

MEMORANDUM

TO: Alora Wachholz

FROM: Bryn Meredith

DATE: May 28, 2019

RE: Competitive Requirements for Public Road Project re: The Square

As a component of the development of the Square mixed use project, the Developer and the City have agreed that a through road connecting Old Decatur and Saginaw Boulevard, should be constructed by the Developer and dedicated to the City. In addition, in order to incentivize the development and the construction of the through road, the City will consider an incentive payment of two million dollars, with one and a one-half million of that amount tied specifically to the construction and dedication of the road. Because more than 30% of the road construction cost will be funded by public dollars, certain procurement rules will apply.

Section 212.071 of the Texas Local Government Code requires that a contract to construct public improvements comply with the competitive bidding requirements of Chapter 252 of the Local Government Code in instances where the City participates in the cost of the improvements in excess of 30% of the total cost. In addition, Section 212.073 of the Local Government Code requires the execution of a performance bond for the project in accordance with Chapter 2253 of the Government Code. (Note that the Development agreement requires additional bonds be supplied.)

Chapter 252 of the Local Government Code requires that this project be competitively bid since the cost of the project exceeds \$50,000. However, section 252.022 (d) provides that if the City Council “determines that a method described by Chapter 2269, Government Code, provides a better value,” the contract is not required to be bid or awarded in accordance with the traditional competitive bidding process.

I recommend that the Council adopt a resolution finding that the through road should be advertised and awarded in accordance with the “best value” method set forth in Chapter 2269, Government Code. In addition, I recommend that the “Competitive Bidding Method” method be used for this project, under Subchapter C of Chapter 2269, Government Code. This method requires the project to be awarded to the lowest responsible bidder who *provides the best value to the City*. *Best value* may include consideration of multiple factors, including:

- (1) the price;
- (2) the offeror's experience and reputation;
- (3) the quality of the offeror's goods or services;
- (4) the impact on the ability of the governmental entity to comply with rules relating to historically underutilized businesses;

- (5) the offeror's safety record;
- (6) the offeror's proposed personnel;
- (7) whether the offeror's financial capability is appropriate to the size and scope of the project; and

(Tex. Gov't Code § 2269.055 (a).)¹

In addition, Section 2269.053 (a) authorizes the City Council to delegate “its authority under this chapter regarding an action authorized or required by this chapter to a designated representative, committee, *or other person.*” (*Emphasis added.*) In this case, I recommend that the Council adopt a resolution designating the Developer’s representative to perform the notice, bidding, and bid award of the construction of the through road. The request for proposals must include “the limits of the delegation, and the name or title of each person designated.” (Tex. Gov’t Code §2269.053 (b).)

Notice of the request for proposals must be published in a newspaper of general circulation “once each week for at least two weeks before the deadline for receiving bids, proposals, or responses.” (Tex. Gov’t Code §2269.052 (c).)

Please note the following requirements mandating the selection process for the successful offeror (and, as a reminder, the City Council’s designated representative performs these tasks):

Sec. 2269.102. **USE OF ARCHITECT OR ENGINEER.** The governmental entity shall select or designate an architect or engineer in accordance with Chapter 1051 or 1001, Occupations Code, as applicable, to prepare the construction documents required for a project to be awarded by competitive bidding.

Sec. 2269.103. **PREPARATION OF REQUEST.** The governmental entity shall prepare a request for competitive bids that includes construction documents, estimated budget, project scope, estimated project completion date, and other information that a contractor may require to submit a bid.

Sec. 2269.104. **EVALUATION OF OFFERORS.** The governmental entity shall receive, publicly open, and read aloud the names of the offerors and their bids.

Sec. 2269.105. **SELECTION OF OFFEROR.** Not later than the seventh day after the date the contract is awarded, the governmental entity shall document the basis of its selection and shall make the evaluations public.

Finally, all bids submitted are required to be *sealed*. (Tex. Gov’t Code §2269.059.)

¹ Note that: “ In engaging in an activity to which this section applies, a governmental entity:

- (1) may not consider whether a person is a member of or has another relationship with any organization; and
- (2) shall ensure that its bid specifications and any subsequent contract or other agreement do not deny or diminish the right of a person to work because of the person's membership or other relationship status with respect to an organization.” Sec. 2269.054(b)

