



CITY OF KIRKLAND
Department of Finance and Administration
123 Fifth Avenue, Kirkland, WA 98033 425.587.3000
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MEMORANDUM

To: Kurt Triplett, City Manager

From: Tracey Dunlap, Director of Finance & Administration
Barry Scott, Purchasing Agent

Date: August 19, 2010

Subject: Purchasing Code Amendments

RECOMMENDATION:

City Council pass the attached ordinance which would change a section that prohibits advance payments (deposits) and also increase the dollar limit allowed for small works roster projects from \$200,000 to \$300,000.

BACKGROUND AND DISCUSSION:

Payment of Deposits

It has long been the policy of the City to avoid the payment of deposits or down payments when purchasing goods or services. KMC 3.85.040(f) states that "Advance funding payments made to a contractor prior to the incurring of costs by the contractor shall be prohibited." RCW 42.24.080 also requires the receipt of goods or services prior to making payment.

However, earlier this year when we were purchasing the rubber sidewalk panels for the Park Lane Improvements Project, we were faced with a situation where the supplier could not sell us the product without a deposit and the supplier was the only company that could supply the product to us.

Seeking a solution to our dilemma, the City's Accounting Manager, Teresa Levine, contacted the State Auditor's Office (SAO) asking their advice as to how we might proceed. The response received from the SAO (Attachment A) provided information on when prepayments (deposits) would be deemed to be acceptable by the SAO and concluded that payment of a deposit by the City of Kirkland "would be allowable provided that the terms of the prepayment were included in a contract signed prior to the payment." With that information, we were able to take the steps necessary to place the order and obtain the sidewalk panels required for the project.

However, KMC 3.85.040(f) specifically states that advance payments are prohibited. The revision to KMC 3.85.040(f) will allow for payment of a deposit to be made, but only when the Purchasing Agent and the Accounting Manager have reviewed the request for the deposit, determined that the payment of a deposit is absolutely necessary and assured that all available precautions have been taken to prevent the loss of public funds.

Small Works Roster Threshold

The City implemented a Small Works Roster process in 2001 when the maximum amount per project allowed by State law (RCW 39.04.155(1)) for the use of a Small Works Roster was \$200,000. The RCW was revised in 2009 and the maximum allowable dollar amount for a Small Works Roster project was increased to \$300,000. We are requesting that KMC 3.85.170(a) be amended to match the \$300,000 threshold allowed by RCW 39.04.155(1).

It is important to note that the Small Works Roster process still requires that competitive bids be solicited. The Small Works Roster process provides an option to the more formal Invitation for Bids process where it is required that projects be advertised twice in a publication of general circulation. Rather than advertising the project, contractors on the Small Works Roster are notified of the bidding opportunity. It is the City's policy to notify all contractors found in the appropriate category on the Small Works Roster of any bidding opportunities for projects in excess of \$35,000. (The RCW requires that all contractors be notified if the estimated amount for the project is in excess of \$150,000.) Our experience has been that the contractors listed on the Small Works Roster are the same contractors that respond to the public notices for our Invitations for Bids.

The City retains the right to use the Invitation for Bids process instead of the Small Works Roster process if it is determined to be to the City's benefit to do so (e.g. an insufficient number of contractors found in a Small Works Roster category).

From: Beth Mauch [mailto:mauchb@sao.wa.gov]
Sent: Tuesday, February 16, 2010 3:07 PM
To: Teresa Levine
Subject: RE: vendor payment question

Hi Teresa

This question comes up from time to time. We have come up with the following guidelines regarding prepayments for goods and services

Prepayments are generally not allowed under RCW 42.24.080, which requires the receipt of goods or services prior to payment. However, in other situations, SAO has determined that early payment is acceptable if additional consideration is received .

In cases where there is prepayment of a one-year maintenance agreement for the software. The entity received something of value, in the form of a service contract for a specified period of time, in exchange for their payment. Therefore, it appears they have satisfied the requirement for payment.

RCW 42.24.035 allows for prepayments of certain expenses, such as subscriptions or other periodical publications, as long as the payment arrangement is consistent with normal business practices. In other situations, SAO has determined that early payment is acceptable if the arrangement is clearly a normal business practice (such as with rent or insurance). It would seem that the normal business practice regarding maintenance agreements are that they are paid at the beginning of the contract period.

A final consideration is whether the arrangement serves to adequately safeguard public resources. **So long as the payment occurs after receipt of a contract and the contract adequately specifies performance on the part of the vendor, public resources are still safeguarded and no gifting of public funds occurs**

Kirkland's situation would fall under the highlighted guideline and would be allowable provided the terms of the prepayment were included in a contract signed prior to the payment.

Beth

From: Teresa Levine [mailto:TLevine@ci.kirkland.wa.us]
Sent: Tuesday, February 16, 2010 12:46 PM
To: Beth Mauch
Subject: vendor payment question

Beth: We are having a fair number of vendors express concern over taking purchase orders in lieu of deposits for certain items. Generally, the issues surround products that are unusual in nature or that a vendor can provide to us in limited quantities with no issues. Recently we have requested unusually large quantities of inventory and the vendor has requested a "deposit" to acquire or have above normal quantities made for us. We do use the standard BARS language when signing for payments as stated below. My question is, as long as there is a contract for service in place that outlines a "pre-payment" or "deposit", are we still within the guidelines?

I, the undersigned, do hereby certify under penalty of perjury that the materials have been furnished, the services rendered or the labor performed as described herein, that any advance payment is due and payable pursuant to a contract or is available as an option for full or partial fulfillment of a contractual obligation, and that the claim is a just, due and unpaid obligation against the (city/county/district), and that I am authorized to authenticate and certify to said claim.

Thanks!

*Teresa Levine
Accounting Manager
City of Kirkland
425 587-3115*

ORDINANCE 4256

AN ORDINANCE OF THE CITY OF KIRKLAND RELATING TO PROCUREMENT STANDARDS AND THE SMALL WORKS ROSTER PROCESS.

The City Council of the City of Kirkland do ordain as follows:

Section 1. Section 3.85.040 of the Kirkland Municipal Code is hereby amended to read as follows:

3.85.040 Procurement standards.

The following standards shall be applicable to city procurements:

(a) A review of all proposed procurements shall be done by purchasing staff and/or the appropriate budget authority for the purpose of, including but not limited to, avoiding the purchase of unnecessary or duplicative items and for consolidating procurements when appropriate to obtain a more economical purchase.

(b) The purchasing agent or designee shall be responsible for analyzing procurements to determine whether or not a lease arrangement may be more economically practical than the purchase alternative. All lease agreements must be approved by the director.

(c) Time and material type contracts shall be used only after a determination that no other type of contract is suitable and when the contract includes a ceiling price, which the contractor shall not exceed, except at its own risk.

(d) When using a liquidated damages provision in a contract, the project manager shall document the derivation of the rate of assessment and ensure it is reasonable, proper, and not arbitrary and capricious. The rate should be enough to reasonably compensate the city for damages suffered, but not so large as to be construed as a penalty.

(e) When contracting for professional services, the contract shall limit the total of the base and option time periods to not more than five years, unless otherwise approved by the city council. Prices for each base and option time period shall be firm and fixed wherever possible and shall be established in the initial contract negotiation and execution. If it is not possible to establish firm, fixed prices, changes in the option period prices shall be tied to a well-known, published pricing index, such as the appropriate Consumer Price Index.

(f) ~~Advance funding payments made to a contractor prior to the incurring of costs by the contractor shall be prohibited~~Generally goods and services are not to be prepaid (paid for before receiving) unless expressly allowed by statute, the Kirkland Municipal Code or city administrative policy; provided, prepayment may be made if the terms of the prepayment are included in a contract executed prior to the payment. Progress or percentage of completion payments made to a contractor while work is being performed by the contractor may be allowed if deemed appropriate for the project.

(g) Project managers and purchasing staff shall work together to ensure contractors perform in accordance with the terms and conditions, and specifications of their contract or purchase order.

(h) All contracts must contain a provision allowing the city to terminate the contract. Ideally, the provision will authorize such termination without cause but, in lieu of this ideal, a provision allowing termination for cause is acceptable if approved by the city attorney's office. A provision in a single contract authorizing termination without cause in certain circumstances and termination only for cause in others is also acceptable upon approval by the city attorney's office.

Section 2. Section 3.85.170 of the Kirkland Municipal Code is hereby amended to read as follows:

3.85.170 Small works roster process.

(a) In accordance with the procedures set forth in RCW 39.04.155, contracts for public works projects with a total cost, including applicable taxes, between seven thousand five hundred dollars and ~~two~~ three hundred thousand dollars may be awarded using the small works roster process.

(b) The limited public works process as defined in RCW 39.04.155(3) may also be used for projects estimated to cost less than thirty-five thousand dollars. Using this process, quotes are solicited from a minimum of three contractors found in the appropriate category of work in the small works roster. The performance and payment bond requirements and retainage requirements may be waived by the city.

(c) Quotations may be invited from all appropriate contractors on the appropriate small works roster. As an alternative, quotations may be invited from at least five contractors on the appropriate small works roster who have indicated the capability of performing the kind of work being contracted, in a manner that will equitably distribute the opportunity among the contractors on the appropriate roster. However, if only five quotations are sought and the estimated cost of the work is from one hundred fifty thousand dollars to ~~two~~ three hundred thousand dollars, the city must also notify the remaining contractors on the appropriate small works roster that quotations on the work are being sought. Such notice must be published in a legal newspaper of general circulation, mailed to these other contractors or sent by facsimile or other electronic means.

(d) At least once a year, the city shall publish in a newspaper of general circulation within the jurisdiction a notice of the existence of the roster or rosters and solicit the names of contractors for such roster or rosters. Responsible contractors shall be added to an appropriate roster or rosters at any time that they submit a written request and necessary records.

(e) The city is authorized to participate with other local governments in the use of a multijurisdictional small works roster. The lead entity for the multijurisdictional small works roster must be clearly identified in the interlocal agreement as being responsible for implementing the provisions of RCW 39.04.155(2).

(f) A formal public bid opening is not required when using the small works roster process. However, no interested party shall be unreasonably denied the opportunity to be present when bids are opened.

(g) Contracts for small works roster bids between fifty thousand dollars and two hundred thousand dollars will be awarded by the city council at the next scheduled council meeting following staff recommendation, unless continued by the city council.

(h) In accordance with RCW 39.04.200, the purchasing agent will, at least once every year, make available to the public a list of the contracts awarded using the small works roster process during the previous year. The list shall contain the name of the contractor or vendor awarded the contract, the amount of the contract, a brief description of the type of work performed or items purchased under the contract, and the date it was awarded. The list shall also state the location where the bid quotations for these contracts are available for public inspection.

Section 3. This ordinance shall be in force and effect five days from and after its passage by the Kirkland City Council and publication, as required by law.

Passed by majority vote of the Kirkland City Council in open meeting this _____ day of _____, 2010.

Signed in authentication thereof this _____ day of _____, 2010.

MAYOR

Attest:

City Clerk

Approved as to Form:

City Attorney