

Best Practices in Contracting for Construction Services

A National State Auditors Association Best Practices Document



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Purpose

The Performance Audit Committee of the National State Auditors Association developed this document as a tool for audit organizations and government agencies to use in identifying and evaluating best practices in contracting for construction services. Although it is intended that this document address many of the best practices that could apply to construction contracting situations, it should not be considered all-inclusive. Further, depending on the construction approach used (CM/GC, design/build, etc.) and local laws, regulations, and policies, the practices listed here may not be applicable in all situations, and other practices may accomplish the same or similar goals. However, this document can be extremely helpful as a starting point for both agency managers and auditors in deciding what types of practices are more likely to result in an efficient, effective, and accountable construction service procurement process.

Planning

Proper and timely planning provides the foundation for construction project implementation, including contract awarding and monitoring. Planning identifies what services are needed and when, how they should be provided, and what provisions should be included in a construction services contract. The project's goals and objectives should be defined during the planning stage. Goals to consider when planning a construction project include whether to construct a new facility, or make additions or renovations to an existing facility. Objectives to consider are how best to protect and maximize the state's property and capital investments, including whether to construct specific features at lowest cost, or to include the most or best features within a certain budget.

Planning also helps ensure proper information is collected to effectively structure a request for proposal (RFP). As a public entity, the agency must know the state's laws, including those related to bidding and contracting, property acquisition, project financing and construction wage labor. Such laws and the agency's procedural guidelines should be included in the RFP process.

Decision to Contract

First, the agency needs to determine whether or not to contract for the service. To make this decision the agency should:

1. Analyze its business needs, goals and objectives and determine whether the construction project is necessary.
2. Determine whether there are sufficient and adequate resources to oversee and perform the construction project using agency staff, and if so, whether using agency staff is cost beneficial as compared to contracting for these services. Also, if a decision is made to out-source both the construction management (overseeing) and the general contracting, an analysis should be done to determine if these services should be provided by the same firm (CM/GC) or separate firms.

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3. Determine whether the decision to contract for construction services complies with applicable statutory and agency requirements.

Second, the agency needs to determine the construction approach to be used (CM/GC, design/build, etc.). This approach should be consistent with the project goals and the expertise available on staff.

Performance Requirements

Once the decision to contract has been made, the agency should develop performance requirements that will hold contractors accountable for the delivery of quality services and end product. Performance requirements should:

1. Clearly state the services expected and who will perform these services, such as the contractor or subcontractors.
2. Clearly define performance standards and measurable outcomes. Measurable outcomes could include costs and target dates for completion of construction phases.
3. Identify how contractor performance will be evaluated.
4. Include positive or negative performance incentives.
5. Clearly define the procedures to be followed if, during the course of the project, unanticipated work arises that requires modification to the contract.

Request for Proposal Process

The decision to employ a Request for Proposal commits an agency to a formal process based on fair and open competition and equal access to information. This decision allows the agency to systematically define the acquisition process and the basis on which the proposals will be assessed. The RFP itself provides a standardized framework for contractor proposals and highlights the business, technical, and legal issues that must be included in the final contract.

The RFP should:

1. If Architectural/Engineering (A/E) designs are already completed, include a copy of the design and project specifications with the proposal.
2. Include a description of the property and proposed construction project, and how the project aligns with the agency's overall goals and objectives.
3. Clearly state any necessary site analyses, environmental remediation, and/or other non-project specific site improvements such as seismic upgrading to existing and adjacent structures.
4. Clearly state the expected performance requirements.
5. Identify constraints, schedules, deadlines, mandatory items, and allowable renewals.

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6. Specify required deliverables, reporting obligations, and payment terms. If applicable, deliverables should include engineering services and permit acquisition.
7. Identify the expected roles and responsibilities of project team members, including the agency project manager, the contractor and subcontractors, current or future facility managers, and any independent members such as cost consultants or architects.
8. Specify the desired qualifications for the contractor and subcontractors. The qualifications should not favor a particular bidder.
9. Specify desired or required construction materials. Again, the specifications should not be written so that they favor a particular bidder.
10. Identify federal and state requirements that govern the contracting process and the delivery of services, including wage labor laws.
11. Clearly state pricing requirements and bid submission expectations, including closing time, date, and location. A standard bid price form is helpful to ensure a fair and transparent contract award decision.
12. Clearly state the evaluation criteria and weighting factors for scoring proposals.
13. Allow sufficient time for contractors to prepare good proposals.
14. Outline all procurement communication devices to ensure all appropriate bidders or potential bidders have access to the same information, i.e. pre-bid conferences, Q&A's, whom to contact with questions, etc.
15. Include provisions that will address financial risks, such as bid bonds, project warranties, insurance, performance bonds, liquidated damages, dispute resolution, contingency costs, and safety issues, as applicable.
16. Depending on the construction method being used, consider requiring the contractor to name their subcontractors and the work they will be performing. Also, consider whether approval by the agency will be needed if there is a subcontractor change.

Award Process

Although evaluation methods vary, the contract award process should ensure contractor proposals are responsive to the agency's needs, consistently and objectively evaluated, and contracts are awarded fairly to responsible contractors. Without proper awarding practices, there is little assurance an agency is selecting the most qualified contractor at the best price. Furthermore, contracting decisions may not be defensible if challenged.

Award Decision

When making an award decision, the agency should:

1. Have appropriate procedures for handling late or incomplete proposals.
2. Ensure that an adequate number of proposals were received. If an appropriate number of proposals are not received by the RFP closing date, the agency should consider resubmitting the RFP with a new, later date. The impact of project delays should be

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considered in determining whether to resubmit or to proceed with a limited pool or a sole source.

3. Use an evaluation committee that includes individuals with experience and expertise in construction management, are trained on how to score and evaluate the proposals, and who are free of impairments to independence.
4. Use fixed, clearly defined, and consistent scoring scales to measure the proposal against the criteria specified in the RFP.
5. Carefully check contractor references. Relevant information from references may include whether the contractor met deadlines, submitted accurate cost estimates, and produced high quality work.
6. Document the award decision and keep supporting materials.
7. Carefully control bids upon receipt to ensure that confidential pricing information is not shared, bids are not accepted after the due date, and inferior bids are not given extra opportunity to cure deficiencies.

Contract Provisions

Contracts for the purchase of services must be formal, written documents. Contracts should (1) protect the interests of the agency, (2) identify the responsibilities of the parties to the contract, (3) define what is to be delivered, and (4) document the mutual agreement, the substance, and parameters of what was agreed upon. Specifically, the contract should:

1. Clearly state and define the scope of work, contract terms, allowable renewals, and procedures for any changes. The scope of the work should reflect the RFP requirements.
2. Provide for specific measurable deliverables and reporting requirements, including costs and due dates for construction phases.
3. Describe the methods of payment, payment schedules, retainage, and escalation factors if applicable. Tie payments to the acceptance of deliverables or the final product, if possible.
4. Depending on the type of construction approach used, it may be necessary to define how services will be billed, such as reimbursable expenses, subcontractor expenses, and services pre-established under a contingency fund plan.
5. Document a system to authorize major additions, deletions, or other changes to project scope. Limit the state's liability for work performed outside of the project scope.
6. Contain performance standards, performance incentives and/or clear penalties and corrective actions for non-performance, with a dispute resolution process. The contract also should include provisions to mitigate financial risk (see #15 in Request for Proposal section above).
7. Describe the expected quality and type of construction materials and include provisions to ensure that the materials are acquired at competitive prices.

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8. Include provisions to ensure that rented equipment rates are competitive, and if the equipment is rented directly from the contractor, that the rental rate reflects actual costs.
9. Include provisions to protect the integrity of subcontractor bids to ensure that such bids are competitive.
10. Contain inspection and audit provisions.
11. Include provisions for contract termination.
12. Include provisions for contract renegotiation and/or price escalations if applicable.
13. Incorporate the RFP itself. Order of precedence should be addressed in case of a discrepancy between the RFP and the body of the contract for example.
14. Contain appropriate signatures, approvals, acknowledgements, or witnesses.
15. As necessary, allow for legal counsel's review of the legal requirements for forming the contract, which may include a review of the contracting process; legal sufficiency of the contract; the contract terms; etc. Also, consider whether state-specific legal requirements are met, such as use of minority or disadvantages business.

Monitoring

Contract monitoring is an essential part of the contracting process. Monitoring should ensure that contactors comply with contract terms, performance expectations are achieved, and any problems are identified and resolved. Without a sound monitoring process, the contracting agency does not have adequate assurance it receives what it contracts for.

To properly monitor a contract, the agency should:

1. Assign a contract manager with the authority, resources, and time to monitor the project.
2. Ensure that the contract manager possesses adequate skills and has the necessary training to properly manage the contract.
3. Track budgets and compare invoices and charges to contract terms and conditions.
4. Monitor, at least periodically, subcontracts to ensure that all subcontractors are authorized and that amounts paid to contractors reflect subcontractors' reported costs.
5. Ensure that deliverables are received on time and document the acceptance or rejection of deliverables. Depending on the construction process being used, it may be necessary to periodically inspect the work done to substantiate that billings and work progress are consistent. It also may be necessary to conduct material testing to verify quality and compliance with plan and specifications. In any case, record keeping of monitoring activities is important to handle later billing or payment disputes.
6. Depending on the construction process being used, payments to contractors should be withheld until deliverables are received.
7. Retain documentation supporting charges against the contract.

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8. After contract completion the agency evaluates the contractor's performance on this contract against a set of pre-established, standard criteria and retain the record of contract performance for future use. If agency maintains a record of contractor past performance, it may use the record as an evaluation element under "Award Decision."