

**ORDINANCE NO. \_\_\_\_**

**AN ORDINANCE ESTABLISHING RESPONSIBLE BIDDER  
REQUIREMENTS ON PUBLIC WORKS PROJECTS**

WHEREAS, Indiana Code § 36-1-3-1 et seq. permits any City in the State of Indiana to exercise any power or perform any function necessary to the public interest in the context of its local affairs, which is not prohibited by the Constitution of the United States or of the State of Indiana, or denied or preempted by any other law, or is not expressly granted by any other law to another governmental entity;

WHEREAS, the City government expends substantial funds for the construction of public work, a portion of that money being derived from taxes paid by residents;

WHEREAS, the City government seeks to preserve administrative resources by ensuring that only qualified contractors and subcontractors are awarded contracts on public work construction projects;

WHEREAS, the City government, based upon its experience, has determined that quality workmanship, efficient operation, safety, and timely completion of projects are not necessarily insured by awarding a construction contract solely on the basis of the low bid;

WHEREAS, the City government seeks to enhance its ability to identify the lowest “responsible and responsive bidder” on all public work construction projects by instituting more comprehensive submission requirements which are in compliance with Indiana State Law; and

WHEREAS, “An Ordinance Establishing Responsible and Responsive Bidder Requirements on Public Work Projects” will assure efficient use of taxpayer dollars, will promote public safety, and is in the public interest.

NOW, THEREFORE, BE IT ORDAINED by the City Council of \_\_\_\_\_, Indiana (hereinafter “City”), that:

**Section 1. Public works**

For purposes of this chapter, the term “public work” has the meaning set forth in IC 36-1-12-2. “Public work” shall also include the following: any constructing, altering, reconstructing, repairing, rehabilitating, refinishing, refurbishing, remodeling, remediating, renovating, custom fabricating, maintenance, landscaping, improving, moving, wrecking, painting, decorating, demolishing, and adding to or subtracting from any public building, structure, airport facility, highway, roadway, street, alley, bridge, sewer, drain, ditch, sewage disposal plant, water work, parking facility, railroad, excavation, or other project, development, real property, or improvement, or to do any part thereof, whether or not the performance of the work herein described involves the addition to, or fabrication into, any structure, project or development, real property or improvement herein described of any material or article of merchandise, which is paid for out of a public fund or out of a special assessment. The term also includes any public work leased by a political subdivision under a lease containing an option to purchase.

## **Section 2. Application**

This ordinance applies whenever the cost of the public work project is estimated to be at least seventy-five thousand dollars (\$75,000) or more.

In order for a bid to be accepted, the bidder must submit the information listed in Section 3 below at or before the date and time that bids are due. Alternatively, the bidder may seek prequalification by submitting the information listed in Section 3 below to the City. All required information shall be submitted on forms provided by the City.

If the bidder participates in a multi-employer program and/or plan that relates to any of the matters referred to in Subsection F and/or G of Section 3 below, then the requirements of such subsections with respect to said bidder shall be satisfied if: (a) the applicable documents with respect to said program and/or plan are submitted to the City; and (b) the bidder certifies to the City that the bidder participates in and is bound by said programs and/or plans. The applicable documents with respect to said programs and/or plans may be submitted by the bidder and/or by the programs/plans and/or a representative of the programs/plans.

A prequalified bidder shall be deemed a “responsible bidder” for purposes of this ordinance for a period of one (1) year from the date the City determines that the bidder is a “responsible bidder” based upon the relevant factors, including those referenced in Section 3 below. The failure and/or refusal of the City to “prequalify” a bidder as a “responsible bidder” shall not prohibit a bidder from bidding on a public project, but the City may consider all relevant factors, including any prequalification submissions, in determining whether or not the bidder is a “responsible bidder” with respect to said public project.

Requirements for subcontractors are set forth in Section 4 below.

Any provisions of this Ordinance that conflict with any applicable federal statute, regulation and/or rule that applies to a federally-funded construction project shall not apply to said federally-funded construction project.

## **Section 3. Responsible and Responsive Bidder**

In determining whether a bidder is a “responsible and responsive bidder” for the award of a public work contract, the City shall consider the factors set forth in IC 36-1-12-4(b)(10) and IC 36-1-12-4(b)(11). In addition, the bidder must submit the following information with supporting documentation, verified under oath on a form provided by the City:

- A. A copy of a print-out of the Indiana Secretary of State’s on-line records for the bidder dated within sixty (60) days of the submission of said document showing that the bidder is in existence, current with the Indiana Secretary of State’s Business Entity Reports, and eligible for a certificate of good standing. If the bidder is an individual, sole proprietor or partnership, this subsection shall not apply;
- B. A valid federal employer tax identification number for the bidder, or, if the bidder is an individual, a valid social security number;

- C. Documents evidencing registration with the Indiana Department of Revenue if bidder has employees (e.g. document with Taxpayer Identification Number);
- D. A statement of compliance with provisions of Section 2000e of Chapter 21, Title 42 of the United States Code and Federal Executive Order No. 11246 as amended by Executive Order No. 11375 (known as the Equal Opportunity Employer provisions);
- E. A statement of compliance with all provisions of the Indiana Common Construction Wage law (IC 5-16-7) and the federal Davis-Bacon and any related acts, and all rules and regulations therein, for the past five (5) years.

Such statement shall also provide that the bidder has reviewed the Common Construction Wage law, the federal Davis-Bacon Act, and any related acts, has reviewed and agrees to pay the applicable common construction wage (or prevailing wage rate) as set forth in the common construction wage rate schedule (or prevailing wage determination) attached to the bid specifications, and will strictly comply with the Common Construction Wage law (and federal Davis-Bacon and any related acts, if applicable) and related requirements.

A bidder who has been found by the Indiana Department of Labor to have a violation of the Common Construction Wage law that has not been fully remedied within sixty (60) days of the bidder's receipt of notice of said violation shall be deemed not to be a responsible and responsive Bidder for two (2) years from the date of said finding. A bidder may also be deemed not to be a responsible and responsive Bidder if the bidder has committed multiple violations of the Common Construction Wage law, regardless of whether or not such violations have been remedied. Further, a bidder on the federal Excluded Parties List System ([www.epls.gov](http://www.epls.gov)) shall be deemed not to be a responsible and responsive Bidder;

- F. Evidence of participation in apprenticeship and training programs applicable to the work to be performed on the project which are approved by and registered with the United States Department of Labor's Office of Apprenticeship, or its successor organization. The required evidence includes a copy of all applicable apprenticeship standards and Apprenticeship Agreement(s) for any apprentice(s) who will perform work on the public work project;
- G. A copy of a written plan for employee drug testing that: (i) covers all employees of the bidder who will perform work on the public work project; and (ii) meets, or exceeds, the requirements set forth IC 4-13-18;
- H. Documents evidencing bidder's safety and health activities, e.g. a written safety policy statement or plan;
- I. A statement that individuals who will perform work on the public work project on behalf of the bidder will be properly classified as either (i) an employee or (ii) an independent contractor, under all applicable state and federal laws and local ordinances;

- J. A statement that all employees of the bidder who will perform work on the public work project are (i) covered under a current worker's compensation insurance policy and (ii) properly classified under such policy.

The evidence of worker's compensation insurance shall include a copy of the Certificate of Insurance showing the minimum statutory coverage. Further, if the bidder is insured with a carrier, the evidence of worker's compensation insurance shall also be a copy of the Declaration Page(s) of the current worker's compensation insurance policy showing the name and address of the insured, policy period, description, categories, class codes, estimated payroll and rates;

- K. Documents evidencing any professional or trade license or registration required by federal or state law or local ordinance for any trade or specialty area in which the contractor is seeking a contract award. Additionally, the bidder must disclose any suspension or revocation of such license held by the company, or of any director, officer or manager of the company;
- L. Disclosure of any federal, state or local claim for unpaid compensation (wages and/or fringe benefits) to bidder's employees filed against the bidder in the last five years, where such claim totals \$100,000 or more; and
- M. Disclosure of any federal, state or local tax liens or tax delinquencies against the contractor or any officers of the contractor in the last five (5) years.

**Section 4. Subcontractors**

The bidder shall provide a written list that discloses the name, address, and type of work for each first-tier subcontractor from whom the bidder has accepted a bid and/or intends to hire on any part of the public work project, including individuals performing work as independent contractors, within five (5) business days from the date the bids are due.

In addition, each such first-tier subcontractor shall be required to adhere to the requirements of Section 3 and Section 4 of this Ordinance as though it were bidding directly to the City, except that first-tier subcontractors shall submit the required information (including the name, address, and type of work for each of their first-tier subcontractors) to the successful bidder no later than the date of the subcontractor's first application for payment for the public work project and the bidder shall then forward said information to the City. Payment shall be withheld from any first-tier subcontractor who fails to timely submit said information until such information is submitted and approved by the City.

Upon request, the City may require any second- and lower-tier subcontractors to provide a written list that discloses the name, address, and type of work for each of their first-tier subcontractors to the successful bidder. Payments shall be withheld from any second- or lower tier subcontract who fails to timely submit said information until such information is submitted and approved by the City.

Failure of a subcontractor to submit the required information shall not disqualify the successful bidder from performing work on the project and shall not constitute a contractual default and/or breach by the successful bidder. However, the City may withhold all payments otherwise due for work performed by a subcontractor, until the subcontractor submits the required information and the City approves such information.

The disclosure of a subcontractor (“Disclosed Subcontractor”) by a bidder or a subcontractor shall not create any rights in the Disclosed Subcontractor. Thus, a bidder and/or subcontractor may substitute another subcontractor (“Substitute Subcontractor”) for a Disclosed Subcontractor by giving the City written notice of the name, address, and type of work of the Substitute Subcontractor. The Substitute Subcontractor is subject to all of the obligations of a subcontractor under this Ordinance.

**Section 5. Additional Criteria Available**

If the criteria in Sections 3 and 4 are otherwise satisfied, the City may also consider the following in determining whether or not a bidder is a “responsible bidder” for purposes of awarding the public work project:

- A. For projects in excess of \$100,000, the City may require submission of Form 96 – Contractor’s Bid for Public Work and may consider the information contained in said document if the submission of said document was required by the bidding documents and/or required by applicable bidding statutes and laws.
- B. Any determinations by a court or governmental agency for violations of federal, state, or local laws including, but not limited to violations of contracting or antitrust laws, tax or licensing laws, environmental laws, the Occupational Safety and Health Act (OSHA), the National Labor Relations Act (NLRA), or federal Davis-Bacon and related Acts.

**Section 6. Credit Toward Bid Award**

The following criteria shall be used as credit toward a bid in determining the lowest responsible bidder if the City provides in the solicitation that local credits shall apply. If the City applies any credit(s) towards a bid, the credit(s) will not reduce the amount of a contract.

EXAMPLE: \$1,000,000 bid, receives \$50,000 local bidder credit. For purposes of determining the lowest bidder, the contractor’s bid is \$950,000. However, the contract price will remain \$1,000,000.

- A. The City shall apply a credit equal to 5% or \$50,000, whichever is less, based on the local bidder’s bid. A local bidder is an individual or business entity that (1) establishes it has a place of business located in the county where the work is to be performed for at least 1 year prior to the deadline for submitting bids, as registered in official documents with the Indiana Secretary of State; and (2) can demonstrate for one year prior to the deadline for submitting bids that it has paid a minimum of \$5,000 of sales tax in the county where the work is to be performed.

In the event a local bidder does not bid on the project, a bidder that establishes it has a place of business located within an Indiana county contiguous to the county where the work is to be

performed for at least one year prior to the deadline for submitting bids, as registered in official documents with the Indiana Secretary of State, will receive a credit equal to 1% or \$10,000, whichever is less; and

- B. The City shall apply a credit equal to 2% or \$20,000, whichever is less, towards the bid of a bidder with a local workforce. "Local workforce" means at least 25% of the bidder's construction employees reside in the county where the work is to be performed or Indiana counties contiguous to the county where the work is to be performed. The bidder is not required to have a place of business in the county where the work is to be performed for this credit to apply.

The bidder is responsible for requesting credit based upon any of the above criteria.

### **Section 7. Material Change**

Any material changes to the bidder's or first-tiered subcontractors' status at any time must be reported in writing to the City within fourteen (14) days of the occurrence of said material change.

### **Section 8. Incomplete Submissions by Bidders and Subcontractors**

It is the sole responsibility of the bidder to comply with all of its submission requirements within the time periods set forth in this Ordinance. Submissions that are inadequate and/or incomplete may result in a determination that the bidder is not a "responsible bidder."

### **Section 9. Lowest Bidder Not Chosen**

If the City awards the contract to a bidder other than the lowest bidder, the City must state in the minutes or memoranda, at the time the award is made, the factors used to determine which bidder is the lowest responsible and responsive bidder and to justify the award. The City shall keep a copy of the minutes or memoranda available for public inspection.

### **Section 10. Certified Payroll Reports**

For projects in which the cost is at least \$250,000, the successful bidder and all subcontractors working on a public work project shall submit a certified payroll report utilizing the federal form now known as a WH-347 (or a successor form or a State of Indiana certified payroll form if and when such a form is adopted) which must be prepared on a weekly basis and submitted to the City within ten (10) calendar days after the end of each week in which the bidder or subcontractor performed its work on the public work project. The City may withhold payment due for work performed by a bidder if the bidder fails to timely submit its certified payroll reports until such time as such certified payroll reports are submitted. The City may also withhold payment due for work performed by a subcontractor if the subcontractor fails to timely submit its certified payroll reports until such time as such certified payroll reports are submitted. The City shall not withhold payment to a bidder for work performed by the bidder or for work performed by subcontractors who have submitted their certified payroll reports, because one or more other subcontractors failed to timely submit their certified payroll reports.

**Section 11. Public Records**

All information submitted by a bidder or a subcontractor pursuant to this Ordinance, including certified payrolls, are public records subject to review pursuant to the Indiana Access to Public Records law (IC 5-14-3).

**Section 12. Materiality**

The requirements of this Ordinance are a material part of the bidding documents and any contract for a public work project subject to this Ordinance. The City shall include a copy of the Ordinance and a copy of the forms for submission of the information required in Section 3 and 4 above, in all bidding documents for all public work projects subject to the Ordinance. If the City fails to include a copy of the Ordinance in such bidding documents, the City may not reject a bid submitted by a bidder on the basis that the bidder failed to submit the information required in Section 3 or 4 in accordance with the applicable time periods; provided, however, that the City may require bidders to submit such information after bids are submitted and then consider such information in determining whether or not a bidder is “responsible.” Regardless of whether or not the Ordinance is included in the bidding documents, however, any bidder awarded a contract for a public work project subject to this Ordinance is subject to the requirements of this Ordinance.

Any bidder awarded a contract for a public work project subject to this Ordinance shall insert provisions in all subcontracts for the public work project that require the subcontractor: (a) to perform the subcontractor’s obligations under this Ordinance; and (b) to include similar language in all lower-tiered subcontracts for the public work project; provided, however, that a subcontractor performing any work on a public work project subject to this Ordinance shall be subject to this Ordinance regardless of whether or not such provisions are included in its subcontract.

**Section 13. Severability**

If any portion of this Ordinance or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other portions or applications of this Ordinance which can be given effect without the invalid portions or applications and, to this end, the portions of this Ordinance are severable.

**Section 14. Other Ordinances**

Any prior ordinance or portion thereof in conflict with this Ordinance is hereby revoked.

**Section 15. Effective Date**

This Ordinance shall take effect upon passage by the City Council of \_\_\_\_\_, Indiana.

IN WITNESS WHEREOF, the above-stated Ordinance has been duly adopted this \_\_\_ day of \_\_\_\_\_, 2013.

PASSED by the City Council of \_\_\_\_\_, Indiana by a \_\_\_\_\_ vote of all members present and voting this \_\_\_ day of \_\_\_\_\_ 2013.

\_\_\_\_\_  
, Mayor

ATTEST:

\_\_\_\_\_  
, City Clerk

Presented by me to the Mayor of \_\_\_\_\_, Indiana, this \_\_\_ day of \_\_\_\_\_, 2013 at the hour of \_\_\_\_\_ o'clock P.M.

\_\_\_\_\_  
, City Clerk

This Ordinance approved and signed by me this \_\_\_ day of \_\_\_\_\_, 2013 at the hour of \_\_\_\_\_ o'clock P.M.

\_\_\_\_\_  
, Mayor