



RE: **Best Value Procurement Ordinance Amendment**
TO: Mayor Taylor and Members of Council
FROM: John Fournier, Deputy City Administrator
DATE: 12/7/22

Since the amendment of the City's Charter in the fall of 2021, and the adoption of the City's best value procurement ordinance in early 2022, City staff have been working diligently to apply this new directive to our operations. In that time, the staff have developed and refined methods for measuring and grading the various required evaluation metrics that were put in city code for public improvements and construction contracts. As our experiences have informed the process, the methods employed have evolved, and we have arrived at a recommendation for implementing the program—though our approach may continue to evolve as more experience is gained with different types of projects. It should be noted that all applicable procurements have been conducted under the best value methodology since January—this is not a pilot, but it is a work in progress.

There are a few criteria and program features that are practically not measurable or actionable, or for technical reasons would benefit from amendment. Staff has also identified an addition to the ordinance that may strengthen its effect. These recommended amendments are detailed below. Finally, the ordinance amendment includes a small number of technical changes that do not have a material effect on the directives provided in the ordinance but do make the code language more consistent and comprehensible. Those technical changes are not detailed in this ordinance.

Partner Bidding

There are many instances, especially in Parks, when we fund construction projects with outside grant dollars from private entities or the State of Michigan, or with support from the Washtenaw County Parks and Recreation Commission. In most instances those outside agencies and grantors require as a condition of providing the funds that the lowest responsible bidder be selected, which puts them in conflict with our current laws.

MDOT has given us feedback that if we choose a best value construction company and it is higher cost than the lowest responsible bidder, then they would only fund a portion of the cost of the lowest responsible bidder and we would be responsible for the rest. For instance, if we are applying for MDOT funding that would account for 80% of the cost of the project, we choose on a best value basis a contractor that will cost \$1.7 million but the lowest responsible bidder would have cost \$1.3 million, MDOT will only provide 80% of the \$1.3 million, or \$1,040,000, which would cover about 61.2% of the project cost in this scenario. That would push an additional \$320,000 in costs on the City.

How other agencies deal with this issue will vary. Some will agree to pro-rate their participation to a proportion of the lowest responsible bidder's cost like MDOT does. Others will simply withdraw their participation or grant awards. In any case, the City will be in the position of assuming more costs for our construction projects and will likely not have adequate outside funding to complete many of our larger parks projects if the status quo is maintained. As more agencies adopt the best value framework, this issue will abate. But in the meantime, it will put city projects and funds at risk.

The following language has been added to the ordinance to deal with these situations:

The City Administrator may exempt a contract for public improvements from best value scoring and instead award the contract to the lowest responsible bidder in instances when the contract will be partially or wholly funded by third parties such as another government entity, a non-profit, an individual, a philanthropy or other similar entity, when that entity requires their funding to be awarded on a lowest responsible bidder basis, and when proceeding on a best value basis may at the sole determination of the City Administrator jeopardize the receipt of third-party funding outside funds, cause costs to the City to increase



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by more than 10% of the total project cost, or jeopardize the participation of a funding partner in the project.

Dollar Threshold

Currently there is no dollar threshold for applying this policy, as was Council’s original intent. As such, we have been applying it to all public improvements above \$25,000 in cost. For smaller projects, however, the policy will likely be ineffective. The policy asks us to evaluate things like participation in apprenticeship programs, the number of environmental violations a company might have, or the bidder’s proposed use of sustainable products. These evaluation criteria are well suited for larger firms that work on big construction projects. However, for simple projects like a roof replacement at a parks facility, or a tennis court rehabilitation, we tend to use smaller firms that specialize in specific types of work and will not be able to respond to many of these criteria. Larger firms do not bid on small projects such as these.

To accommodate this issue, we have included a threshold of \$50,000 to apply best value procurement scoring. This matches the dollar threshold that Washtenaw County has adopted.

OSHA Certification

The ordinance requires that we ask bidders to provide evidence of a “Michigan OSHA approved safety-training program” in their responses. However, Michigan OSHA does not approve general safety training programs and so no firm can be responsive to this criterion. I asked our safety manager to draft new proposed language for the safety portion of the best value procurement ordinance. The following language has been amended into the draft ordinance:

Existing Language	Proposed Language
Documentation of an on-going, Michigan OSHA-approved safety-training program for employees to be used on the proposed job site.	Provide a copy of bidder's safety program, and evidence of a safety-training program for employees addressing potential hazards of the proposed job site. Bidder must identify a designated qualified safety representative responsible for bidder’s safety program who serves as a contact for safety related matters.
Evidence of the bidder’s worker’s compensation Experience Modification Rating (“EMR”). Preference within this criterion will be given to an EMR of 1.0 or less based on a three-year average.	Provide the bidder’s Experience Modification Rating (“EMR”) for the last three consecutive years. Preference within this criterion will be given to an EMR of 1.0 or less based on a three-year average.
Evidence that all craft labor that will be employed by the bidder for the project has, or will have prior to project commencement, completed at least the OSHA 10-hour training course for safety established by the U.S. Department of Labor, Occupational Safety & Health Administration.	Evidence that all craft labor that will be employed by the bidder for the project has, or will have prior to project commencement, completed at least an authorized 10-hour OSHA Construction Safety Course.



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<p>The safety record of bidder and major subcontractors, including OSHA, MIOSHA, or other safety violations.</p>	<p>For the last three years provide a copy of any documented violations and the bidder's corrective actions as a result of inspections conducted by the Michigan Occupational Safety & Health Administration (MIOSHA), U.S. Department of Labor – Occupation Safety and Health Administration (OSHA), or any other applicable safety agency.</p>
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The Ratio of Masters or Journeypersons to Apprentices

This criterion has proven to be an extremely complicated issue that is difficult to evaluate and award points for. This is primarily because the number of job classifications for which an apprentice program might be used is significant (the State of New York has 209 approved apprenticeship structures by craft). The State of Michigan does not approve apprenticeship programs, so instead that power devolves to the federal Department of Labor (DOL). However, DOL does not publish requirements for apprentice ratios and so there are no legally enforceable standards that we can rely on to judge whether the ratios submitted are acceptable or not—it really is up to the company, their union (if they have one), and the DOL on a case-by-case basis.

Nonetheless, we have conducted research on what other states do in terms of publishing guidance on ratios, and the most comprehensive apprenticeship regulation that we can identify is the State of New York's. There are drawbacks to using these standards as our own because the apprenticeship programs that are approved in New York are extremely detailed and complex. For instance, there are six different apprenticeship programs for carpenters depending on the type of work they do, and the ratios are not the same among all of them. There are five apprenticeship programs for plumbers, and two different ratios depending on the work. We do not have the expertise to know which program to apply, and therefore what the ratio should be.

The reality is that any company with an apprenticeship program must have it approved by the DOL, and in approving it the DOL will require a ratio for that specific company and craft. Enforcement of that ratio is up to the DOL and the employee's union (if they have one). That makes this criterion completely redundant because we are already awarding points to companies if they have a DOL approved apprenticeship program to begin with. So, companies will either get full points for both criterion or no points for both criterion. For this reason, we have removed this criterion from the draft ordinance.

Misappropriation of Labor

The current version of the ordinance does not require contractors to verify that they are not over-relying on 1099 or contract labor. We have added an evaluation criterion to the ordinance in the workforce development section that is stated as follows:

Bidders shall disclose the number of non-craft employees who will work on the project on a 1099 basis, and bidders shall be awarded points based on their relative reliance on 1099 work arrangements with more points assigned to companies with fewer 1099 arrangements.



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Bidders will acknowledge that the City may ask them to produce payroll records at points during the project to verify compliance with this section.