplify the bidding process, and revised safety policy, be and are hereby approved for all City of Des Moines public improvement projects; and the City Engineer is directed to implement and administer said policy and process revisions.

(Council Letter Number 07-062 attached)

Moved by _____ to adopt.

FORM APPROVED: 
Kathleen Vanderpool
Deputy City Attorney



COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
COLEMAN				
HENSLEY				
KIERNAN				
MAHAFFEY				
MEYER				
VLISSIS				
TOTAL				

MOTION CARRIED APPROVED

Mayor

CERTIFICATE

I, DIANE RAUH, City Clerk of said City hereby certify that at a meeting of the City Council of said City of Des Moines, held on the above date, among other proceedings the above was adopted.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal the day and year first above written.

City Clerk

**Summary of Bidding/Contracting Process Changes
for
Construction of Public Improvements
February 2007**

A. Policy Revisions associated with new Chapter 26, Iowa Construction Bidding Procedures Act, Code of Iowa

The 2006 Iowa Legislature enacted House File 2713 which is a comprehensive rewrite of Iowa's competitive bidding laws, and is applicable to all contracts entered into by public owners effective January 1, 2007. This section is an overview of House File 2713 which created a new Chapter 38 of the Iowa Code, entitled Iowa Construction Bidding Procedures Act. In January 2007, the Des Moines Legal Department learned that the Iowa Code editor changed the code chapter number for the "Iowa Construction Bidding Procedures Act" from "38" to "26". Chapter 26 replaces the competitive bidding provisions of Chapter 384, which applied to cities, and by extension in Chapter 331 to counties and created new competitive bidding law, which now applies to a "governmental entity" which by definition means the state, political subdivisions of the state, public school corporations, and all officers, boards, or commissions empowered by law to enter into contracts for the construction of public improvements, excluding the state board of regents and the state department of transportation.

This section is based on information obtained from the "Construction Bidding Procedures Workshop Series", which was a program jointly sponsored by: American Council of Engineering Companies, Associated General Contractors, Iowa Chapter of the American Public Works Association, Iowa League of Cities, Iowa State Association of Counties, master Builders of Iowa, and Mechanical Contractors Association of Iowa. The principal speaker was Terry Timmins, Associated General Counsel for the Iowa League of Cities.

Part I: Competitive Bidding Process for Public Improvements

Former Section 384.102 of the Iowa Code provided that when the estimated cost of a public improvement exceeded \$25,000, the city had to advertise for sealed bids and hold a public hearing on the plans, specifications, form of contract and cost estimate before entering into a contract to construct a public improvement. Chapter 26 of the Iowa Code clarified the definition of "public improvement", and raised the public competitive bid limit and hearing threshold from \$25,000 to

- \$57,000 for highway, bridge, and culvert projects.
- \$100,000 for other public improvements also called "vertical infrastructure".

Iowa Code also provides for the adjustment of these dollar limits in Section 314.

The competitive bidding process (for public improvements with estimated costs exceeding these competitive bid limits) as set forth in new Chapter 26 is essentially the

same process as former Sections 384.95 through 384.102, (for public improvements with estimated costs exceeding \$25,000), which was previously followed by the City of Des Moines. The Chapter 26 process includes the following:

1. **Preparation of plans and specifications and cost estimate.** Section 26.3.2 provides that a licensed architect or engineer is required to prepare the plans and specifications and calculate the estimated total cost of the proposed improvement. Section 26.4 states that the procurement of architect or engineering services is not subject to the competitive bidding procedures of Chapter 26.
2. **Notice to bidders.** The competitive bidding process commences with publication of a notice to bidders as provided in Section 26.7, which includes the following changes:
 - a. **Change in publication period for notice to bidders.** Formerly, Section 384.96 required the notice to bidders to be published not less than 4 nor more than 45 days before the date for filing of bids. Given this code requirement, the Des Moines City Council authorized the publication of the notice to bidders as part of the roll call ordering construction of the project and fixing the date for receiving of bids and public hearing. Des Moines typically had a 2-week bid period so an example bid period be:
 - o February 6 – Draft Council Communication due in City Manager’s Office by noon.
 - o February 7 – Roll Call deadline to City Clerk for February 12 Council meeting
 - o February 12 – Council approves roll call ordering construction
 - o February 14 – Notice to bidders published in Des Moines Register
 - o February 21 – Notice of public hearing published in Des Moines Register
 - o February 27 – Bids publicly opened
 - o March 12 - Council receives and files bids, designates lowest bidder, and holds the public hearing on the plans, specification, form of contract, and engineer’s estimate.

New Section 26.3 provides that the notice to bidders must be published more than 20 but not more that 45 days before the date for filing of bids. For the above example, to comply with the more than 20 days (21 days) required by Section 26.3, the notice to bidders would need to be published in the Des Moines Register on February 6, which is the day before the deadline to submit the roll calls to the City Clerk for the February 12 Council meeting. Therefore, staff recommends that the City Council authorize the City Engineer to publish the notice to bidders (which establishes the date for receiving of bids) prior to the City Council meeting at which the Council orders construction and officially sets the date for receiving of bids. Without this minor change, the bid period would need to be extended from 2-weeks to 3-weeks; however, to meet scheduled City Council meetings the award of the contract would need to be delayed two weeks from March 12 to March 26.

- b. **Change in content of the notice to bidders.** Formerly, Section 384.97 stated that the notice must include certain items including a lengthy statement regarding the nature of the bid security. Section 26.8 now defines the bid security and Section 26.7 requires that the notice simply state “That each bidder shall accompany its bid with bid security as defined in Section 26.8 and as specified by the governmental entity.” The City Engineer will make this administrative revision, which greatly reduces the length of the publication and will save money on publications.
3. **Notice of public hearing on plans, specification, form of contract and cost estimate.** The public hearing on the plans, specification, form of contract and cost estimate must be held before the governing body can enter into contract for construction of a public improvement and allows the public a chance to appear before the governing body to ask questions and provide comments concerning the project. Chapter 26 did not change the requirements of the notice of the public hearing.
4. **Bid security required with bids.** Chapter 26 changed the text of the notice to bidders regarding bid security; however, the requirement remains unchanged that each bidder’s bid must be accompanied with bid security. Section 26.8 outlines the requirements and defines acceptable bid security. For Des Moines contracts, the requirements remain unchanged and bid security will be released by the City Council as part of the roll call to designate the lowest responsible, responsive bidder.
5. **Opening and consideration of bids.** The requirements for opening and consideration of bids, new Sections 26.10 and 26.11, remain unchanged from prior law. Section 26.11 provides that the duty of receiving and opening bids and announcing the results can be delegated to the city manager, clerk, engineer, or other public officer. The Des Moines City Council has previously delegated these duties in Section 94-196, Opening of bids, of the Des Moines Municipal Code, to the city engineer, deputy city attorney, and city clerk. No change is required.
6. **Public hearing on plans, specification, form of contract, and cost estimate.** The governing body must hold a public hearing, in accordance with Section 26.12, on the plans, specification, form of contract and cost estimate before the governing body can enter into contract for construction of a public improvement. This public hearing allows the public a chance to appear before the governing body to ask questions and provide comments concerning the project. Chapter 26 did not change the requirements of the public hearing.
7. **Award of contract to the lowest responsive, responsible bidder.** Section 26.9 makes one substantive change in the award of contract. Prior Code Section 384.99 provided that contract must be awarded to the lowest **responsible** bidder. New Section 26.9 requires that the contract must be awarded to the bidder submitting the lowest **responsive, responsible** bid. Section 26.10 provides that the governing body may award the contract to the bidder submitting the lowest responsive, responsible bid, or may reject all bids. A **responsible bid** is a bid submitted by a contractor who is capable of performing the work. A **responsive bid** is a bid in which the bidder agrees to do everything required by the plans and specifications and other bid documents without any conditions. The statutory

language regarding **responsive** is new; however, it reflects the rulings of many court decisions. The City of Des Moines has followed these court decisions and has been awarding to the lowest responsible, responsive bidder for some time; therefore no change is necessary.

Part II: New Competitive Quotation Process for Public Improvements

House File 2713 also created a New Competitive Quotation Process for Public Improvements found in Section 26.14, which applies only to vertical infrastructure projects where the estimated cost is less than the competitive bid limit (currently \$100,000) yet greater than a lower threshold (currently \$57,000). Section 26.14 is silent on the process for awarding construction work for either vertical infrastructure projects or highway, bridge, and culvert projects where the estimated cost is less than \$57,000.

Under 26.14 the governmental entity is required to:

1. Solicit quotations from at least two contractors and provide
 - a. Description of work to be performed
 - b. Plans and specifications if required by Chapters 542B or 544A
 - c. A site visit for prospective bidders
2. Designate the time, place, and manner for filing quotations, which may be received by mail, fax, or e-mail.
3. Award the contract to contractor submitting the lowest responsible, responsive quotation. Section 380.4 Code of Iowa requires the passage of a resolution by the governing body to approve the expenditure of more than \$25,000 on a public improvement.
4. Governmental entity may also submit a quotation; if no quotations are received from contractors, or if the governmental entity submits the lowest quotation, the governmental entity may authorize its employees to perform the work.

On August 21, 2000, under Roll Call No. 00-3525, the City Council received and filed a process to be used by the Engineering Department for award of contract for construction of a public improvement with an estimated cost less than \$25,000, which is also known as the "Informal Bid Process". As stated above, former Section 384.102 provided that when the estimated cost of a public improvement exceeded \$25,000, the city had to advertise for sealed bids and hold a public hearing on the plans, specifications, form of contract and cost estimate before entering into a contract to construct a public improvement. Former Section 384.102 was silent on the process when the estimated cost was less than \$25,000. The informal bid process outlined in Roll Call No. 00-3525 basically meets the requirements of new Section 26.14 except for the application of the dollar thresholds.

Engineering Department Staff recommends that informal bid process outlined in Roll Call No. 00-3525 and as modified below be used on all public improvement projects where the estimated construction cost is less than the competitive bid threshold in accordance with Section 314 of the Iowa Code, which is currently:

- \$57,000 for highway, bridge, and culvert projects.
- \$100,000 for other public improvements also called vertical infrastructure

The City of Des Moines informal bid process on all public improvement projects where the estimated construction cost is less than the competitive bid threshold shall be administered by the City Engineer and shall be as follows:

1. The Engineering Department shall prepare plans, specifications, contract documents, and Engineer's estimate for the construction of the public improvement.
2. Said plans, specifications, proposal, and contract documents will be issued to contractors that normally bid on City of Des Moines projects of similar nature.
3. Contractors shall be required to submit written proposals on or before a stated time, date, and location as established by the City Engineer. Proposals may be submitted as sealed bids, mail, fax, or e-mail as stated in the instruction to bidders for the work.
4. The bid time, date, and location as established by the City Engineer will be posted on the Engineering Department website at the same site where bid information for other public improvements is posted.
5. Notice to bidders and notice of public hearing will not be published in the Des Moines Register, as neither is required by Iowa Code.
6. The City Engineer will post a list of plan holders for the project on the Engineering Department website at the same site where plan holder information for other public improvements is posted.
7. Bids received will be opened by the City Engineer (or designee) at the specified time, date, and place.
8. Said bids and the tabulation of bids will be presented to the City Council, or Airport Board, to receive and file.
9. The City Engineer will determine the lowest responsible, responsive bidder and recommend to the City Council, or the Airport Board, that said bid be accepted or all bids rejected.
10. If the City Engineer recommends acceptance of the lowest bid, Engineering Staff will secure execution of the contract, as well as the performance, payment, and maintenance bond, for the public improvement by the lowest responsible, responsive bidder for presentation to the City Council, or Airport Board, for approval and authorization by the Mayor, or Airport Board Chairperson, to sign on behalf of the City of Des Moines. Funding for the improvement will be identified and the method of financing will be presented for approval.
11. Engineering Department staff will provide inspection and contract administration for the work similar to other public improvement projects, including partial payments, change orders, and final acceptance by the City Council, or Airport Board.

Part III: Early release of retainage when project is substantially complete.

Existing Section 573.12, Iowa Code, provides that payments made under contracts for the construction of public improvements, shall be made on the basis of monthly estimates of labor performed and materials delivered as determined by the project architect or engineer. The public corporation shall retain from each monthly payment not more than 5% of that amount. Existing Section 573.14, Iowa Code, provides that funds provided for in Section 573.12 shall be retained by the public corporation for a period of 30 days after completion and final acceptance of the improvement. If at the end of the 30-day period claims are on file as provided, the public corporation shall continue to retain double the amount of claims on file and the remaining balance shall be released and paid to the contractor.

New Section 26.13 now provides that payments made by a governmental entity for the construction of public improvements and highway, bridge, or culvert projects shall be made in accordance with the provisions of Chapter 573, except as provided in Section 26.13. Section 26.13, Early release of retained funds, which states:

At any time after all or any part of the work on the public improvement or highway, bridge, or culvert project is **substantially completed**, the contractor may request the release of all or part of the retained funds owed. The request shall be accompanied by a sworn statement of the contractor that, ten calendar days prior to filing the request, notice was given as required by subsection 7 to all known subcontractors, sub-subcontractors, and suppliers.

The new law establishes four “triggers” that determine if a project can be deemed “substantially complete” and eligible for the timely or early release of partial retainage. Pursuant to the new law, a project is deemed substantially complete at the first date on which any of the following occurs:

1. The project has been substantially completed in general accordance with the terms and provisions of the contract.
 - * 2. The project is substantially complete so that the governmental entity can occupy or utilize the public improvement or designated portion of the public improvement for its intended purpose.
 3. The public improvement or the highway, bridge or culvert project has been designated substantially complete by the architect or engineer authorized to make such a certification, or the authorized contract representative.
 - * 4. The project is substantially complete when the governmental entity is occupying or utilizing the public improvement for its intended purpose.
- * These triggers DO NOT APPLY to highway, bridge or culvert projects.*

Under Section 26.13, the Governmental Entity has the following rights and responsibilities:

- Upon receipt of the contractor’s request, governmental entity shall release all or part of the retained funds at the time of the next monthly payment, or within 30 days, whichever is sooner.

- If the governmental entity does not release the retained funds within 30 days of when payment becomes due, interest will begin to accrue at prime plus one percent per year until the amount is paid.
- The governmental entity has the right to retain 200 percent of the value of work remaining to be done when the contractor's request is received, as determined by the governmental entity's contract representative.

This new law will require the City of Des Moines to release retainage to the contractor with the next partial payment, or within 30 days, if requested by the contractor and the project is "substantially complete" in accordance with the above triggers; instead of being released and paid 30 days after City Council acceptance of the project by roll call, which includes authorization to release the retained funds. In order to comply, the retainage must be handled like any other construction partial payment for the project; therefore, the City Engineer and the Finance Director need to be authorized to make payment without separate City Council approval. Staff recommends that the City Engineer and Finance Director be authorized to release retainage on a public improvement contract in accordance with Chapter 26 and associated administrative rules, and make payment to the contractor in the same manner as a partial payment for a public improvement contract.

B. Additional Public Improvement Policy Revisions

Engineering and Legal Department Staff have reviewed City bidding and construction policies at the request of the City Council and propose the following recommendations.

Part I: Proposal Revisions to simplify bidding process.

Engineering Department Staff has researched the bids received in 2005 and 2006, and examined statistical trends to determine where bidders were making errors on their proposals. Approximately 6% of the bids were not read, which basically fell into two categories:

- Failure to identify DBE contracts made prior to bid. Staff has reviewed the Contract Compliance program, which includes the City's DBE Program. Recommendations on revisions are included in Part IV of this report.
- Fatal errors in the bid security. Bid Security is required by State law and is not subject to revision by the City.

The bidders in 2005 and 2006 also made errors resulting in their bids being read under advisement approximately 8% of the time, which basically fell into four categories:

- 15% of the errors were from failure of the bidder to provide their Public Registration Number as issued by the Iowa Commissioner of Labor pursuant to Section 91C.5 of the Iowa Code. Iowa Code does not require Des Moines to monitor the Public Registration Number; however, does require that all contractors doing construction in Iowa be registered. Recommendation: The City Engineer will delete the proposal requirement for the bidder to submit its Public Registration Number, and instead Engineering Staff will verify that the bidder is registered with the Iowa Division of Labor.

- 15% of the errors were from failure of the bidder to provide their company owner, president, or CEO. This proposal requirement is for the Engineering Department to obtain information to properly prepare the Council Communication and Roll Call where Council has required this name and title information.
Recommendation: The City Engineer will delete the proposal requirement for the bidder to provide their company owner, president, or CEO name and title, and instead Engineering Staff will contact the low bidder to obtain this name and title information if not known.
- 25% of the errors were from failure of the bidder to notarize their proposal or sign certifications. No revisions can be made, as these are requirements of the State Code or certifications required by state or federal funding.
- 45% of the errors were from failure of the bidder to properly identify subcontractors on the proposal. This is a City Council requirement that was enacted years ago in an attempt to limit bid shopping of subcontractors after the City opens the bids. Bidders have continually voiced concern about this requirement with the additional stress and opportunity for errors that are created by the last minute inclusion of this data on the proposal. Recommendation: Delete the proposal requirement to identify subcontractors over \$25,000 on the proposal and replace it with a requirement that the low bidder is required to provide a list of all subcontractors to the City Engineer within 24 hours after notification of apparent low bid. **Based on comments received from City Council Members since the January 24th Workshop, Staff is withdrawing this proposed revision. The current City Council policy on identification of subcontractors over \$25,000 on the proposal will not be changed.**

Part II: Revised Safety Policy.

The Engineering, Public Works, and Legal Department Staff have been reviewing the safety standards and specifications given the recent court decision against the City of Des Moines. Staff has revised the Supplemental Specification to the SUDAS Urban Standard Specifications to reflect the Court's ruling. Recommendation: Engineering will include a new Section 4.11E to the Supplemental Specification to the SUDAS Urban Standard Specifications. The Engineering Department will make available a copy of the City of Des Moines Safety Plan to the Contractor when the contract is awarded. It is the Contractor's sole responsibility to provide, or make available, this safety information to all its Subcontractors. The City of Des Moines Safety Plan will be made available on the Engineering Department website and is also available upon request from the Engineering Department.

Part III: Change Order Administration Policy.

The City of Des Moines Supplemental Specification to the SUDAS Urban Standard Specifications include in each public improvement project include the following

statements regarding execution of change orders by the Jurisdiction (City of Des Moines).

SECTION 1030 – Contractual Provisions, 1.13 – Change Orders, B. – Written Orders: Add the following to the end of the section:

Execution by the Jurisdiction shall be as follows:

1. City of Des Moines or Des Moines International Airport projects. The authority of the Des Moines City Manager and the Des Moines City Engineer to approve change orders shall be limited to those change orders which will cost \$10,000 or less. Change orders for work to cost more than \$10,000 shall be approved by the Contracting Authority, being either the Des Moines City Council or the Des Moines International Airport, prior to the payment of the work provided for under the change order.
2. Des Moines Metropolitan Wastewater Reclamation Authority projects. The WRA Director and the Des Moines City Engineer have authority to approve change orders to contract documents in an amount up to \$10,000 or 10% of the original contract price, or such other contingency amount or percentage established by the WRA Board, whichever is greater; provided that any change order in excess of \$100,000 shall require approval by the WRA Board. Change orders shall be approved prior to the payment of the work provided for under the change order.

This \$10,000 change order authorization limit on City construction projects has not been adjusted for over 15 years. Over that time period, the construction costs have increased significantly and the change order authorization limit should be increased accordingly.

On June 17, 2002, under Roll Call 02-1498, the City Council approved a resolution authorizing the City Manager to approve Iowa Department of Transportation change orders on behalf of the City of Des Moines not to exceed \$25,000 without City Council approval on projects associated with I-235. Since that date, the Council has approved numerous Construction Agreements between the Iowa Department of Transportation and the City of Des Moines for I-235 that state change orders up to \$25,000 in additional City contribution will be implemented and signed by the DOT District 1 Engineer and the Des Moines City Manager. Change Orders requiring over \$25,000 in additional City contribution will be implemented and signed by the DOT District 1 Engineer and approved by the Des Moines City Council.

Section 2-708 of the Municipal Code of Des Moines states: “The city manager may execute contracts to procure goods and services where the estimated cost or revenue will not exceed \$25,000 annually and may authorize department directors to execute such contracts.” In addition, under Section 2-736(b) the procurement administrator is authorized to issue a purchase order for goods and/or services, or concessions, where the cost to the City will not exceed \$25,000. Section 2-736(d) states the procurement administrator may approve, execute, and issue change orders to purchase orders when the sum of the original purchase order plus the change order amount(s) does not exceed \$25,000. Section 2-736(e) states the procurement administrator may approve, execute,

and issue change orders to purchase orders previously approved by City Council when the change order amount(s) does not exceed ten percent of the original purchase order amount, or \$15,000, whichever is lesser.

As discussed above, former Section 384.102 provided that when the estimated cost of a public improvement exceeded \$25,000, the city had to advertise for sealed bids and hold a public hearing on the plans, specifications, form of contract and cost estimate before entering into a contract to construct a public improvement. New Chapter 26 clarified the definition of “public improvement”, and raised the public competitive bid limit and hearing threshold from \$25,000 to

- \$57,000 for highway, bridge, and culvert projects.
- \$100,000 for other public improvements also called vertical infrastructure.

As such, the Iowa Legislature has adjusted the bid threshold for inflation. In addition, a New Competitive Quotation Process for Public Improvements is found in Section 26.14, which applies only to vertical infrastructure projects. Section 26.14 is silent on the process for awarding construction work where the estimated cost is less than \$57,000.

Recommendation: Change the authority limit of the City Manager from \$10,000 to \$25,000, which accounts for inflation and is in line with the authorization limits discussed above. This \$25,000 limit is consistent with current City Code regarding purchasing of goods and services and current State Code regarding construction of public improvements. Staff recommends the Council adopt the following policy on City of Des Moines or Des Moines International Airport public improvement projects.

- The authority of the Des Moines City Manager and the Des Moines City Engineer to approve change orders shall be limited to those change orders which will cost \$25,000 or less. Change orders for work to cost more than \$25,000 shall be approved by the Contracting Authority, being either the Des Moines City Council or the Des Moines International Airport, prior to the payment of the work provided for under the change order.

The Engineering Department will continue to submit a report monthly to the City Council listing change orders executed the previous month.

Part IV: Contract Compliance Program.

The City’s Contract Compliance Program was last revised in 1990 and is comprised of two parts being:

- Equal Employment Opportunity (EEO) Program that evaluates the contractor’s or subcontractor’s efforts to maintain a discrimination-free work environment, which is measured against the statistical make-up of the community.
- Disadvantaged Business Enterprise (DBE) Program that evaluates the contractor’s efforts to subcontract work to DBE’s as measured against the City’s Overall Annual Goal of 5.5% of the work.

Legal Department Staff have reviewed recent federal court decisions, as well as changes to Federal Regulations, and have recommended that the City’s Contract Compliance Program be examined and updated. Engineering and Legal Department Staff have

rewritten the Contract Compliance Program and recommend adoption of the new Contract Compliance Program revised January 2007, which is attached for reference.

Equal Employment Opportunity (EEO) Program

Under the 1990 EEO Program, the contractor and its subcontractors are required to maintain a discrimination-free work environment.

- Each contract includes a non-discrimination clause.
- Contractor and its subcontractors must submit to City
 - Utilization Statement identifying the number of employees by work classification and the ethnic distribution within each classification.
 - EEO Policy that states the company's policy on hiring, promotion, and non-discrimination in the workplace.

Under the 1990 EEO Program, the Engineering Department

- Evaluates the contractor's (and each subcontractor's) Utilization Statement.
- Compares the contractor's workforce distribution against statistical information for the area.
- Utilizes and honors the Iowa Department of Transportation (IDOT) list of approved EEO programs to eliminate duplication of effort in workforce analysis.
- Determines compliance, conditional compliance, or non-compliance.

EEO Recommendation: Engineering and Legal Department Staff have rewritten the EEO Program in light of recent federal court decisions. This new EEO Program is included in the new Contract Compliance Program revised January 2007. The Engineering and Legal Departments have included and recommend the following revisions to the EEO Program:

1. Maintain the contract non-discrimination clause, which includes certification that the contractor and all its subcontractors will comply with the Des Moines Human Rights Ordinance.
2. Enforcement of the Des Moines Human Rights Ordinance, or corresponding state or federal civil rights law, will be on a complaint basis with the complaint of discrimination being filed with one of the agencies responsible for investigating such claims. If the contractor is found by one of these agencies to be engaged in illegal discrimination, the contractor will be in breach of its contract with the City of Des Moines and appropriate action will be taken.
3. Eliminate the contractor and subcontractor's reporting and submittal requirements.
4. Eliminate the Engineering Department evaluation and determination of compliance requirements.

Disadvantaged Business Enterprise (DBE) Program

The City's DBE Program for city-funded projects was written in 1990 and is based on Federal Regulation 49 CFR Part 23. This Federal regulation was rewritten in February

1999 and replaced with 49 CFR Part 26. In August 1999, July 2000, and January 2001, the City revised its DBE Program for federally funded projects to comply with said Part 26; however, did not revise its program for City-funded projects. This locally funded program needs to be updated to comply with the spirit of 49 CFR Part 26, which among other things, requires a unified certification program, whereby DBE's are certified by only one organization in each state – which in Iowa is the Iowa Department of Transportation. The Engineering Department is currently certifying DBE's for the local program under Part 23 regulations while the IDOT is certifying under Part 26 regulations. Recommendation: Engineering and Legal Department Staff have worked with the IDOT and recommend the following:

1. Eliminate the City's current 1990 DBE Program based on Part 23 regulations.
2. Continue to use the City's January 2001 DBE Program on federally funded projects, which complies with 49 CFR Part 26. This January 2001 DBE Program is based on the IDOT's DBE program, which the IDOT uses only on its federally funded projects. The IDOT is required by the Iowa Code to utilize a Targeted Small Business (TSB) Program on state funded projects.
3. On City-funded projects, the City of Des Moines Disadvantaged Business Enterprise/Targeted Small Business (DBE/TSB) Program shall apply which is based on and shall utilize the following rules, regulations, and definitions:
 - a. The City DBE/TSB Program recognizes both certified DBEs and certified TSBs as equally eligible under the program. Wherever the term DBE/TSB is utilized, it shall mean either a certified DBE or a certified TSB, or both.
 - b. All DBEs shall be certified in accordance with the Iowa Unified Certification Program by the Iowa Department of Transportation (IDOT). The DBE certification process, with its associated definitions and administrative rules, is the only part of the IDOT DBE Program that applies under the City DBE/TSB Program.
 - c. All TSBs shall be certified by the Iowa Department of Inspections and Appeals. The TSB certification process, with its associated definitions and administrative rules, is the only part of the Iowa Department of Inspections and Appeals TSB Program that applies under the City DBE/TSB Program.
4. The proposed City DBE/TSB program is similar to the current DBE program as demonstrated by the following definitions:
 - a. DBE as defined by the current 1990 City DBE Program: Disadvantaged Business Enterprise is defined by the City as at least fifty-one percent (51%) owned by one or more minorities or females or, in the case of a publicly-owned business, at least fifty-one percent (51%) of the stock of such business is owned by one or more minorities or females and whose management and daily business operations are controlled by one or more such individuals; or any business which is at least 51 percent (51%) owned by one or more individuals found to be economically and socially disadvantaged or, in the case of a publicly-owned business, at least 51 percent (51%) of the stock of such business is owned by socially and economically disadvantaged individuals whose management and daily business operations are controlled by one or more such individuals.

- b. DBE as defined by the IDOT DBE Program to have the meaning defined in 49 CFR Part 26. The implementing regulations prohibit discrimination on the basis of race, color, sex and national origin in the award of contracts or in the administration of a DBE program. (49 CFR 26.7) The regulations also define a DBE as a “socially and economically disadvantaged individual” which reputedly presumably includes Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans and Women, plus any additional groups that the SBA (Small Business Administration) so defines and includes. (49 CFR 26.5).
 - c. TSB as defined by Iowa Code, Section 15.102(5) is a small business which is 51% or more owned, operated, and actively managed by one or more women, minority persons or persons with a disability. Generally this is a for-profit small business enterprise under single management, is located in Iowa and has an annual gross income of less than 3 million dollars computed as an average of the three preceding fiscal years.
5. The Engineering Department will not certify a company as a DBE or a TSB. This will maintain unified DBE and TSB certification by the state and simplify the certification process for potential DBEs and TSBs.
 6. The Engineering Department will implement and enforce the DBE/TSB Program as detailed in the attached program which will include:
 - a. Establish an Overall Annual DBE/TSB Goal for DBE/TSB participation in City public improvement construction contracts. The City Overall Annual DBE/TSB Goal shall be based on the IDOT DBE overall annual goal established for the corresponding federal fiscal year as further adjusted by the Engineering Department to consider such factors as the current capacity of DBEs/TSBs to perform work, differences in the DBE versus TSB market, etc. This IDOT DBE overall annual goal is also used by the Engineering Department as the base figure to annually establish the City’s Overall Annual DBE Goal for projects at the Des Moines International Airport funded by the Federal Aviation Administration.
 - b. Include these City DBE/TSB Program requirements and the City overall annual DBE/TSB goal in the contract documents of those public improvement projects competitively bid, or quoted, in accordance with Iowa Code Chapter 26; and where DBE/TSB potential exists. The Engineering Department shall also include in the contract documents both the IDOT Certified DBE Directory and the Iowa Department of Inspections and Appeals Certified TSB Directory; or include said directories by reference in the contract documents, with links to these directories available on the Engineering Department website, and with printed copies available upon request.
 - c. Review the documentation provided by each bidder for compliance with this DBE/TSB Program as necessary. If the bidder fails to provide sufficient documentation of good faith efforts, the Engineering Department shall make a recommendation of noncompliance for City Council consideration and rejection of the bid.

7. City DBE/TSB Policies and rules regarding good faith efforts by the contractor and proposal requirements.
 - a. Most of the current DBE rules were unchanged, but were adapted for DBE/TSBs.
 - b. On projects with DBE/TSB potential, the contractor shall be required to solicit DBE/TSB participation and document those contacts on a proposal form similar to the current DBE contacts.
 - c. On projects with DBE/TSB potential, failure to make and disclose DBE/TSB contacts will result in the bid not being read.
8. Utilize the IDOT overall annual DBE goal for its federally funded projects as the City's overall annual TSB goal for City funded projects for the following reasons:
 - a. Annually, the IDOT does a statistical analysis of the past year's DBE participation to determine its overall goal for the next federal fiscal year. This analysis is done in compliance with 49 CFR Part 26 regulations and is ultimately reviewed by the Federal Highway Administration (FHWA).
 - b. The IDOT's goal for FY 2006-2007 is 4.5%.
 - c. The Engineering Department currently uses this IDOT goal as the basis to establish the City's overall annual DBE Goal on Airport projects funded the Federal Aviation Administration (FAA). The Engineering Department adjusted the IDOT 4.5% DBE goal for construction work to 4.3% for the City's FAA goal to reflect the FAA requirement to establish the goal based on all FAA-funded contract work, including professional services and asbestos removal, which are not included in the IDOT goal. On December 22, 2006, the FAA approved the City's FY 2007 overall DBE Goal for FAA work at 4.3%.
 - d. The City's current overall annual DBE goal is 5.5%, which was established by Council in 1992.
 - e. The City's 5-year average DBE participation on City construction contracts with DBE goals only was 4.8%, which represents \$9.55 million in work to DBEs.
 - f. The City's 5-year overall average DBE participation on all City construction contracts with and without DBE goals was 4.04%. Therefore, it is realistic to utilize the current IDOT DBE goal of 4.5% as the City's DBE/TSB goal.
 - g. By utilizing the IDOT overall annual DBE goal as the City's overall annual DBE/TSB goal, the goal will be independently reviewed annually and updated regarding the availability of the DBEs that are ready, willing, and able to perform work. Many DBEs are also certified as TSBs and the availability is similar.
9. Allow a six-month transition period during which the City counts the participation by DBEs currently certified by the City toward the contractor's DBE/TSB utilization. This will provide a six-month period to allow any contractor not certified to become certified as either a DBE or a TSB.
10. The City Engineer will modify the Proposal documents to reflect the changes in the DBE/TSB Program.

Date 2/12/07
Agenda Item 73
Roll Call # _____



Contract Compliance Program

Including

Equal Employment Opportunity Program

Disadvantaged Business Enterprise Program

Targeted Small Business Program

Revised January 2007

The Des Moines City Council adopted
this Contract Compliance Program
on _____,
under Roll Call No. _____.

Engineering Department

Jeb Brewer, P. E.
City Engineer
Program Administrator

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