

To: Olin Woods, Chair, and
Members of the Local Agency Formation Commission

From: Elisa Carvalho
Assistant Executive Officer

Date: February 28, 2011

Subject: Surveyor Agreements

Recommended Action

1. Authorize the Chair to sign agreements with the following Survey Firms for survey services:
 - a. Laugenour and Meikle
 - b. RBF Consulting
 - c. Frame Surveying
2. Discuss letter from the American Council of Engineering Companies (Attachment A) regarding the Request for Qualifications to Provide Contract Surveyor Services

Reason for Recommended Action

In December 2009, the Commission directed staff to prepare and distribute a Request for Proposal (RFP) to contract with a private firm or individual for surveyor services. Surveyor services would include the review and verification of proposed project boundaries and legal descriptions submitted to Yolo LAFCO.

COMMISSIONERS

*★ Public Member Olin Woods, Chair ★
★ County Member Matt Rexroad, Vice Chair ★
★ City Members Stephen Souza, Skip Davies ★ County Member Don Saylor ★*

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★ Public Member Robert Ramming ★ City Member Bill Kristoff ★ County Member Jim Provenza ★

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*★ Executive Officer Elizabeth Castro Kemper ★ Assistant Executive Officer Elisa Carvalho ★
★ Commission Clerk Terri Tuck ★ Commission Counsel Robyn Truitt Driven ★*

Yolo LAFCO issued a Request for Qualifications (RFQ) to Provide Contract Surveyor Services on December 6, 2010. Yolo LAFCO issued an RFQ rather than an RFP to focus on the general capacity and experience of potential service providers to provide assistance on an as needed basis. Yolo LAFCO received six proposals by the due date of January 26, 2011. All of the firms met LAFCO's minimum qualifications. The selected firms directly addressed LAFCO needs in their proposal, possessed previous LAFCO experience, and/or possessed unique information, such as an extensive archive system or legal description manual.

In addition to the surveyor responses, Yolo LAFCO also received a letter from the American Council of Engineering Companies (ACEC). The ACEC accused LAFCO of violating state law by basing selection criteria on cost. In addition to qualifications, LAFCO staff asked each firm to include proposed hourly charges in its response and indicated that a firm's cost proposal would be part of the selection criteria. LAFCO Counsel indicated the RFQ is a proper competitive measure for staff to evaluate qualified firms who will provide fair and reasonable prices to the Commission. The ACEC has, in the past, sent a similar letter to the Yolo County Parks Department. At that time, County Counsel investigated the matter and determined there was no basis for ACEC's accusations and no real case for litigation.

Background

Yolo County LAFCO currently sends proposals to the Yolo County Surveyor for verification of the legal description and map. The County Surveyor charges \$33.37 for every half hour or \$66.74 per hour.

The current surveyor is retired and serves the County on a part-time basis. Contracting with a surveyor will provide LAFCO with the flexibility to have maps and legal descriptions for proposals reviewed by another surveyor in a timely manner.

Attachments:

Attachment A: Letter from the American Council of Engineering Companies

Surveyor agreements are on file in the LAFCO office



Attachment A
RECEIVED

JAN - 3 2011

YOLO LAFCO

December 21, 2010

Ms. Elisa Carvalho
Yolo County LAFCO
625 Court Street, Suite 203
Woodland, CA 95695

Dear Mr. Carvalho:

Jerry Michael
President

Jacob Lipa
President-Elect

Eddie Kho
Vice President

John Moossazadeh
Secretary-Treasurer

Thomas W. Blackburn
Past President

Robert Salaber
ACEC National Director

Paul J. Meyer
Executive Director

Our organization is a statewide association of engineering and land surveying firms. We recently reviewed the Yolo County LAFCO's RFQ to Provide Contract Surveyor Services. We noted that the RFP requires applicants to provide cost information, including hourly charges and billing polices in addition to an overall cost proposal to perform requested services.

We are concerned that the RFP and selection processes proposed in this case directly violates state law in that the RFP requests specific, detailed cost information which will be used in part as selection criteria by the evaluating committee to differentiate between firms. State law is very clear that price is not to be used in the initial selection decision for consultant services, and certainly not as a comparison tool to weight one proposal against another. As an example, the required selection process detailed for state agencies (and mirrored in the Federal Brooks Act) is to rank the firms on qualifications, and then negotiate a contract with the top ranked firm. If unable to reach a "reasonable and fair price" to your satisfaction, you then have the authority to terminate negotiations, and move to negotiations with the second ranked firm, etc.

We wish to call your department's attention to current provisions in state law concerning the selection of design professionals, which are substantially different than the laws governing the selection of contractors. State law now specifically requires that:

"Notwithstanding any other provision of law, selecting by a state or local agency head for professional services of private architectural, engineering, land surveying, or construction project management firms *shall be* on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required." [Government Code §4526, emphasis added.]

This law means that price may not be a factor in the initial selection of a design consultant. Of course, local public agencies need to discuss and negotiate an agreement on fees with the design consultant, but under the law the agreement on fees must occur after the initial selection of a design consultant. The public agency still retains leverage during the fee discussions. If a mutually acceptable agreement on fees between the public agency and the design firm cannot be reached, then the agency may cease negotiating with the first firm and begin negotiating with its second choice. This is also the required process that state agencies MUST follow, and is a guideline strongly recommended for local agencies as well.

Professional engineers and surveyors dedicated to building a better California.

Additionally, it is unclear to us how an applicant could provide a cost proposal for review, given that the scope of work is undefined and the RFP specifically states "Surveyor services are expected to be provided as needed" based on workload which changes in both "number and frequency". It seems to us, therefore, that using cost to differentiate between firms would further complicate the process of selecting the most qualified candidate, as proposals for services are likely to be all over the map given the nebulous and undefined scope of work criteria.

For your information enclosed is a copy of §4525-4529 of the Government Code of the State of California. Note that so long as a local agency meets the basic requirement of selecting design consultants on the basis of demonstrated competence without price as a consideration, the agency does have discretion to develop its exact method of implementation. For example, the requirements that state agencies conduct statewide advertising and that no less than three firms be interviewed is not mandatory for local agencies.

This law governing the procurement of design services (called Qualification Based Selection or QBS) is not at all unique to California. The federal government and nearly all of the states have similar laws.

It is sound, cost-effective public policy for an agency to procure design consultant services using Qualification Based Selection rather than competitive bidding. Whereas actual construction of a project can be competitively bid, because there then exists a set of plans and specifications on which all interested contractors can base their cost estimates, at the stage of design procurement no such plans or specifications can exist. At this stage no one yet really knows what the project will entail. When design firms are required to submit "competitive bids" at this stage, the so-called "bids" are not really comparable. Each "bid" submitted may be based on very different sets of assumptions.

Particularly where significant environmental issues or true health and safety issues (potential structural failures for example) are involved, it is not only misleading but dangerous to make the selection on the basis of the lowest cost proposal. If all the design consultants know that as a matter of practice the lowest proposal is much more likely to be selected, there will be an inevitable pressure to cut corners and reduce the design costs. That is not good public policy anywhere in California.

When a public agency chooses the lowest design "bid," the agency will often end up with modified "off-the-shelf" designs which are not based on thorough evaluations of many possible design approaches for a project. The agency may save a few dollars on design fees by restricting the time designers can spend on projects, but the agency will end up with designs which are much more costly to construct than the optimum designs. Or the agency which consistently seeks low "bidders" could end up forcing designers to submit fee adjustments for services outside the original scope of work.

The law also prohibits an agency from requiring that a fee be included in a proposal "as only one of many factors." Such a procedure does not avoid a bidding atmosphere and the problems that it creates. Once a fee is included, there is a strong tendency for agency officials to look quickly at the bottom line figure, and for the fee to have an undue and often decisive weight in the selection decision. In fact if an agency requires a proposed fee in the consultants' proposals and then does not select the "lowest" proposal, the agency could be criticized by persons who do not understand the state law and the reasons for it.

That is why §4526 states without qualification that selection "shall be based on demonstrated competence." Price may not be a factor in the proposal and selection process. Negotiating "fair and reasonable prices," as §4526 states, comes later when "services are engaged."

We urge you to revise your procedures for this and future proposals so that they comply with §4525. The grounds for selection and award in this manner are cause for successful legal action should anyone wish to challenge the result.

Enclosed for your information are several items:

- Government Code §4525
- Correspondence from State Senator Leroy Greene (D-Carmichael) who authored SB 419, the last bill to amend Government Code §4525
- A Legislative Counsel's legal opinion from Bion M. Gregory on SB 419
- "The use of qualification-based selection in public agencies" article from September 2002 issue of *APWA Reporter*
- "The State of QBS: Battles at the Local and National Level" article from November/December 2002 issue of *Engineering Inc.*
- ACEC QBS Brochure
- THE APWA Red book on Qualifications-Based Selection – Guidelines for Public Agencies

Thank you for your attention to this matter. As stated before, the grounds for selection and award in this manner are cause for successful legal action should anyone wish to challenge the eventual result. We will post a copy of this letter on our website as an informational item for our members, and look forward to posting your response as well, so they can be assured that the Yolo County LAFCO is intent on becoming fully compliant with California law.

I am also available at your convenience to provide you with further information or answer any questions.

Sincerely,



Mark Smith
Legislative Advocate

Enclosures

Cc: Paul Meyer, Executive Director, ACEC-CA
James P. Corn, General Counsel, Stoel Rives LLP
Olin Woods, Chair, Yolo County LAFCO
Matt Rexroad, Vice Chair, Yolo County LAFCO
Stephen Souza, City Member, Yolo County LAFCO
Skip Davies, City Member, Yolo County LAFCO
Helen Thomson, County Member, Yolo County LAFCO
Elizabeth Castro Kemper, Executive Officer, Yolo County LAFCO