


City of Alexandria, Virginia

MEMORANDUM

DATE: MARCH 23, 2021

TO: THE HONORABLE MAYOR AND MEMBERS OF CITY COUNCIL

FROM: MARK B. JINKS, CITY MANAGER 

SUBJECT: RESPONSE TO QUESTIONS RELATED TO PROCUREMENT POLICIES

This memorandum is in response to a number of questions and clarifications from the Mayor, Vice-Mayor and Councilman Chapman raised in regard to several procurement topics related to the City's procurement process for the City's vendors and City departments. These questions encompass the following general categories:

- Responsible bidder requirements,
- Apprenticeship programs,
- Micro-bidders,
- Disability considerations,
- Surety bond requirements, and
- Prevailing wage requirements

The City Code is the reflection of the Virginia Public Procurement Act (VPPA) and is the public facing set of rules related to purchasing in the City of Alexandria. From a purchasing perspective, the Code is what the City is required to do. The Purchasing Manual is the tool to educate and guide the execution of the VPPA and all of the codified elements. The Purchasing Manual is the best way to ensure that the City is following the rules, and achieving the most competitive, fair procurement process. The City Code states what is required, the Manual instructs Departments on how to do it. This Manual is an internal facing document.

Responsible Bidder

Existing language in the VPPA provides that a responsible bidder is a characterization that designates a prospective vendor/bidder as qualified to perform the work that is being requested. Under this definition, it is not sufficient to be the lowest bid. A successful bidder must also be deemed "responsible." By definition, in the Commonwealth,

"Responsible bidder" or "offeror" means a person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability that will assure good faith performance, and who has been prequalified, if required.

For certain Virginia Department of Transportation (VDOT) contracts, recently enacted legislation regarding determination of "responsible bidder" provides further criteria enabling vendors to be classified as "responsible" who are not already pre-qualified by VDOT. This includes evidence of:

- a. *Completion of specific safety training programs*
- b. *Participation by the bidder and any potential subcontractors in approved apprenticeship training programs; or*
- c. *Maintenance by the bidder and any potential subcontractors of records of compliance with applicable local, state, federal laws.*

The City currently has diverse methods of determining responsibility that do not solely rely on VDOT pre-qualification; therefore, the addition of these criteria to the City's Purchasing Policies and Procedures Manual is now planned. Once bidders are deemed responsible, invitation to bid contracts awarded under this provision would be awarded to the lowest responsive and responsible bidder. These changes will be added to the Purchasing Manual. Since responsible bidder definition is already in the State Code, there is no additional requirement to add this to the City Code.

Apprenticeship Programs

Currently, Virginia does not yet have approved legislation mandating or providing local authority for this activity in the Commonwealth. Recently proposed legislation would require several state agencies to review and evaluate the impact of these programs on public procurement in the Commonwealth. This evaluation is proposed to be submitted to the General Assembly by December 1, 2021, which should be in time for the 2022 session of the General Assembly. It is important to note that not all companies have apprentice programs, particularly small businesses.

If the legislation is enacted, the benefits of requiring approved apprenticeship programs would be to strengthen the workforce capabilities and reduce likelihood of post project rework. The negative aspects would be that it would take approximately a year for non-apprenticeship contractors to get a certified program up and running sufficiently to be able to qualify to bid on contracts with this requirement. The increase in time needed to complete the program could reduce the open competition requirements of public procurement. Recent estimates from the American Building Contractors have estimated a cost increase of 15 percent per project requiring apprenticeship programs and the possible negative impact to small contractors to comply.

Currently, Section 2.2-4302.1 of the VPPA does allow *consideration of whether a bidder participates/has participated in apprenticeship programs, if included in the Invitation to Bid*. If the City specifies that this will be a factor when bids are issued, under current State law such participation could be considered but cannot be mandated from contractors at this time.

Micro-businesses

A micro-business means a small, women-owned, or minority owned business with no more than 25 employees. New legislation provides that any locality may enact an ordinance to enhance micro-business participation in local government procurement practices. Such measures may include special designation of local micro-businesses, providing technical support to micro-businesses, setting target goals for micro-business participation in the local procurement process, and other reasonable measures intended to promote micro-business participation in the locality. This action is consistent with the direction that City Council has given staff with regard to the Small, Women and Minority (SWaM) initiatives. The new legislation helps to focus this effort on the business size most in need of support. Alexandria has 209 certified SWaM, micro businesses. The current SWaM program involves concentrated outreach to SWaM institutions and businesses

through seminars, email, and virtual meetings. City solicitations have been updated to make clear annotation of how SWaM business can register as such with the Commonwealth and the City. The City has worked with Northern Virginia Transportation Commission to set three-year goals for SWaM participation in City transportation projects.

Disability Considerations

As the state code allows this, the City will utilize the ability to use permit public bodies to include the proposer's employment of persons with disabilities as an evaluation factor during a competitive negotiation as allowed.

Surety Bonds

The Virginia Code was recently changed to provide an extended period for actions to be brought against performance bonds in conjunction with construction contracts (five years from acceptance). Surety or Performance bonds ensure compliance and completion of the contract by the contractor. This protects the City in cases of contractor poor performance, walk-off, bankruptcy, latent construction defects, etc. This action will be brought forward in an upcoming ordinance to change the City Code.

Prevailing Wage

The current State approved legislation concerning prevailing wage rates will become effective May 1, 2021. It will allow localities, by ordinance, to adopt similar requirements. If adopted, the City would then be required to select companies that pay the "prevailing wage" for all levels of work, and currently only applies to Public Works (i.e., likely horizontal infrastructure such as roads, sidewalks, bike/ped trails, roads, sanitary sewers, storm sewers, etc) projects that are above \$250,000. The term "Public Works" will need to be more specifically defined, as would the ability of localities to set an applicability threshold greater than \$250,000.

Laws that dictate who the City can do business with and how much these businesses are required to pay can be detrimental to some priced-based competition and would tend to materially increase the cost of many small and medium-sized capital projects for the City. Given the City's proximity to the seat of the federal government with its many capital projects, the existence of federal wage laws, and the wages paid in this region, the bidders that the City utilizes for many large (i.e., multi-million dollar) projects are already likely meeting all or most of these prevailing wage requirements. It should be noted that smaller and medium sized firms tend to have greater SWaM ownership rates.

However, some of the large projects, medium sized projects and likely most of the City's smaller projects do not meet some or all of the prevailing wage rates. Therefore, if a prevailing wage rate policy was enacted for Public Works projects the cost to the City would increase. From one project's calculation and a trade association estimate, it would not be unreasonable to assume that a 15% project increase would be likely for these projects. It is also important to keep in mind that there would be increased costs that a "codified" prevailing wage would generate in that detailed record keeping, reviews of contractor payrolls vs the prevailing wage for each job category would be required of staff. This would be a significant enough task it would require the addition of at least one staff position (depending on the definition of Public Works and the dollar level of projects that a prevailing wage might be applied to).

The premise of this State legislation was to mirror the federal Davis Bacon Act requirements of prevailing wage application. The Commonwealth Commissioner of Labor and Industry would utilize the federal prevailing wage determinations to apply the new requirements for Commonwealth public works contracts. The legislation also allows local governments to adopt, by ordinance, the same legislation for locally funded Public Works projects.

Prevailing wages are determined every few years by the US Department of Labor, Wage Determination Division by survey from each State down to the county level. The survey is sent to Union and Non-Union contractors for their input on what they are paying differing classifications of workers on public works projects. The most numerous of responses between the two categories (Union vs. Non-Union Contractors) becomes the prevailing wage for that state/county for each class of worker involved in public works projects. This wage rate may be updated more frequently based on Union negotiations in the area (if Union wages were utilized to set the prevailing wage).

The impacts of enacting a local ordinance for this have both positive and negative attributes. The positive attributes are that providing prevailing wages will strengthen the worker pool by providing more experienced personnel by classification and would most likely provide back-end savings on projects by reducing re-work. One of the strongest arguments for a prevailing wage is the improvement of skill-level for trade workers who would command a higher wage. This is also not an issue this region, where there is a large pool of capable, trained workers.

The negative impacts would be an estimated increase in project costs of 15 percent per project and compliance requirements/forms that may be onerous to small businesses who may not have the skill set to fully comply.

If Council is interested in considering a prevailing wage policy for Public Works projects, I would recommend that staff be directed to undertake an analysis of the costs of such a policy through a detailed survey of City public works vendors and bidders, as well as analyzing the fiscal impact to the City's operating budget and its capital improvement program. Since this policy might have a material fiscal impact on the City's CIP, and is not budgeted for, knowing what the cost implication of a prevailing wage policy is important. Given the City's already challenging position of funding capital projects, a prevailing wage policy would add to the CIP costs or require some projects to be cancelled to make fiscal room for the payment of prevailing wages for other public works projects.

The changes discussed in this memo are summarized as to how they are or might be incorporated into law and execution. Arlington is also considering enacting a prevailing wage policy, but no proposal or ordinance has yet been formally made for County Board consideration. One option that the staff in a number of Northern Virginia jurisdictions are looking at would be to set a higher threshold than \$250,000 for applicability of a prevailing wage policy (for many of the same reasons cited in this memorandum). In a related matter, Amazon agreed to utilize some aspects of prevailing wage doctrines as part of their current HQ2 office construction project in Arlington.

Summary

In conclusion, the responsible bidder, microbusiness, disability consideration can be included in the updated Purchasing Manual which is planned to be issued shortly. A surety bond ordinance will come to Council this spring. These are all ministerial changes with no or a small fiscal impact. The prevailing wage rate policy is a substantial change in City policy and likely has a material fiscal impact, and therefore would need to be a policy determined by City Council.

	Manual	Changes to City Code	State Code
Responsible bidder	In process	None needed	Law enacted
Apprenticeship	Not until mid 2022 at the earliest	Not until mid 2022 at the earliest	Not until mid 2022 at the earliest
Microbusiness	In process	None needed	Law enacted
Disability consideration	In process	None needed	Law enacted
Surety Bond	In process	Upcoming	Law enacted
Prevailing Wage	Policy choice	Policy Choice	Law enacted

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