



**CITY OF ALBANY
CITY COUNCIL AGENDA
STAFF REPORT**

Agenda Date: October 15, 2018

Reviewed by: NA

SUBJECT: Ordinance amending Chapter XIII of the Municipal Code to revise two definitions in Section 13-4, and to replace the protest procedures in Section 13-18

REPORT BY: Craig Labadie, City Attorney
Mark Hurley, Public Works Director

SUMMARY

Ordinance No. 2018-09 amends Chapter XIII of the Albany Municipal Code, “Public Works Projects, Contracts and Procedures,” to 1) revise two of the definitions in Section 13-4 to align with the applicable definition in the Albany City Charter, and 2) replace the current protest procedures in Section 13-18 with more streamlined procedures.

STAFF RECOMMENDATION

That the Council Introduce Ordinance 2018-09 (First Reading).

BACKGROUND

The definitions of “public works” and “public works contract” in Section 13-4, “Definitions,” of the Albany Municipal Code are incomplete and inconsistent with the related definition of “public project” in Section 4.03, “Contract Work,” of the Albany City Charter. This ordinance would revise the definitions in Section 13-4 to align with the definition of “public project” in the City Charter, thereby clarifying which types of services constitute public works that may be subject to bidding and other applicable legal requirements.

Section 13-18, “Protests of Contract Award,” of the Municipal Code provides protest procedures pursuant to which any “nonselected bidder may protest award of a contract, public works contract, or consultant agreement.” The existing procedures are overbroad and inefficient. Replacing the existing protest procedures in Section 13-18 with more streamlined procedures will ensure that contract awards are not delayed due to bid protests, and that bid protests will be resolved quickly, fairly, and as required by law. The streamlined procedures will more effectively serve the intentions and objectives set forth in Section 13-1, “Findings and Purpose,” of the Municipal Code which include securing the best economic result for the public, preventing waste of public funds, and administering a bidding process that does not impede regular public business.

Accordingly, Ordinance No. 2018-09 revises two of the definitions in Section 13-4, and replaces Section 13-18 in its entirety.

DISCUSSION

Section 13-4 Definitions:

Contracts for public projects are subject to public bidding requirements as well as other legal requirements. Therefore, it is important to clearly identify whether a contract is for a “public project” and subject to the applicable legal and procedural requirements. Section 4.03 of the City Charter defines “public project” for purposes of bidding requirements under the Charter as follows:

- “(a) A project for the erection, improvement, and repair of public buildings and works.
- (b) Work in or about streams, bays, waterfronts, embankments, or other work for protection against overflow.
- (c) Street or sewer work, except maintenance or repair.
- (d) Furnishing supplies or materials for any such project, including maintenance or repair of streets or sewers.”

This definition tracks the definition in California Public Contract Code section 20161 almost verbatim. However, the following definitions in Section 13-4 of the Municipal Code do not precisely or completely align with the above City Charter definition:

“*Public works* shall mean the construction, reconstruction, or repair of public buildings streets, utilities and other public works.”

“*Public works contract* shall mean a contract for the construction, reconstruction or repair of public buildings, streets, utilities and other public works.”

These definitions do not encompass the full scope of contracts subject to bidding requirements under the Charter. Definitions used in the Municipal Code with respect to public bidding requirements should be consistent with the City Charter definition for the same purpose. Ordinance 2018-09 will correct this inconsistency by revising the definitions for “public works” and “public works contract” in the Municipal Code to be consistent with the definition of “public project” in Section 4.03 of the Charter.

Section 13-18 Protest Procedures:

Bid protests generally arise only in the context of formal public bidding for a public works project, where selection is based solely on price, and not on any subjective criteria. As drafted, the protest procedures in current Section 13.18 are overbroad because they apply to award of any contract, even contracts that are not subject to competitive procurement

procedures. Staff recommends that the protest procedures in Section 13-18 should be focused on and generally limited to public works contracts awarded pursuant to Chapter XIII.

Protests can and should be resolved as swiftly as possible so that there is no undue delay in the procurement of goods or services. The current protest procedures can require weeks rather than days to resolve a routine bid protest, partly due to the unusually long deadline for submitting a protest. Under current Section 13-18 a “nonselected bidder” has ten days after bidder selection or disqualification is announced (or more if the tenth day falls on a weekend or holiday). This time period is not required by law. Bid protests are typically not complex and do not require much time to prepare. The proposed new procedures provide for a shorter deadline of three business days, which may be extended at the discretion of the City Manager, if merited by the circumstances for a given procurement.

The current protest procedures are unduly burdensome for the City because they require a due process hearing for most protests, even when that is not required by law. The current protest procedures provide the option of conducting a public hearing on a protest based on “responsiveness.” A bid is considered responsive if it conforms to all the material terms of the bid package. However, under well-established California case law, no hearing is required for issues of responsiveness, since review is limited to the “four corners” of the bid itself.

The only circumstance under which a hearing is appropriate is when the issue is whether the City will disqualify a bidder for a public works project as not “responsible.” A responsible bidder is one who has demonstrated the attributes of trustworthiness, quality, fitness capacity, and experience to satisfactorily perform the public works contract. Before a bidder may be disqualified as not responsible, it is entitled to a basic due process hearing, which includes the opportunity to present and rebut evidence. The proposed new procedures eliminate the requirement for a public hearing unless the City seeks to disqualify a bidder as not responsible.

The protest procedures contained in Ordinance 2018-09 are a bidder’s sole remedy for protesting a bid submitted by a competing bidder and provide clear guidelines for protesting bidders as well as deadlines for submission of protests and responses that are absent from the current version. Although the new procedures are intended for public works protests, they may be applied on a discretionary basis to protests that arise in different contexts, such as competitive procurements based on a request for qualifications, request for proposals, or request for quotes.

FINANCIAL IMPACT

It is anticipated that the revisions to Chapter XIII of the Municipal Code will save staff time and Council time, at no additional cost to the City.

Attachments

1. Ordinance No. 2018-09

ORDINANCE NO. 2018-09

**ORDINANCE OF THE ALBANY CITY COUNCIL AMENDING CHAPTER XIII
OF THE OF THE ALBANY MUNICIPAL CODE TO REVISE
TWO DEFINITIONS IN SECTION 13-4 AND TO REPLACE
THE PROTEST PROCEDURES IN SECTION 13-18**

WHEREAS, Section 4.03, “Contract Work,” of the Albany City Charter concerns bidding requirements applicable to “public projects” as defined therein, and sets forth the authority of the City Council to establish by ordinance requirements for formal competitive bidding, and to establish other procedures as necessary for undertaking the completion of any public projects; and

WHEREAS, Section 4.04, “Public Improvements and Street Work,” of the Albany City Charter provides that all public improvements may be done under and pursuant to State law or by procedure ordinance adopted by the City Council or electors; and

WHEREAS, Chapter XIII of the Albany Municipal Code, “Public Works Projects, Contracts and Procedures,” includes, in Section 13-1, “Findings and Purpose,” specific statements of the City Council’s intent in enacting Chapter XIII including preventing waste of public funds; securing the best economic result for the public; and administering competitive bidding to accomplish those objectives fairly and reasonably with sole reference to the public interest and so as not to impede the regular progress of the public business; and

WHEREAS, the City Council has determined that the definitions for “public works” and “public works contract” in Section 13-4, “Definitions,” of the Municipal Code are inconsistent with the definition of “public project” in Section 4.03 of the City Charter; and

WHEREAS, the City Council has determined that consistent definitions for public projects subject to bidding requirements are important to achieving the objectives set forth in Section 13-1 of the Municipal Code; and

WHEREAS, the City Council desires to amend the definitions for “public works” and “public works contract” in Section 13-4, “Definitions” of the Municipal Code to be consistent with the definition of “public project” in Section 4.03 of the City Charter; and

WHEREAS, the City Council has determined that the protest procedures Section 13-18, “Protests of Contract Award,” are inconsistent with the objectives in Section 13-1, because the procedures are overbroad and inefficient; and

WHEREAS, the City Council has determined that the protest procedures in Section 13-18 should be replaced with protest procedures that more effectively serve the intentions and objectives set forth in Section 13-1, by narrowing the scope and streamlining the bid protest procedures to ensure that work on public projects will not be delayed due to bid protests, to resolve bid protests fairly and quickly to the benefit of the public and the bidders, and to resolve protests more efficiently and cost-effectively to prevent waste of public funds; and

WHEREAS, the City Council desires to replace Section 13-18 in its entirety with the revised and streamlined procedures set forth below in order to better effectuate the intentions and objectives of Section 13-1 of the Municipal Code.

NOW, THEREFORE, THE ALBANY CITY COUNCIL DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. Amendment:

A. Section 13-4, “Definitions,” in Chapter XIII of the Albany Municipal Code is hereby amended to revise the definitions of “public works” and “public works contract,” respectively, to read as follows:

“*Public works*” has the same meaning as “public project” in Section 4.03 of the City Charter.

“*Public works contract*” means a contract for performing work on a “public project” as defined in Section 4.03 of the City Charter.

B. Section 13-18, “Protests of Contract Award,” in Chapter XIII of the Albany Municipal Code is hereby amended by deleting current Section 13-18 in its entirety, and replacing it with a new Section 13-18, as follows:

13-18 PROTESTS OF CONTRACT AWARD.

The protest procedures in this section apply to procurements for a Major Public Works Contract which are subject to formal bidding pursuant to subsection 13-5c.

a. The following procedures are a bidder’s sole remedy for protesting a bid submitted by a competing bidder, including, but not limited to, (1) protests based on alleged defects in the content of a bid or the manner in which it was submitted; (2) protests alleging that a competing bidder is not responsible; or (3) protests challenging the City’s administration of the procurement, including the City’s bidding documents or selection process.

b. A protest must be in writing and must be received by the Director of Public Works before 5:00 p.m., no later than three business days after the day on which the bids or proposals were opened, unless the time is extended in advance in writing by the City Manager based on special circumstances (the “Protest Deadline”), and must comply with the following requirements:

1. Only a bidder who has actually submitted a bid to the City is eligible to submit a protest. Third parties such as subcontractors or suppliers are not eligible to submit protests. A bidder may not rely on the protest submitted by another bidder, but must timely pursue its own protest.

2. The protest must be accompanied by a non-refundable fee, payable to the City of Albany, in the amount required under the City's current fee schedule, based upon the City's reasonable costs to administer the protest.

3. The protest must contain a complete statement of the basis for the protest and attach all supporting documentation. Material submitted after the Protest Deadline will not be considered. The protest must refer to the specific portion or portions of the bid or contract documents upon which the protest is based. The protest must include the name, address, email address, and telephone number of the protesting bidder and any person submitting the protest as an authorized representative the protesting bidder, such as legal counsel for the protesting bidder.

4. The protesting bidder must concurrently transmit a copy of the protest and all supporting documents to the protested bidder and any to other bidder who has a reasonable prospect of receiving an award depending upon the outcome of the protest, by email or personal delivery to ensure it is received before the Bid Protest Deadline.

5. The protested bidder is encouraged to submit a written response to the protest, provided the response is received by the City before 5:00 p.m., within two business days after either the Protest Deadline or the protested bidder's actual receipt of a copy of the protest, whichever is sooner (the "Response Deadline"). The response must attach all supporting documentation. The response must include the name, address, email address, and telephone number of the protested bidder and any person submitting the response to the protest as an authorized representative the protested bidder, such as legal counsel for the protested bidder.

6. The protested bidder must also concurrently transmit a copy of its response and all supporting documents to the protesting bidder and to any other bidder who was copied on the bid protest, by email or personal delivery to ensure it is received before the Response Deadline.

c. The procedure and time limits set forth in this Section 13-18 are mandatory and are a bidder's sole and exclusive remedy in the event of protest. A bidder's failure to strictly comply with these procedures will constitute a waiver of any right to further pursue a protest, including, but not limited to, the right to file a Government Code Claim or to initiate legal proceedings.

d. The merits of the protest will be determined by the Public Works Director, acting in consultation with the City Attorney and subject to final approval or ratification by the City Council. The City Council's action is final and non-appealable.

e. Neither a protesting nor protested bidder is entitled to a formal hearing, with the sole exception that if the City seeks to disqualify a bidder as not responsible, the City will schedule a public hearing before the City Manager or his or her authorized delegee, and will provide the bidder with notice and opportunity to present or rebut evidence directly related to the stated grounds for rejection. The City Manager or his or her authorized delegee, acting in consultation with the City Attorney, and based on its findings of fact, will make a

recommendation to the Council to either accept the bidder as responsible or to disqualify it on grounds it is not responsible. The City Council's action is final and non-appealable.

f. Subject to the limitations of law, the City further reserves the rights to waive or to decline to waive any immaterial bid irregularities; to accept or reject any or all bids; to postpone or cancel a bid; to postpone or cancel a project in whole or in part; or to perform work with its own forces. The City reserves the right to award a contract and to issue a notice to proceed with work notwithstanding any pending protest, claim, or legal action challenging the City's award.

g. Each bidder is solely responsible for any and all costs it incurs in preparing and submitting a bid, a bid protest, or protest response to the City.

h. These procedures will also apply to a protest of a contract award that does not involve formal public bidding for a Major Public Works Contract, unless or except to the extent otherwise specified in the applicable request for qualifications, request for proposals, request for quotes, or other such invitation for a competitive procurement process.

Section 2. Severability:

If any section, subsection, sentence, clause or phrase of this ordinance is held to be invalid, such decision shall not affect the validity of the remaining portions of the ordinance, and each section, subsection, sentence, clause or phrase thereof.

Section 3. CEQA Exemption:

The City Council finds that this ordinance is exempt from the provisions of the California Environmental Quality Act ("CEQA") pursuant to Section 15061(b)(3) of the CEQA Guidelines, because it can be seen with certainty that there is no possibility of significant environmental effects occurring as a result of the adoption of this ordinance.

Section 4. Publication and Effective Date:

This ordinance will be posted at three public places within the City of Albany and will become effective thirty days after the date of its posting.

PASSED AND ADOPTED by the City Council of the City of Albany at its meeting on the ____ day of _____, 2018, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

PEGGY MCQUAID, MAYOR