


Top Ten Construction Procurement Mistakes...

...or Rather—How to Avoid Making a Top Ten Construction Procurement Mistake

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TOP TEN PROCUREMENT OPPORTUNITIES

How to Avoid Making a Procurement Mistake

Not A Speech about Statutory Compliance

- Practical Discussion of Common Situations
- Key Points Presented for Each
- Take-Away Tips for Each



Don't Hire the First Design Professional You Meet

- This is NOT the Constitution
 - Not All Design Professionals Are Created Equal
 - Different Specialties & Areas of Expertise
 - Varying Degrees of Experience



Don't Hire the First Design Professional You Meet

- Evaluate Relationships
 - Cities often have long-standing relationships with engineers and architects
 - Consider Fit with Each Project
- Evaluate Intangibles
 - Quality of Daily Records and Meeting Notes
 - Level of Communication
 - Performance in Disputes



Lessons Learned: Don't Hire the First Design Professional You Meet

- Past Performance on Similar Projects
- Experience in the Region with Contractors
- Different Styles Suitable to Different Projects
 - Hands on Management if needed
 - Ability to Conduct Site Visits
 - Communication Style



Follow the Procurement Rules

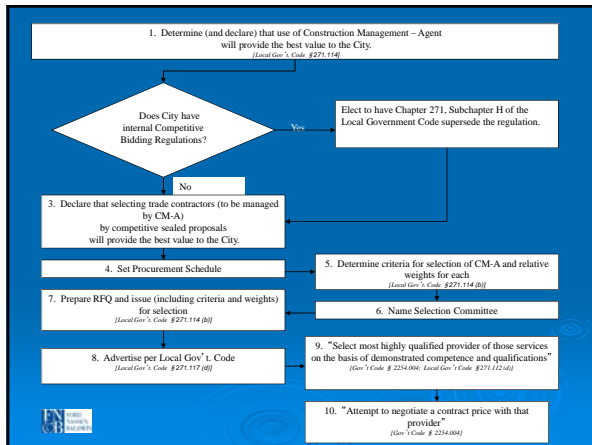
- Subchapter H – Local Government Code CH 271
- Wright Realty shows the wrong way



Lessons Learned: Follow the Procurement Rules

- Each delivery system has its own statutory process
- Create your own flow chart





Customize (and Read) Your Contracts

- Not a “Form Contracts Are Bad” Speech
 - Form Contracts are Useful
 - Heavily Relied Upon in the Industry
- But Form Contracts Can be Problematic
 - May Not Be Owner Friendly
 - People Tend Not To Read Them Carefully



Customize (and Read) Your Contract

- Standard Contracts Are Efficient
 - Best if Customized to Suit Your Needs
 - Familiarity with Terms Improves Ease of Use
- Can Draft Specific Contracts For Specific Types of Projects
 - Based on Delivery Method
 - Vertical or Horizontal
 - Architecturally Driven or Engineer Driven




Lessons Learned: Customize (and Read) Your Contract

- Readability matters
 - Contracts that are easy to follow work best
- Consider specific provisions that forms leave out
 - Venue provision in home county
 - Jury Trial vs. Arbitration
 - No Delay or Consequential Damages



Getting Your Performance and Payment Bonds

- The requirement: Government Code § 2253.021 (a)
- The benefit from the bonds
- Why get bonds?
- Why not get a (combined) Performance and Payment Bond?
- The problem of fraudulent bonds



Lessons Learned: Getting Your Performance and Payment Bonds

- Require the bonds
- Check the bonds
 - Did the surety write them?
 - Is the surety acceptable?



Understanding that Bonds have Short Statute of Limitations

- 1 year from “final completion”
 - Gov’ t Code § 2253.078
- Mont Belvieu’ s surprise:
 - Final completion = substantial completion
- Are longer private limitations enforceable?




Lessons Learned: Understanding that Bonds have Short Statute of Limitations

- Know your limitations
- In doubt? Consider a tolling agreement
- Write your own bonds!
 - Define “Final Completion” for purposes of the bond.



Intervene at the First Sign of Trouble

- What's the First Sign of Trouble
 - Significant dispute
 - Reservation of Rights letter
 - Formal Protest of Work Under Change Directive
 - Allegations of Defective Work
- How To Intervene
 - Diligence in Record Keeping
 - Active Involvement in Project Activities




Intervene at the First Sign of Trouble

- Take an Active Role
 - Passive Delegation to Design Representative May Not Serve City's Interests
- Failure to Intervene Can Compromise Rights On Surety Bonds
 - Immediate Notice and Involvement
 - Consent of Surety and Overpayment



Lessons Learned: Intervene at the First Sign of Trouble

- Don't Sit Back
- Involve the Surety Early
- Terminate if Required
- Keep Track of All Activities and Costs



Evaluate Project and the Delivery Method

- “Alternative” Delivery Methods
 - Pros and Cons



Lessons Learned: Evaluate Project and the Delivery Method

- Make sure you understand the benefits – and costs – of each delivery method
- Choose the method that provides “best value” to the City



Don't Give or Allow Liens on the Project

- Public Land is Exempted from Liens
- Texas Constitution; Article 11, Section 9
- Texas Property Code Chapter 43



Don't Give or Allow Liens on the Project

- The Property to counties, cities and towns, owned and held only for public purposes, such as public buildings and the sites therefor, ..., public grounds and all other property devoted exclusively to the use and benefit of the public shall be exempt from forced sale and from taxation, provided, nothing herein shall prevent the enforcement of the vendors lien, the mechanics or builders lien, or other liens now existing.



Lessons Learned: Don't Give or Allow Liens on the Project

- The real property of the state, including the real property held in the name of state agencies and funds, and the real property of a political subdivision of the state are exempt from attachment, execution, and forced sale. A judgment lien or abstract of judgment may not be filed or perfected against the state, a unit of state government, or a political subdivision of the state on property owned by the state, a unit of state government, or a political subdivision of the state; any such judgment lien or abstract of judgment is void and unenforceable.



Carefully Draft Bid/Proposal Criteria

- Discretion in selection
 - Local Gov't Code § 271.113 (b)
- Choosing "relevant factors"
- Process of selection
 - Identifying / describing



Lessons Learned: Carefully Draft Bid/Proposal Criteria



Lessons Learned: Carefully Draft Bid/Proposal Criteria

- Explain how the competitive process will work
- Limit “relevant factors”



Cities Can Act as their Own General Contractor ... But

- 1. You'll Need a Qualified Employee
 - Project Coordination Is Not as Easy As It Sounds – Materials, Subcontractors, etc.
- Can Save Money for City
- But Following Procurement Rules is Vital



Cities Can Act as their Own General Contractor ... But

- Chapter 252 – Local Government Code
 - Require Bids for Contracts over \$50,000
 - Does not Require on a Project Basis
- Be Sure to Break Up Work Rationally
- Each Trade and Vendor Can Be Split
- Do Not Artificially Divide Work



Lessons Learned: Cities Can Act as their Own General Contractor ... But

- Section 252.062 Makes Violations of Procurement Code a Criminal Offense
- Sec. 252.062. CRIMINAL PENALTIES. (a) A municipal officer or employee commits an offense if the officer or employee intentionally or knowingly makes or authorizes separate, sequential, or component purchases to avoid the competitive bidding requirements of Section 252.021. An offense under this subsection is a Class B misdemeanor.



QUESTIONS??

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