Strategic Review
17-302

Albuquerque International Sunport Terminal Restroom Remodel & Change Order No. 1

October 26, 2016
INTRODUCTION

On July 20, 2016, the Office of Internal Audit (OIA) received a request from a City Councilor to conduct an independent review to:

1. “Determine if the procurement process followed for the Albuquerque International Sunport Restroom Remodeling Project #7770.02, and the issuance of subsequent Change Order No. 1 complied with the City Public Purchases Ordinance, the Regulation Governing the Award and Debarment of Contractors for Public Works Projects of the City of Albuquerque, and other applicable state and federal regulations.”

Specifically, the Councilor requested that OIA perform an assessment of:

2. Whether material change orders may be negotiated between the time of a competitive bid opening and the time of award, and
3. Whether bidders (competitors) other than the low bidder have been, or should be, afforded the opportunity to provide competitive bids for additional work identified by the City prior to or shortly after the bid opening.

Additionally, the Councilor asked that OIA provide “recommendations for improvement to the capital project procurement process, especially in regard to the timing of competitive bids and material change orders.”

SUMMARY

Overall, the procurement process followed for the Albuquerque International Sunport (AIS) Restroom Remodeling Project and Change Order No. 1 complied with the City’s Public Purchases Ordinance and the “Regulation Governing the Award and Debarment of Contractors for Public Works Projects of the City of Albuquerque” (CIP Award Regulation).

Materiality of change orders is not defined and no regulations expressly addressing whether material change orders may be negotiated between the time of competitive bid opening and the time of award were identified.

Both the City’s Public Purchases Ordinance and the Federal Acquisition Regulation (FAR) imply that open market competition is preferred and should be used when possible. However, no City regulations expressly addressing whether other bidders/competitors should be afforded the opportunity to provide competitive bids for additional work that had been identified shortly after the bid opening of the original project were identified.

One miscellaneous area of concern pertaining to bond coverage was identified. The contractor furnished the necessary bonds for the original contract price of $1.15 million. However, the contractor did not increase the bond amounts to reflect the increased contract value from the subsequent change orders. At a final project cost of $2.33 million, the project exceeded the value of the bonds by $1.18 million.
SCOPE
The work performed for this strategic review was limited to the items contained in the request from the Councilor and did not address any allegations of fraud, waste, or abuse. The City’s Office of Inspector General is responsible for the investigation of possible fraud, waste, or abuse and may issue a separate report addressing any findings in these areas.

OBJECTIVE
The objective of the strategic review was to determine if the procurement process followed for the AIS Restroom Remodeling Project, and the subsequent issuance of Change Order No. 1, complied with:

- City Public Purchases Ordinance,
- CIP Award Regulation, and
- Other applicable City regulations.

Note: State and Federal procurement regulations are not applicable as no State or Federal funding was used for the project.

BACKGROUND
The AIS Restroom Remodeling Project was awarded to Enterprise Builders, Inc. as a lump sum contract totaling $1.15 million. A lump sum contract involves one price that includes cost of work, fees, and general conditions. This type of contract is appealing for government entities as the majority of the risk lies with the contractor.

On September 18, 2013, a Request for Bid (RFB) was issued for the AIS Restroom Remodeling Project. Sealed bids for the project were due by 1:30 pm on October 22, 2013. On that date, the project’s architect, SMPC Architects, opened the sealed bids and tabulated the results. Ten bidders submitted proposals for the project, which ranged in cost from $1.15 million to $1.48 million, and all were below the SMPC Architect’s opinion of probable construction cost of $1.67 million. Enterprise Builders, Inc. was awarded the project based on its lowest responsible bid of $1.15 million including New Mexico Gross Receipts Tax. According to the Deputy Director of the Department of Municipal Development, the contract award was not protested by any of the other bidders.

On February 14, 2014, Change Order No. 1 was initiated in the amount of $940 thousand. The change order involved a change in scope, added work to the project, and received final approval from the City’s Chief Administrative Officer on March 12, 2014.

The parties involved throughout the remodeling project were:

- Project Manager & Oversight – City of Albuquerque, Aviation Department
- Project Oversight – City of Albuquerque, Department of Municipal Development
- Contractor – Enterprise Builders
  - Various subcontractors
- Architect/Consultant to the City – SMPC Architects

The CIP Award Regulation establishes the “procedures for solicitation and consideration of bids or requests for proposals, the award or rejection of bids or proposals, determining the
responsibility of bidders or offerors, and to protect substantial interest of the City of Albuquerque and the integrity of the City’s Public Works construction contracting process.”

The timeline of project events is depicted below.

![Timeline of Events]

**RESULTS**
The results presented are based on information obtained through interviews with City personnel and related parties, and a review of contracts and supporting documentation pertaining to the AIS Restroom Remodeling Project. The results below address the City Councilor’s concerns as listed in the Introduction section of this report.

1. **Procurement**

   **Original Project**
   Overall, the procurement process followed for the AIS Restroom Remodeling Project complied with the City’s Public Purchases Ordinance and the CIP Award Regulation. The only exception noted involved a 13-day delay of the contract award.
The procurement process and the AIS Restroom Remodeling Project’s compliance with the process are listed in the chart below. A more detailed chart referencing the applicable authoritative documents is attached as **Appendix A**.

### Procurement Process

**Original AIS Restroom Remodeling Project**

<table>
<thead>
<tr>
<th>Description of Regulatory Event</th>
<th>Deadline</th>
<th>Actual Completion Date</th>
<th>Compliant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bidding Closes</td>
<td>October 22, 2013</td>
<td>October 22, 2013</td>
<td>Yes</td>
</tr>
<tr>
<td>Notice of Award</td>
<td>November 21, 2013</td>
<td>December 3, 2013</td>
<td>No – 13 days late</td>
</tr>
<tr>
<td>Award of Contract</td>
<td>November 21, 2013</td>
<td>December 3, 2013</td>
<td>No – 13 days late</td>
</tr>
<tr>
<td>Delivery of formal contract documents (including Performance Bond, Labor &amp; Material Payment Bond, and required Certificates of Insurance)</td>
<td>December 13, 2013</td>
<td>December 12, 2013</td>
<td>Yes</td>
</tr>
<tr>
<td>Execution of Agreement</td>
<td>December 27, 2013</td>
<td>December 19, 2013</td>
<td>Yes</td>
</tr>
<tr>
<td>Contract Date</td>
<td>January 6, 2014</td>
<td>January 6, 2014</td>
<td>Yes</td>
</tr>
<tr>
<td>Notice to Proceed</td>
<td>January 18, 2014</td>
<td>January 7, 2014</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Source: City documents

### Change Order

The general process for issuing a Change Order is detailed below:

- Potential change identified (by contractor, owner, consultant, or subcontractor).
- Owner (City) notified of change.
- Contractor prepares cost estimate for change.
- Architect reviews cost estimate and makes recommendation to owner.
- If accepted by owner, formal change order document prepared and routed for signatures.

Change order No. 1 followed the above process and was finalized on March 12, 2014 by the City’s Chief Administrative Officer.
2. **Negotiation of Material Change Orders**

No City regulations expressly addressing whether material change orders may be negotiated between the time of competitive bid opening and the time of award were identified. At a cost of $940 thousand, Change Order No. 1 totaled 82 percent of the original project cost.

Although there is no formal definition of materiality or percentage threshold in the City’s regulations, based on the following definitions, OIA concludes that Change Order No. 1 for the AIS Restroom Remodeling Project is material.

- According to the on-line legal dictionary (www.law.com), materiality is an adjective meaning “relevant and significant”.
- The Merriam-Webster Dictionary defines relevant as “relating to a subject in an appropriate way” and significant as “large enough to be noticed or have an effect; very important”.

Although City regulations do not address materiality levels, State regulations do. The NM State Department of Transportation’s Standard Specifications for Highway and Bridge Construction, Section 104.2 states:

> “Significant change” applies only to modifications or alterations that:
> 1. Materially change, in kind or nature, the character of the Work including the Critical Path; or,
> 2. Increase or decrease a Major Contract item by twenty-five percent (25%)

Federal regulations contain language that provides guidance regarding the avoidance of conflicts of interest. Subpart 3.1 of the Federal Acquisition Regulation (FAR) Safeguards, 3.101 Standards of Conduct, 3.101-1 General states:

> Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. [Emphasis added]

By treating additional work that nearly doubled the total project cost as a change order, rather than a separate project, the City has caused the overall integrity of the procurement process to be questioned by the appearance of a conflict of interest.

3. **Opportunity for Competitive Bid**

No City regulations expressly addressing whether other bidders/competitors should be afforded the opportunity to provide competitive bids for additional work that had been identified shortly after the bid opening of the original project were identified. However, both the City’s Public Purchases Ordinance and the FAR imply that open market competition is preferred and should be used when possible.
The Public Purchases Ordinance, Section 5-5-11 Capital Projects (D) ROA 1994 states: “It is the policy of the city to require local participation in capital projects where possible.”

Additionally, Title 41, Section 3301, part (a) of the United States Code states:

In general…an executive agency in conducting a procurement for property or services shall:

(1) Obtain full and open competition through the use of competitive procedures in accordance with the requirements of this division and the Federal Acquisition Regulation; and
(2) Use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

To help ensure the integrity of government procurement, Subpart 3.5 of the FAR addresses “Other Improper Business Practices” and what contract managers should be aware of. According to Section 3.5 of the FAR, “buying-in” is defined as “submitting an offer below anticipated costs, expecting to—

(1) Increase the contract amount after award (e.g., through unnecessary or excessively priced change orders); or
(2) Receive follow-on contracts at artificially high prices to recover losses incurred on the buy-in contract.”

Further, FAR 3.501-2 states:

(a) Buying-in may decrease competition or result in poor contract performance. The contracting officer must take appropriate action to ensure buying-in losses are not recovered by the contractor through the pricing of—

(1) Change orders; or
(2) Follow-on contracts subject to cost analysis.

It is customary for additional work to be added to an existing contract. However, without clearly defined requirements, additional guidance, or limitations to potential changes of scope, the inclusion of material change orders may persist. Although previous construction contracts at the Aviation Department also contained Change Orders that involved a change of scope, none of the other scope changes were as significant as Change Order No. 1 of the AIS Restroom Remodeling Project as shown in the table below.
# AIS Construction Projects with Change of Scope Change Orders

<table>
<thead>
<tr>
<th>Project #</th>
<th>Project Name</th>
<th>Original Amount</th>
<th>Change Orders</th>
<th>Total Project Cost</th>
<th>Change Order % to Original Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>777002</td>
<td>AIS Terminal Restroom Remodeling Project</td>
<td>$1,147,757</td>
<td>$1,183,205*</td>
<td>$2,330,962</td>
<td>103%</td>
</tr>
<tr>
<td>770002</td>
<td>AIS Taxiway A Reconstruction (Phase A &amp; B)</td>
<td>$10,208,753</td>
<td>$48,930</td>
<td>$10,257,683</td>
<td>.48%</td>
</tr>
<tr>
<td>770004</td>
<td>Sunport Electrical Ground Service</td>
<td>$448,715</td>
<td>$43,486</td>
<td>($2,503)</td>
<td>$489,698</td>
</tr>
<tr>
<td>770005</td>
<td>AIS Taxiway A Reconstruction (Phase C)</td>
<td>$7,966,329</td>
<td>$188,148</td>
<td>$8,312,969</td>
<td>4.35%</td>
</tr>
<tr>
<td>725703</td>
<td>AIS Central Utility Reconstruction</td>
<td>$699,780</td>
<td>$18,413</td>
<td>($1,212)</td>
<td>$716,980</td>
</tr>
<tr>
<td>722291</td>
<td>AIS Terminal Parking Structure Lighting Remodel</td>
<td>$1,566,209</td>
<td>$127,559</td>
<td>$1,694,985</td>
<td>8.22%</td>
</tr>
<tr>
<td>722104</td>
<td>AIS Snow Barn Complex</td>
<td>$4,423,464</td>
<td>$202,580</td>
<td>$89,353</td>
<td>$4,715,397</td>
</tr>
<tr>
<td>722293</td>
<td>AIS Terminal 2nd Level Police Suite</td>
<td>$1,421,590</td>
<td>$39,869</td>
<td>$2,448</td>
<td>$1,463,907</td>
</tr>
<tr>
<td>722292</td>
<td>AIS Terminal Fitness Center</td>
<td>$211,118</td>
<td>$13,831</td>
<td>$365</td>
<td>$225,314</td>
</tr>
<tr>
<td>722294</td>
<td>AIS Terminal Mechanical Penthouses Reconstruction</td>
<td>$3,857,348</td>
<td>$48,698</td>
<td>$0</td>
<td>$3,906,046</td>
</tr>
<tr>
<td>770007</td>
<td>AIS Terminal Apron Reconstruction (Phase II)</td>
<td>$3,744,832</td>
<td>$56,971</td>
<td>$0</td>
<td>$3,801,803</td>
</tr>
</tbody>
</table>

* Amount includes Change Order No. 1 of $939,676

** Average Project Amount** | $3,454,813

Source: Project Change Orders

The documentation for Change Order No. 1 indicates that the reason for the change was “changed scope” and that the cost adjustment was “negotiated”. All parties involved (architect, contractor, Director of DMD, Aviation Finance Officer, CIP, and CAO) agreed to the change and approved the Change Order.
According to Public Purchases Ordinance, Section 5-5-11 ROA 1994, Capital Projects:

(C) The Mayor may promulgate additional or revised rules and regulations regarding the solicitation of offers for capital projects and the award or rejection of offers therefor, including but not limited to establishing procedures for the solicitation and consideration of offers, award or rejection of offers, determining the responsibility of offerors, and such other matters as the Mayor deems desirable for the efficient administration of capital projects.

**Miscellaneous Item of Concern**

**Bonds**

The contractor furnished the necessary bonds for the original contract price of $1.15 million. However, the contractor did not increase the bond amounts to reflect the increased contract value from the subsequent change orders. At a final project cost of $2.33 million, the project exceeded the value of the bonds by $1.18 million.

According to the “Instructions to Bidders,” Section 17, Bonds and Insurance Certificates, “…the Contractor shall furnish separate surety bonds in the form provided in the Contract Documents each in the amount of one hundred percent (100%) of the total Contract Price, as follows:

- A Performance Bond as security for the faithful performance of the Contract and
- A Labor and Material Payment Bond for the payment of all labor and materials.”

Contract Price is defined in the General Specifications as “the total monies payable to Contractor under the Contract Documents.” Contract Documents is defined as “the Agreement, Addenda, Advertisement for Bids, Instructions to Bidders…and all Modifications, also referred to as the contract.”

Without the necessary bond coverage, the City would not have a guaranteed remedy should the contractor default.

**RECOMMENDATIONS**

The City Council should work with the City’s Administration to:

- Review and update the CIP Award Regulation to include:
  - The definition of material change orders,
  - Clarify language to address:
    - Whether material change orders require a separate bidding process,
    - Whether the other qualified, losing bidders should be afforded the opportunity to provide competitive bids for additional work identified by the City shortly after the original bid opening.
- Ensure bonding clauses address the increase in contract price caused by material change orders, as no City regulation currently addresses this issue.
CONCLUSION
Change orders to construction contracts are not uncommon. Since 2013, change orders for the Aviation Department’s construction projects, increased the average total project cost by 4.4 percent. Change order No. 1 of the AIS Terminal Restroom Remodeling Project exceeded the average and was an 82 percent increase of the original project value. Without clearly defined requirements, additional guidance, or limitations to potential changes of scope, the inclusion of material change orders may persist.

Opportunities for improvement exist within the construction contracting process as the items contained in the City Council’s request are not clearly addressed in City regulations. Aside from the 13-day delay of the contract award, the procurement of the AIS Terminal Restroom Remodeling Project complied with the City’s Public Purchases Ordinance and CIP Award Regulation.

The purpose of the CIP Award Regulation is to “protect the substantial interest of the City and the integrity of the City’s Public Works construction contracting process.” By reviewing and updating City regulations, the City Council and Administration have the ability to clarify procurement regulations and address the issues raised by the Councilor. Updating these regulations will strengthen related processes, while protecting and ensuring the integrity of the City’s construction contracting process.
## APPENDIX A

### Procurement Process

Including Authoritative Documents

<table>
<thead>
<tr>
<th>Description of Event</th>
<th>Authoritative Document</th>
<th>Section Reference</th>
<th>Required Timing</th>
<th>Required/Specified Date</th>
<th>Actual Date</th>
<th>Results</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bidding Closes</td>
<td>Advertisement for Bid</td>
<td>N/A</td>
<td>N/A</td>
<td>October 22, 2013</td>
<td>October 22, 2013</td>
<td>On time</td>
</tr>
<tr>
<td>Notice of Award</td>
<td>Bid Proposal</td>
<td>Item #5</td>
<td>Within 30 days after scheduled closing time for receipt of bids.</td>
<td>No later than November 21, 2013</td>
<td>December 3, 2013</td>
<td>13 days late</td>
</tr>
<tr>
<td>Award of Contract</td>
<td>Instructions to Bidders</td>
<td>Item #15.D Time to Award</td>
<td>Within the period specified in the Bid Proposal unless the Bidder and the Owner agree in writing to extend the period specified.</td>
<td>Within 30 days after scheduled closing time for receipt of bids.</td>
<td>No later than November 21, 2013</td>
<td>December 3, 2013</td>
</tr>
<tr>
<td>Delivery of formal contract documents (including Performance Bond, Labor &amp; Material Payment Bond, and required Certificates of Insurance)</td>
<td>General Specifications &amp; Bid Proposal</td>
<td>2.1.1 &amp; Item #6</td>
<td>Within 10 days of Bidder’s receipt of Notice of Award.</td>
<td>No later than December 13, 2013</td>
<td>December 12, 2013</td>
<td>On time</td>
</tr>
<tr>
<td>Execution of Agreement</td>
<td>General Specifications</td>
<td>2.1.1</td>
<td>Within 15 days of receipt of agreement and all required contract documents</td>
<td>No later than December 27, 2013</td>
<td>December 19, 2013</td>
<td>On time</td>
</tr>
<tr>
<td>Description of Event</td>
<td>Authoritative Document</td>
<td>Section Reference</td>
<td>Required Timing</td>
<td>Required/Specified Date</td>
<td>Actual Date</td>
<td>Results</td>
</tr>
<tr>
<td>----------------------</td>
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<td>-------------------</td>
<td>----------------</td>
<td>------------------------</td>
<td>-------------</td>
<td>---------</td>
</tr>
<tr>
<td>Effective Date</td>
<td>General Specifications</td>
<td>Definitions</td>
<td>The date on which the Agreement is signed and delivered by the last of the two parties to sign and deliver</td>
<td>N/A</td>
<td>December 19, 2013</td>
<td>N/A</td>
</tr>
<tr>
<td>Contract Time</td>
<td>General Specifications</td>
<td>2.5.1</td>
<td>Commence to run on the 30th day after the Effective Date of the Agreement, or if a Notice to Proceed is given, on the day indicated.</td>
<td>January 6, 2014</td>
<td>January 6, 2014</td>
<td>N/A</td>
</tr>
<tr>
<td>Notice to Proceed</td>
<td>General Specifications</td>
<td>2.5.1</td>
<td>Within 30 days after the effective date of the Agreement</td>
<td>No later than January 18, 2014</td>
<td>January 7, 2014</td>
<td>On time</td>
</tr>
</tbody>
</table>

Source: CABQ documents
SUBMITTED:

______________________________
Contract Auditor

REVIEWED & APPROVED:  APPROVED FOR PUBLICATION:

______________________________  ________________________________
Lawrence L. Davis, Acting Director  Chairperson, Accountability in
Office of Internal Audit  Government Oversight Committee