

★ Roll Call Number

Agenda Item Number

32 I

Date September 12, 2011

Report from City Attorney regarding the actions and deliberations of the City Council Taxpayer Quality Assurance Sub-Committee.

Moved by \_\_\_\_\_ to receive and file.

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
COLEMAN				
GRIESS				
HENSLEY				
MAHAFFEY				
MEYER				
MOORE				
TOTAL				

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.

MOTION CARRIED

APPROVED

\_\_\_\_\_  
Mayor

\_\_\_\_\_  
City Clerk

**CITY ATTORNEY**

Jeffrey D. Lester

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September 9, 2011

HONORABLE MAYOR AND MEMBERS  
OF THE DES MOINES CITY COUNCIL

RE: REPORT FROM THE CITY ATTORNEY TO THE CITY COUNCIL CONCERNING  
THE CITY COUNCIL TAXPAYER QUALITY ASSURANCE SUBCOMMITTEE

**SUMMARY**

Pursuant to City Council direction, a Subcommittee consisting of Council Members Hensley, Mahaffey and Moore met to discuss taxpayer quality assurance/bidder qualification and determine what form such an item should take. Council Member Mahaffey was asked to serve as Chairman of the Subcommittee. There have been two meetings of the Subcommittee. The first meeting began review of a list of 14 questions/discussion items which the City Attorney had prepared to facilitate discussion and provide information to allow for the drafting and composition of a framework regarding the topic. This list is attached as Exhibit A hereto. The second meeting began with a recap of the previous meeting and informational report from the City Attorney, and proceeded with Subcommittee review and answers to the questions/discussion items previously submitted, followed by opportunities from those in attendance to provide input and information to the Subcommittee. The Subcommittee made several recommendations, but deferred several items to Council review where no consensus was reached. These items will be explained in greater detail below.

**MEETINGS REPORT**

At the first meeting of the Subcommittee, there was significant discussion, but there was consensus on only two of the items, namely, that any adopted procedures should be done as a policy or as part of bid specifications rather than as an ordinance and that any procedures should apply to horizontal as well as vertical projects, but that DOT contractors pre-approved pursuant to Chapter 314 of the Iowa Code would be considered acceptable contractors by the City of Des Moines. At the second meeting, the Subcommittee was presented with a brief recap of the last meeting, noting of the 14 questions previously submitted only the two aforementioned items were approved. The Subcommittee confirmed that the recap on consensus was accurate.

Lester next provided a handout from the Des Moines School District and noted, that, as with Polk County, the School District does background check/investigations as part of its bid

specification process and not as part of a standing policy or resolution. This is similar to what Cedar Rapids does. It was noted that the School District *may* request additional information regarding the apparent low bidder's "competency and practical knowledge" to do the work and the "Bidder's financial responsibility, resources, experience, organization and equipment to complete the proposed work." The City Attorney then reported that he was working with the Cedar Rapids City Attorney's office to gather their information on its post-bid process, but that the Cedar Rapids' City Attorney had been gone from the office all week and would return on September 8<sup>th</sup> and Lester would follow up on his return. During the subsequent follow up, it was determined that Cedar Rapids process is simply a reference/performance checking process done on certain—but not all—projects as determined prior to the bid specifications. There is no questionnaire or policy which guides this reference checking.

The Subcommittee then moved to the previously submitted questions that needed to be addressed in order to provide the necessary direction to staff to formulate a bidder qualification process of some sort.

There was consensus of the Subcommittee that not all projects should be subject to the ultimate process nor should all projects come before City Council for review. There was general discussion without consensus as to whether a Citizens' Committee should be established to review projects and determine applicability of the questionnaire/process. Ultimately, staff was directed to provide the Subcommittee with the number of projects completed per year and the amount of the projects within ranges of costs to evaluate applicability and the need for a Committee.

There was majority agreement next that the Polk County Questionnaire should serve as a starting point for a similar City questionnaire as part of whatever City of Des Moines process is ultimately determined.

Discussion next ensued regarding what to do with Questionnaire responses that would appear to indicate some sort of potential problem with performance. There were several options discussed including simply requiring an explanation for a negative response, to moving ahead with the contract for contractors with negative responses on "minor questions" but disqualifying those that were negative responses to "major questions" to referring it all to the Citizen Committee for determination. There was no general consensus on the issue, other than that staff should prepare options for Council to consider on this item.

Subcommittee Member Moore indicated that workers compensation or OSHA issues should disqualify a contractor from participating or bidding on City business. Discussion ensued regarding the virtual impossibility that the City would be able to find contractors with no OSHA violations or workers compensation issues and continued with comments that only serious or significant issues should disqualify a contractor.

With respect to training issues, there was discussion as to whether Department of Labor (DOL) training programs were essential or whether equivalent training would be acceptable. Chairman Mahaffey commented that DMAAC provides excellent training in many areas, while Subcommittee Member Moore believed that only training certified under DOL would be sufficient as to permit "equivalent" training would place Council or staff in the position of having to make determinations about training which would be beyond the particular level of

expertise of either. Subcommittee Member Hensley believed that training should be broad enough to include DOL training or equivalent training.

Subcommittee Member Moore indicated that evaluating the responses should be based on the significant likelihood that the particular bidder/contractor has a present inability to complete the project per specification.

Additional consensus was obtained that there should be no appeals process; whether staff or a committee make an initial determination regarding the use of the questionnaire, the ultimate decision to use and the ultimate review of questionnaire answers when used should be left to the City Council. Consensus also materialized regarding the use of bankruptcy questions (that they should *not* be used) and that emergency procurement already authorized by statute should continue unaffected. On particularly unique projects where obtaining bidders proves problematic and no bidders bid, the Subcommittee consensus was to direct those circumstances back to the City Council for review and determination about continued use of the questionnaire. The consensus of the subcommittee included that independent contracting authorities (*e.g.* WRA, Library Board, Airport Authority) would continue to operate exclusive of the policy or directive, although each could certainly consider adopting such a policy individually. Finally, in situations where grant, state or federal funding would be at risk via use of the questionnaire, then the questionnaire would not be used.

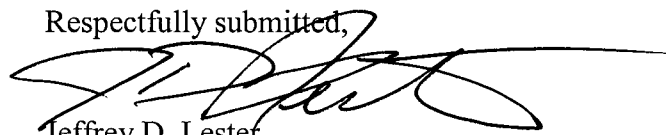
Subcommittee Member Hensley requested some sort of fiscal impact for staff time and costs as well as additional costs for projects. City Manager Rick Clark reminded the Subcommittee that indirect costs would include not only staff time but any bidder costs resulting from diminution of the competitive environment, but would potentially be offset by gains in improved quality on projects. He indicated that competitive costs and improved quality on bids would be extremely difficult to quantify. Staff was also directed to provide the Subcommittee with the number of projects completed per year and the amount of the projects within ranges of costs to evaluate applicability and the need for a Citizen Committee. That information has yet to be compiled.

Left for Council determination was the effectiveness date of any policy or directive. Ideas ranged from an immediate effectiveness date to coordinating with CIP approval to an extended effectiveness date as in past years to allow for litigation should that avenue be broached by policy opponents.

It was the consensus of the Subcommittee that the City Attorney should meet with representatives of labor and builders to gather any additional information available from those two sources. Toward that end, a meeting with Legal Department staff is tentatively set for next week with Scott Norvell of Master Builders and Robert Henry, an attorney representing labor. Results from this meeting will be shared with the Subcommittee to determine if additional meetings of the Subcommittee will be necessary prior to submission of the item to Council for direction.

Please contact me with any questions.

Respectfully submitted,



Jeffrey D. Lester  
City Attorney

## EXHIBIT “A”

### Items for Discussion/Determination

Ordinance or Policy?

Apply to vertical projects only (Polk County) or both horizontal & vertical projects?

Apply to only specific, large projects as determined case-by-case? Who makes determination? Staff? Council?

Polk County questionnaire to be used? What criteria are used to measure responses to the questionnaire?

What do we do with the answers to the questions (and criteria) once submitted? How do we rate or assess the answers to the questions or criteria?

Who makes the decisions as to the answers given to the questions or criteria? Need uniform application, but what is the application?

Is there an appeal process? If so to whom?

Use of DOT pre-qualified contractors for all work within City ROW related to bridges, highways, culverts and sidewalks?

Certain questions or criteria lead to problems (i.e. bankruptcy)

Application problems for federal and state funded projects—Executive Order 69 —just note this in the policy or note that it won't apply when to do so would risk such funding?

Certain projects so unique, complicated or undesirable, the City is lucky to get one bidder, applying restrictions may mean no bidders – do we want ability to exempt certain projects? Or consider that case-by-case?

Other exemptions from the Policy

--Would need to continue to exempt emergency situations where the City is able to act without competitive bidding pursuant to state statute.

--Would exempt other independent/quasi-independent authorities that already have contracting authority pursuant to state statute or ordinance

--WRA

--Library Board

--Airport Authority

Effectiveness Date of the Policy?