



City of Arts & Innovation

City Council Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL DATE: APRIL 17, 2012

FROM: CITY ATTORNEY ITEM NO: 13
CITY MANAGER WARD: ALL

SUBJECT: COMMUNITY BENEFIT PROGRAM FOR USE WITH DESIGN-BUILD
REQUESTS FOR PROPOSALS

ISSUE:

The issue presented for consideration by the City Council is whether to adopt an enhanced and expanded Community Benefit Program for use in future Requests for Proposals (“RFPs”) for Design-Build contracts.

COMMITTEE RECOMMENDATION:

That the City Council approve the attached Community Benefit Program template for use in RFPs for Design-Build contracts.

BACKGROUND:

The Public Works Department and the City Attorney’s Office were requested to prepare a staff report addressing local preference options in evaluating construction bids for the Riverside Regional Water Quality Control Plant Phase I Expansion. The staff report was presented to the Utility Services/Land Use/Energy Development Committee on June 16, 2011. As explained in that staff report, Section 1109 of the Riverside City Charter establishes the City’s authority in awarding public works contracts. Generally, “every project for the construction and/or improvement of public buildings, works, streets, drains, sewers, utilities, parks or playgrounds, ... when the total expenditures exceed \$50,000, shall be let by the City Council ... by contract to the lowest responsible bidder” (traditional “design-bid-build”); however, “projects for the construction and/or improvement of any public utility operated by the City or for the purchase of supplies or equipment for any such utility may be excepted from the requirements of this section, provided the City Council so determines by at least five affirmative votes.” In such cases, the City could utilize a “design-build” delivery method under Charter section 1114 and Chapter 1.07 of the Riverside Municipal Code.

Legally, there is a crucial difference between the two options. Riverside's traditional "design-bid-build" contracts must be awarded to the lowest responsible bidder; there are no exceptions. Efforts to favor local businesses, such as a simple percentage bidding preference, have been struck down for violating lowest bidder requirements. The criterion considered in lowest-bidder awards is the amount of the bid. Alternatively, Riverside's design-build ordinance allows award on the basis of the *"best value to the City."* While a simple percentage bidding preference would violate the ordinance, the City may lawfully enhance local participation through outreach and awareness, and consider that in the award.

The City of Riverside will have to comply with the following legal principles in order to lawfully consider local preference provisions in public works bidding:

- The City cannot mandate local residency quotas. Goals and incentives, short of fixed quotas, are permissible
- Residency requirements affecting union participation can violate the First Amendment and the National Labor Relations Act.
- Simple percentage-based preferences, even as low as 5%, would violate Section 1109 of the City Charter, which requires award to the lowest bidder, unless the City Council, by at least five (5) affirmative votes, adopts a resolution excepting the Project from competitive bidding, based upon factual findings to support the preference. Such findings would be challenging to make based on established case law.
- Any additional costs or expenses to a bidder could not be charged to the enterprise fund and paid out of rates. Local preference expenditures would necessarily have to be paid out of the City's General Fund.

We believe the best way to maximize the opportunities for local persons and businesses to fully and fairly participate in City project contracts and subcontracts is through extensive outreach efforts to inform local, qualified persons and businesses of those opportunities to participate. Having heard and received the information in the staff report, the Committee determined that good-faith efforts to meet local participation goals was the best option, and tasked the City Attorney's Office to develop implementing language. Based upon our research, the City Attorney's Office developed a Community Benefit Program for use with design-build RFPs. Having reviewed prior City RFPs, it was determined that the Community Benefit Program should be incorporated into all design-build RFPs.

For the Community Benefit Program, the term "local" is generally defined as within a 50-mile radius of the City's boundaries. The "local" area has been defined in past City agreements as a 50-mile radius extending from City boundaries; a smaller radius could be considered on a project-by-project basis if it does not reduce the available pool of qualified participants. Proposals must address: (1) local labor outreach; (2) local business outreach; and (3) a return-to-work program. Proposers must actively recruit and employ skilled craft workers with a primary residence located within a 50-mile radius (or other approved radius) of the Project site. At least 50% of the proposal labor must be local; if not, the Proposer must continue to make verified efforts to meet that goal.

All Proposers must undertake outreach to all qualified Local Businesses. To demonstrate good-faith efforts at engaging Local Businesses, Proposers must:

- Attend a Community Benefit Program information meeting;
- Identify and select supplies, specific work items, and services which can be locally provided;
- Advertise for bids from interested businesses in one or more daily or weekly newspapers, trade association publications, trade journals, or other media;
- Provide written notice of its interest in retaining those businesses enterprises, including Local Businesses, which express an interest in participation;
- Document efforts to follow up initial solicitations of interest by contacting the Local Businesses;
- Provide interested Local Businesses with information about the plans, specifications and requirements;
- Request assistance from organizations that provide assistance in the recruitment and placement of Local Businesses, such as the Greater Riverside Chambers of Commerce;
- Negotiate in good faith with interested Local Businesses and not unjustifiably reject as unsatisfactory their bids or proposals;
- Submit a list of all interested Local Businesses for each item of work for which bids were solicited, including dollar amounts of potential work for Local Businesses, and shall provide the reasons any Local Businesses were not selected; and
- Document efforts to advise and assist interested Local Businesses in obtaining bonds, lines of credit, and insurance required by the City or Proposer.

Proposers are also instructed to provide detailed information about local job training, apprenticeships, the Helmets to Hardhats program (for further information, see <http://www.helmetstohardhats.org/>) or other veteran employment opportunity programs.

Failure to failure to comply in good faith with the Community Benefit Program would be considered a material breach of the contract and, in addition to other remedies, the City may impose damages for noncompliance. Because the actual amount of the damages would be extremely difficult determine, a fixed, estimated and reasonable amount can be set (known as “liquidated damages”). The City has used liquidated damages for a contractor’s failure to comply with community benefit program requirements in other RFPs. The particular amount of liquidated damages imposed would differ for each RFP, based on factors such as cost and duration of the contract; for example, the design-build Agreement for the \$13.7 Million Arlington Heights Sports Park project allowed for liquidated damages of \$1,000 per day of noncompliance. The \$110 Million RERC Units 3 & 4 project RFP imposed liquidated damages of \$2,500 per incident, or per day, of noncompliance with local labor efforts. In both projects, the contractor met the local labor and community benefits requirements. With the RERC 3 & 4 Project, the cumulative community benefit was \$5,310,137.85, or 144% of the contract requirement as verified by a third party compliance entity.

Efforts to improve local participation may meet future legal hurdles. Take for example, California Assembly Bill 359 (“AB 356”). AB 356 would prohibit any local agency from mandating that any portion or percentage of work on a public works project be performed by persons residing within particular geographic areas, if any portion of that project will take place outside the geographical boundaries of that local agency. It would also require a local agency to pay for the difference in

costs attributed to a local resident hiring policy, if the project is funded with state funds, even if the project is entirely within the local agency's geographical boundaries. Although AB 356 died in the Assembly last year, there may be future similar legislation introduced on this issue.

It is our considered opinion that the proposed Community Benefit Program would be legally consistent with and complimentary to Riverside's design-build ordinance, because it will affirmatively assist in providing the best value to the Riverside taxpayer.

On March 15, 2012, this Program was presented to the City Council's Utility Services/Land Use/Energy Development Committee. With Chair Bailey, Vice Chair Gardner, and Member Davis present, the Committee voted unanimously to recommend the Program's adoption to the City Council. On March 27, 2012, this Program was presented to the Greater Riverside Chambers of Commerce Economic Development Council, which also voted unanimously to recommend City Council adoption of the Program.

FISCAL IMPACT:

The Community Benefit Program, if approved, could impose a small additional burden on some Proposers and the selected Contractor. Any increased Project cost from the Community Benefit Program would not be payable from enterprise funds, but from the General Fund.

Prepared by:

Gregory P. Priamos, City Attorney
Scott C. Barber, City Manager

Concurs with:



William R. Bailey, III, Chair
Utility Services/Land Use/Energy Development Committee

Attachments: Community Benefit Program Template

RFP NO. _____

(PROJECT NAME)

(DATE)

ADDENDUM NO. ____

COMMUNITY BENEFIT PROGRAM

This Addendum hereby becomes a part of the bid specifications and documents for the _____ project bid. The bid due date of _____ has not changed. Bid proposals submitted after _____ will not be accepted.

1) Community Participation in City Projects

1(a) It is important that all workers, contractors, subcontractors, suppliers, and businesses, particularly local workers, contractors, subcontractors, suppliers, and businesses, have a full and fair opportunity to participate in City projects. For the Community Benefit Program, "local" is defined as within a 50-mile radius of the City's boundaries. The Proposer shall be required, as part of its Proposal, to submit proposals for the following: (1) local labor outreach; (2) local business outreach; and (3) a return-to-work program.

1(b) Non-compliance with the Community Benefit Program will damage the City. Because the actual amount of the damages would be extremely difficult, if not impossible to determine, the Proposer will be subject to liquidated damages. Proposer and its surety shall be responsible for payment of any liquidated damages imposed.

1(c) Proposers must respond to each of the sections below. The responses must state whether or not the requirements are acceptable, and if further information is required, those details must be provided with adequate detail.

2) Local Labor Outreach

2(a) To the extent permitted by law, Proposers shall actively recruit and employ skilled craft workers located within a 50-mile radius of the Project site ("Local Labor").

2(b) The City has established a goal that Local Labor shall account for a minimum of 50% of Proposer's and its subcontractors' labor forces for Project construction. Proposals shall include

the proposed worker outreach methods, to provide the City with sufficient information to monitor and evaluate Proposer's post-award outreach efforts.

2(c) Achievement of the 50% goal shall be periodically evaluated by a review of certified payroll records, as submitted by the Proposer.

2(d) If Local Labor participation is at least 50%, the Proposer shall be deemed to be successful in its outreach efforts for that review period, without the need to document its outreach efforts. If Local Labor participation is below 50% for any compliance period, the Proposer must demonstrate that its outreach efforts conform to those proposed by submitting documentation of its outreach efforts to the City; as long as Local Labor participation remains below the 50% goal, outreach efforts must continue.

3) Local Business Outreach

3(a) Proposers shall make good-faith efforts to optimize local subcontractor, supplier, and service provider ("Local Business") participation through information and outreach. ALL Proposers, including local firms, must undertake Local Business outreach; and Proposers must undertake outreach to ALL qualified Local Businesses, including, but not limited to, those within as a 50-mile radius from City boundaries ("Local Businesses"). To demonstrate good-faith efforts at engaging Local Businesses:

3(b) The Proposer must make a good faith effort to obtain participation by Local Businesses.

3(c) The Proposer will attend a pre-proposal meeting scheduled by the City to inform all Proposers of the project contract requirements. The City may waive this requirement only if a Proposer certifies in writing it is already informed as to those project requirements prior to the pre-proposal meeting.

3(d) The Proposer will identify and select supplies, specific work items in the project to be performed by subcontractors, and services to be performed by service providers, in order to provide an opportunity for participation by Local Businesses. For larger projects, the City may require the Proposer to subdivide the total contract work requirements into smaller portions or quantities to permit maximum active participation of Local Businesses.

3(e) Not less than 10 calendar days prior to the submission of bids or proposals, the Proposer will advertise for bids from interested businesses in one or more daily or weekly newspapers, trade association publications, trade journals, or other media specified by the City.

3(f) The Proposer will provide written notice of its interest in retaining those businesses enterprises, including Local Businesses, which express an interest in providing subcontracting, services, or supplies. All notices of interest shall be provided not less than 7 calendar days prior

to the date the bids are required to be submitted. In all instances, Proposer must document that invitations for subcontracting, services, and supplies were sent to available Local Businesses for each item of work to be performed.

3(g) The Proposer will document efforts to follow up initial solicitations of interest by contacting the Local Businesses to determine with certainty whether the Local Businesses are interested in supplying or performing specific services or portions of the project work and if they will submit a bid to the Proposer therefor.

3(h) The Proposer will provide interested Local Businesses with information about the plans, specifications and requirements for the selected subcontracting work, service, or supplies.

3(i) The Proposer will request assistance from organizations that provide assistance in the recruitment and placement of Local Businesses, such as local Chambers of Commerce, not less than 15 calendar days prior to the submission of bids.

3(j) The Proposer will negotiate in good faith with interested Local Businesses and will not unjustifiably reject as unsatisfactory their bids or proposals. As documentation, the Proposer will submit a list of all interested Local Businesses for each item of work for which bids were solicited, including dollar amounts of potential work for Local Businesses, and shall provide the reasons any Local Businesses were not selected.

3(k) The Proposer will document efforts to advise and assist interested Local Businesses in obtaining bonds, lines of credit, and insurance required by the City or Proposer.

4) Return-to-Work and Other Programs

The City, in awarding this project, will consider community benefit proposals including but not limited to local job training, apprenticeships, the Helmets to Hardhats program (for further information, see <http://www.helmetstohardhats.org/>) or other veteran employment opportunity programs. Please provide detailed information about such community proposals that Proposer would provide if awarded this Project.

5) Noncompliance

Should the Proposer not achieve the 50% goal of Local Labor participation AND not demonstrate compliance with the proposed outreach efforts; not satisfy all Local Business participation requirements; and/or, not satisfy the Return-to-Work or Other Community Benefit Programs; the Proposer will be notified, in writing, of the violation. The Proposer will have an appropriate cure period to remedy the violation. Failure to cure the violation within the time specified in the notice will subject the Proposer to liquidated damages. The City may impose liquidated damages of \$_____ for every day or every incident of noncompliance, as applicable.

Date: 4-17-12

Item No.: 13

From: Julie Houser [mailto:JHouser@riverside-chamber.com]
Sent: Tuesday, April 17, 2012 11:43 AM
To: Brookshire, Jittaune
Cc: Priamos, Greg; Barber, Scott
Subject: Letter of Support

Jittaune,

Could you see that each council member gets a copy of this letter. It is for an item at council tonight.

Thank You

Julie Houser
Divisions Coordinator
Greater Riverside Chambers of Commerce
Email: jhouser@riverside-chamber.com
Phone: (951) 683-7100 ext. 210
Fax: (951) 683-2670

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**GREATER RIVERSIDE
CHAMBERS OF COMMERCE**

The Chamber...building a stronger local economy

April 16, 2012

The Honorable Ron Loveridge and City Council
3900 Main St., 7th Fl.
Riverside, CA 92522

RE: Community Benefit Program for use with Design-Build Request for Proposals

Dear Mayor Loveridge and Council Members:

The Economic Development Council of the Greater Riverside Chambers of Commerce unanimously supports the Community Benefit Program for use with Design-Build Request for Proposals.

After considerable research by the City Attorney, it has been determined that the City could utilize a Community Benefit Program for Design-Build Project. Under Charter section 1114 and Chapter 1.07 of the Riverside Municipal Code to award a bid on the basis of the "Best Value to the City." While a simple percentage bidding preference would violate the ordinance, the City may lawfully enhance local participation through outreach and awareness.

The Economic Development Council believes that adding this addendum to Design-Build Request for Proposals will provide the best value to the Riverside taxpayers as well as keep jobs in the city and region.

We respectfully request your favorable consideration.

Sincerely,

Cindy Roth
President/CEO

CR/jh

cc: Scott Barber, City Manager
Greg Priamos, City Attorney

**CITY OF RIVERSIDE
SPEAKER CARD**

WELCOME TO THE RIVERSIDE CITY COUNCIL MEETING.

IF YOU WISH TO ADDRESS THE CITY COUNCIL/REDEVELOPMENT AGENCY, PLEASE COMPLETE AND SUBMIT THIS CARD TO THE CITY CLERK. SPEAKERS ARE ENCOURAGED TO SUBMIT THEIR CARDS TO THE CITY CLERK BEFORE THE SCHEDULED MEETING TIME. SPEAKER CARDS WILL BE ACCEPTED UNTIL THE AGENDA ITEM IS CALLED.

ITEM NO.: 13
NAME: CINDY ROTH DATE: 4/17/12

CITY/NEIGHBORHOOD: RIV CHAMBER PHONE # (Optional): _____

ADDRESS (Optional): _____
Address City/State/Zip

SUBJECT: COMMUNITY BENEFIT PROGRAM
☒ SUPPORT ☐ OPPOSE ☐ NEUTRAL

In accordance with the ~~Public~~ Records Act, any information you provide on this form is available to the public.

PLEASE TURN OFF OR SILENCE PAGERS AND CELLULAR TELEPHONES.

SEE REVERSE FOR FURTHER INFORMATION

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ITEM NO.: 13 1 of

NAME: Karen Doris Wright

DATE: 4/17/2012 630

CITY/NEIGHBORHOOD: Wood 3

PHONE # (Optional): _____

ADDRESS (Optional): _____

Address

City/State/Zip

SUBJECT: _____

☐

SUPPORT

☐

OPPOSE

☐

NEUTRAL

In accordance with the Public Records Act, any information you provide on this form is available to the public.

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SEE REVERSE FOR FURTHER INFORMATION

Karen Davis Wright
written comments for
the record

CITY OF RIVERSIDE
SPEAKER CARD

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ITEM NO.: 13 2 of

NAME: Ward 3

DATE: 4/17/2012 630

CITY/NEIGHBORHOOD: Ward 3

PHONE # (Optional): _____

ADDRESS (Optional): ① I want to know how contracts under 50,000k are let
and what percent of those contracts have gone
to Riverside businesses over the last 5 years + the
5 years before that

SUBJECT: ② the 50 mile radius which the city has used
☐ SUPPORT ☒ OPPOSE ☐ NEUTRAL

In accordance with the Public Records Act, any information you provide on this form is available to the public.

as "Local" ensures that non Riverside businesses
can snatch up that contract. The Radius should
be much less, say 15 miles from the city center

PLEASE TURN OFF OR SILENCE PAGERS AND CELLULAR TELEPHONES.

SEE REVERSE FOR FURTHER INFORMATION

CITY OF RIVERSIDE
SPEAKER CARD

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ITEM NO.: 13 3 of

NAME: Karen Doris Wright

DATE: 4/17/03

CITY/NEIGHBORHOOD: Ward 3

PHONE # (Optional): _____

Will some of the requirements keep out local business such as strategy requirements
ADDRESS (Optional): _____
Address City/State/Zip

Will hard copy paper advertising be used, or
SUBJECT: direct contact with local businesses to ensure

☐ SUPPORT ☐ OPPOSE ☐ NEUTRAL

In accordance with the Public Records Act, any information you provide on this form is available to the public.
they can bid, advertising should not be kept internet only as that hurts Riverside businesses

PLEASE TURN OFF OR SILENCE PAGERS AND CELLULAR TELEPHONES.

Will there be training for local businesses to apply

SEE REVERSE FOR FURTHER INFORMATION

Why was there only one bidder on a roof on a recent item for the utility. Why weren't there more bids