



## PUBLIC WORKS DEPARTMENT

CITY HALL  
10300 TORRE AVENUE • CUPERTINO, CA 95014-3255  
TELEPHONE: (408) 777-3354 • FAX: (408) 777-3333  
CUPERTINO.ORG

### CITY COUNCIL STAFF REPORT

Meeting: September 17, 2019

#### Subject

Approve option to use design-build procurement for qualifying projects and establish a corresponding conflict-of-interest limitation pursuant to Public Contract Code section 22160 et seq.

#### Recommended Action

Adopt Resolution No. \_\_\_\_ approving the use of design-build project delivery pursuant to Public Contract Code section 22160 et seq., and establish a corresponding conflict-of-interest limitation pursuant to Public Contract Code section 22162.

#### Discussion

The City Council has indicated its interest in having the option of using design-build delivery for future public works projects as an alternative to conventional design-bid-build project delivery. Benefits of design-build delivery could include reduced project costs, expedited project completion, and superior design features. Using design-build procurement, a single entity, known as the “design-build entity” (DBE) provides both design and construction for a project. In theory, this process can afford greater integration of services and provides a single entity responsible for both design and construction. By contrast, with conventional design-bid-build delivery process, the City initially contracts with a design firm to develop plans and specifications for a project, and then bids out the project to a qualified contractor to construct the project as designed.

However, even with design-build procurement, the City will need to separately retain the services of a design professional (architect or engineer) to develop preliminary project documents, often referred to as “bridging documents” or “requirement documents”, which are used during the design-build procurement.

City use of design-build procurement is governed by Public Contract Code section 22160 et seq., which is currently scheduled to sunset on December 31, 2024. (All subsequent statutory references are to the Public Contract Code, unless otherwise specified.)

Only certain types of projects may be procured on a design-build basis. Pursuant to section 22161(g), a qualifying “project” includes “the construction of a building or

buildings and improvements directly related to the construction of a building or buildings . . . and park and recreational facilities, but does not include the construction of other infrastructure, including, but not limited to, streets and highways, public rail transit, or water resources facilities and infrastructure.” A qualified project also includes construction of wastewater, solid waste management, or water recycling facilities.

Prior to using the design-build process, City Council must approve use of design-build procurement pursuant to section 22162(a), which also establishes a \$1,000,000 minimum on qualifying projects. The draft resolution approves the use of design-build project delivery for any qualifying project in excess of \$1,000,000 which the Director of Public Works has determined could be delivered more efficiently using design-build instead of design-bid-build procurement. For specific projects that the City intends to procure using design-build, City Council will approve the award of a contract to a design professional for preparation of the preliminary bridging documents when the contract amount requires Council approval under the City’s procurement policy, and the City Council will consider the approval of any subsequent contract awarded to a design build entity.

Section 22162(c) further provides that a city must adopt conflict-of-interest guidelines, “consistent with applicable law, regarding the ability of a person or entity, that performs services for the local agency relating to the solicitation of a design-build project, to submit a proposal as a design-build entity, or to join a design-build team.” Applicable law includes Government Code section 1090, which can apply to outside consultants, including design professionals, who are involved in the development of a public contract (e.g., by preparing bridging/requirement documents).

The draft resolution complies with section 22162(c) and Government Code section 1090, by providing that any person or entity providing services for the City related to solicitation of a design-build project, including, but not limited to, services pertaining to preparation of the preliminary documents required pursuant to Public Contract Code section 22164(a), may not submit a proposal as a design-build entity or join a design-build team for that project.

Subject to the draft resolution being adopted by Council and the Director of Public Works determining that a project could be delivered more efficiently using design-build instead of design-bid-build procurement the design-build procurement would proceed in four stages:

- (1) Pursuant to section 22164(a), the City retains a licensed design professional to develop bridging documents for the project, including the scope and estimated price, and which may also include preliminary plans, building layouts, performance specifications, etc.

(2) The City issues a request for qualifications (RFQ) pursuant to section 22164(b) to either prequalify or short-list the design-build entities who will then be eligible to submit proposals during the next stage.

(3) The City issues a request for proposals (RFP) pursuant to section 22164(d) to prequalified or short-listed design-build entities.

(4) Proposals are evaluated as specified in section 22164, which may include discussion and negotiation with proposers, and the design-build contract may be awarded to the design-build entity that offers the best value or that submits the lowest price, depending on the RFP requirements.

In addition, there are requirements for an “enforceable commitment” to use a “skilled and trained workforce” which must be addressed at the RFQ stage pursuant to section 22162(c), which states:

“(c) (1) A design-build entity shall not be prequalified or shortlisted unless the entity provides an enforceable commitment to the local agency that the entity and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project or contract that falls within an apprenticeable occupation in the building and construction trades, in accordance with Chapter 2.9 (commencing with Section 2600) of Part 1.”

The term “skilled and trained workforce” is defined in detail in section 2601(d), and generally requires that a specified percentage of journeypersons and subcontractors are graduates of apprenticeship programs. There are exceptions to the “enforceable commitment” requirement that may apply if the City enters into a project labor agreement, as further specified in section 22161(c)(2). However, the City is not required to enter into a project labor agreement as a precondition to using design-build procurement pursuant to section 22160 et seq.

With adoption of the draft resolution, qualifying public works projects may be delivered and constructed on a design-build basis, subject to the applicable legal limitations and requirements and City Council approval for construction award.

**Sustainability Impact**

No sustainability impact.

**Fiscal Impact**

No fiscal impact.

Reviewed by: Michael Zimmerman, CIP Program Manager

Approved for Submission by: Deborah Feng, City Manager

Attachments:

A – Draft Resolution