

Practical Applications for SAO Audit Findings
OR
Carpita's Top 10 (+/-) Ways to Keep the Auditor at Bay
March 2009

Introduction

Agencies dislike SAO audit findings, even if offered as constructive criticism, as it triggers unwanted and, sometimes unwarranted, scrutiny and criticism of the agency's project management practices. Despite the tired old jokes about *government work*, agencies do want to deliver well-designed public work projects on time and under budget. In a perfect world, there would be no change orders, no contractor claims – and no audit findings.

The intent of this white paper is to bridge the seemingly bottomless chasm between perceived auditor naiveté and the real world of contracting that agency project managers live in. After all, project managers are charged with getting projects out the door and getting the most “bang” for the agency's buck. Sometimes change orders to existing contracts appear to be the most efficient and expeditious way to get things done. However, auditors are not naïve. They are bound by statute to look at the RCWs first and then an agency's own purchasing policies. It should be no surprise to agency staff that they are expected to do the same.

Audit Findings

Several SAO audit findings relating to change orders are attached and discussed in this white paper. [No, the names have not been changed to protect the guilty.] The most common finding is that the change order(s) were for work not included in the original scope of the project and should have been competitively bid (or as an RFQ) as separate project. In many instances, the findings are completely valid: there are change orders that agencies should avoid like the plague.

So what is a project, according to the statutes? Note:

RCW 39.04.020 Plans and specifications -- Estimates -- Publication -- Emergencies.

Whenever the state or any municipality shall determine that any public work is necessary to be done, it shall cause plans, specifications, or both thereof and an estimate of the cost of such work to be made and filed in the office of the director, supervisor, commissioner, trustee, board, or agency having by law the authority to require such work to be done. The plans, specifications, and estimates of cost shall be approved by the director, supervisor, commissioner, trustee, board, or agency and the original draft or a certified copy filed in such office before further action is taken.

RCW 39.04.040 Work to be executed according to plans -- Supplemental plans.

Whenever plans and specifications shall have been filed the work to be done shall be executed in accordance with such plans and specifications unless supplemental plans and specifications of the alterations to be made therein shall be made and filed in the office where the original plans and specifications are filed.

In the event that the probable cost of executing such work in accordance with the supplemental plans and specifications shall be increased or decreased from the estimated cost as shown by the original estimate to an amount in excess of ten percent of such estimate, then a supplemental estimate shall be made of the increased or decreased cost of executing the work in accordance with the supplemental plans and specifications and filed in the office where the original estimate is filed.

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RCW 39.04.050 Contents of original estimates.

Original estimates shall show in detail the estimated cost of the work; the estimated quantities of each class of work; the estimated unit cost for each class; the estimated total cost for each class; the time limit, allowed for the completion of the work and the estimated dates of commencement and completion.

RCW 39.04.060 Supplemental estimates.

Supplemental estimates shall show the estimated increase or decrease in the total quantities of each class, in the unit cost of each class, in the total cost for each class and in the total cost of the work as shown by the original estimate, together with any change in the time limit and in the estimated dates of commencing and completing the work.

The statutes envision that a public works project of whatever size has a finite scope. When an agency seeks bid or quotes on a project, the contract documents (advertisement or request for quotes, plans, specifications, general and special provisions, etc.) describe/define work to be accomplished by the lowest responsible bidder for the price(s) shown on the proposal. Auditors look at that description or definition of work when they audit to see if a change order is or is not in the scope of work.

In this day and age of volatile bid prices and uncertain funding, however, it is difficult to define a project scope that accurately reflects the amount of funding available and/or potentially available. Only months ago, bid prices were climbing faster than agencies could update their estimating methodology. Now, with the downturn in the economy, bid prices are falling.

Creative Public Work Project Scopes of Work

As auditors and agencies both look to the "scope of work" for a given project to determine if a change order is justified, my proposal, as the MRSC Public Works Consultant, is this: BE CREATIVE. Examples follow:

City of Redmond 2007 Sidewalk Improvement Project:

Auditor's Comments:

In 2007, the City awarded a \$1,787,100 contract for a sidewalk improvement project.

The Council approved three change orders totaling \$524,774. Our audit found two of the change orders were for work not within the original scope of the project:

- *\$140,000 to add two sidewalks in different locations and not within the original scope of the project.*

This is a separate project and appropriate bidding procedures should have been followed.

- *One was \$404,000 to add two sidewalks not included in the original scope of the project.*

This is a separate project and appropriate bidding procedures should have been followed.

Creativity Comments:

Reading between the lines, so to speak, I surmise that the low bid prices for the initial bid came as a pleasant surprise to the City and that their sidewalk/repair plans were accelerated to take advantage of the low prices. The question is, though, how could have the city structured its bid proposal to

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minimize chances of an audit finding. Thoughts:

- State the scope of the project in terms of implementing its master sidewalk plan, with a prioritized list/map of sidewalks in the contract documents that exceeded the funds tentatively available, even if detailed plans are not provided for all of the sidewalk sections.
- State a range of quantities for each unit price item that covers the possibility of additional funds becoming available (and project segments added), with the note that unit prices apply throughout the range.
- Award the bid based on a given number of the individual projects on the prioritized list, with the quantities to match.
- State in the Contract Documents, particularly in the Bid Proposal, that the intent is to add additional sidewalk sections through change orders as funding permits.

City of Redmond 2007 Sammamish River Habitat Enhancement Phase 4 Project:

Auditor's Comments:

Also in 2007, the City awarded a \$1,847,580 contract for the Sammamish River Habitat Enhancement Phase 4 project.

The Council approved two change orders totaling \$270,886. Our audit found one change order for work not within the original scope of the project:

- *One was \$146,463.60 for landscaping and irrigation. These costs were added to the project when additional funding became available. This is a separate project and appropriate bidding procedures should have been followed.*

The City's response was:

The original bid included grading and soil improvements to an area on the east side of the Sammamish trail. When additional funding became available, through a grant from the Department of Ecology, the planting of this area was added through a change order. The work could not have been completed by another contractor in a timely manner because the area was within the project limits of the original contract.

Creativity Comments:

- If the DOE grant was imminent, the city could have shown the landscaping and irrigation as an additive alternative and secured prices for this work in the original bidding process.
- State in the Contract Documents, particularly in the Bid Proposal, that the additive alternate will be added to the project through a change order as funding permits.
- Note the sample language in the Colorado State Information for Bidders packet, attached.
- **CAUTION:** Think carefully about adding additive alternates during a project if doing so would change the order of which contractor would have been the low bidder at the time of bid. This may lead to a challenge by another bidder.

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City of Ephrata the East Division Avenue Improvements Project (1999)

Auditor's Comments:

The City did not comply with bid law requirements.

Description of Condition

During our review of bid law compliance, we noted the City of Ephrata issued a significant change order for the East Division Avenue Improvements Project. This change order was in the amount of \$416,372 for the reconstruction of an additional 2,100 lineal feet to the original project. The original project cost was \$612,425. This project was originally bid to reconstruct an adjacent portion of East Division Avenue. As this additional work was not in the general scope of the original project, the City should have competitively bid this additional work.

Cause of Condition

The City was awarded a grant by the Transportation Improvement Board (TIB) to reconstruct East Division Avenue from "K" Street to the Airport. Per the grant agreement, TIB would reimburse the City 90 percent of the total construction costs for this approved project. The bids came in significantly less than the grant award and the City was provided funding to reconstruct the additional 2,100 lineal feet of East Division Avenue. The City opted to perform this additional work by agreeing to a change order on the original contract.

Effect of Condition

By not complying with formal bid law requirements, the City cannot be sure they received the lowest possible price for the work performed.

[Note: The City's response is worth reading, even if the auditor did reaffirm the finding.]

Creativity Comments:

- If the TIB concurred, the City could have shown the additional 2,100 lineal feet (as it was already designed) as an additive alternative and secured prices for this work in the original bidding process.
- State in the Contract Documents, particularly in the Bid Proposal, that the additive alternate will be added to the project through a change order as funding permits.
- Note the sample language in the Colorado State Information for Bidders packet, attached.

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Northshore Utility District

Auditor's Comments:

The Northshore Utility District did not comply with competitive bid laws.

Description of Condition

In July 2007, the District awarded a \$1,384,360 contract for the extension of sewer and water lines in five specific neighborhoods within the District. The Board of Commissioners approved nine change orders totaling \$332,135, including one that reduced the contract by \$53,163. Our audit found four of the change orders were for work not within the original scope of the project:

- Three of the change orders, totaling \$270,703, were to repair damaged pipes. The District indicated the repairs were an emergency, which would be appropriate for this situation. However, these pipes were in locations outside the neighborhoods included in the project and should have been separately contracted.*
- One of the change orders totaled \$84,550 for water and sewer extensions on a separate District project. The developer on that project hired a contractor who did not finish the work. As a result, the District consulted its small works roster to select a new contractor and determined the contractor for the sewer and water project was the lowest quote. The District should have bid this work separately.*

Creativity Comments:

- *The auditor's comments are appropriate. A separate contract (based on the unit prices in the existing contract) with the existing contractor after an emergency declaration resolution by the District for the damaged pipes would have been more appropriate. The \$85,000 contract should have gone out as an RFQ to contractors on the District's small works roster, with an award to the lowest responsible bidder.*

City of Quincy Street Repair Project

Auditor's Comments:

The City did not comply with bid law requirements.

Description of Condition

During our review of bid law compliance, we noted the City issued a significant change order of \$42,190 for a street repair project. The work to be done through the change order was not part of the original \$117,750 project a contract was awarded for. Because this additional work was not in the scope of the original project, the City should have competitively bid the work.

Cause of Condition

Each year, the City budgets an amount of money for street repairs. As the low bid on this project was less than the City had budgeted for the work in 2000, the City felt it appropriate to increase the scope of the repairs. The City opted to have this additional work done by agreeing to a change order on the original contract.

Creativity Comments:

Note that low bid prices for the initial bid came as a pleasant surprise to the City. How could have the

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city structured its bid proposal to minimize chances of an audit finding? Thoughts:

- State the scope of the project in terms of implementing its master street repair plan, with a prioritized list/map of repair projects in the contract documents that exceeded the funds tentatively available.
- State a range of quantities for each unit price item that covers the possibility of additional funds becoming available, with the note that unit prices apply throughout the range.
- Award the bid based on a given number of the individual projects on the prioritized list, with the quantities to match.
- State in the Contract Documents, particularly in the Bid Proposal, that the intent is to add additional sidewalk sections through change orders as funding permits.

City of Edmonds 220th Avenue Project

Auditor's Comments:

City of Edmonds did not comply with competitive bid laws.

Description of Condition

In June 2005, the City awarded a \$4,322,113 contract for improvements along 220th Street. The Council approved 19 change orders totaling \$630,639. Our audit found three of the change orders were for work not within the original scope of the project:

- *One was for \$30,197.97 to install equipment requested by a water/sewer district to avoid future cuts into the pavement. This is a separate project and appropriate bidding procedures should have been used.*
- *One was \$66,143.14 for playground improvements at an elementary school through an inter-local agreement with a school district. This is a separate project and appropriate bidding procedures should have been used.*
- *One was \$341,700 for increased traffic control costs due to the project taking longer than expected to complete. We were unable to determine how much of these costs were associated with the original project.*

Cause of Condition

The City indicated the change orders were not separately bid due to the convenience of using the original contractor.

Creativity Comments:

- If the water/sewer district had requested the equipment installation up front, the work could have been shown on the original plans and no change order would have been needed.
- Even though the non-city agencies paid for their requested work and a share of the traffic control costs, they could (and should) have contracted for the work under their own bidding rules as separate contracts.
- The school district work was clearly not in the street project scope and should have been a separate project; even if the City performed the work under an interlocal agreement.

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Appropriate Uses of Change Orders

- Unforeseen conditions
- Design errors, deficiencies, or defects
- Design changes requested by Owner (within the project scope)
- Increased quantities
- Upgrading materials
- Compensation for delays (unusual weather or owner caused delays)
- Acts of God
- Regulatory changes
- Safety or environmental issues
- Emergency work
- Additive, Deductive, or Alternate work
- Negotiated claim settlement
- Deletion of work
- Additional work of the same type
- Potential additional work identified in advertisement
- Adding additive, deductive, alternate work as budget permits (if described in project scope)

Inappropriate Uses of Change Orders

- Planned as a separate project
- Project at different location
- Different nature of work
- Work not reasonably anticipated
- Changes basic character of project
- Could be bid as a separate project
- Undeclared and not related emergency work
- Deductive Change Order immediately after award to meet budget

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Last Minute Change Order Thoughts

- ✓ Change orders require approval by the original signers of the contract or their designee(s)
- ✓ Develop the change order justification narrative while the information is new
- ✓ If the change order amount is not yet determined or is a being done under force account, develop and use a high and low cost estimate to establish range
- ✓ Verbal change orders need to be documented as quickly as possible
- ✓ Change orders need to be approved prior to proceeding with the work
- ✓ Track change orders closely: they may change prior to approval
- ✓ Remember to check the final numbers before approving
- ✓ Clarify the change order process in advance:
 - Who approves
 - On call list
 - What are the limits and time restraints

Rock and Roll Moment

Your \$500,000 contract with Elvis Pres-Lee Construction for the Don't Be Cruel Lane road construction project is going well. So well, in fact, that City Manager Neil Sedoka asks you to add another two blocks to the contract at an estimated cost of \$250,000 (50% of the original contract amount). Then, John Lemon, your public works superintendent, asks you to replace a short section of sewer main nearby Penny Lane (about \$25,000 or 10% of the original contract amount) while we have a contractor in town'. What should your response be to these people? Does the amount (or percentage) of the proposed change order make a difference?

There are no statutory restrictions on either the amount or percentage of a change order. Adopted agency policies and procedures should contain such guidelines, however. Chapter 39.04 RCW and other bid statutes anticipate that a public works project will have a well-defined scope with definite physical boundaries. The sewer main replacement on Penny Lane is clearly not in the Don't Be Cruel Lane project scope and must be a separate contract. As the estimated cost is below the bid limit, Pres-Lee can be awarded the contract. The additional two blocks of Don't Be Cruel Lane can be added to the present contract *only if* they were in the original project scope and were deleted for budgetary reasons or if they were part of an additive alternative not accepted by the bid award action. Otherwise construction of these two blocks must be competitively bid.



STATE OF COLORADO

INFORMATION FOR BIDDERS

1. **CONTRACTOR QUALIFICATION:** State projects of \$150,000 or more, and under supervision of State Buildings and Real Estate Programs, require the Contractor to be registered with State Buildings and Real Estate Programs. Projects under \$150,000 do not require qualification. A Contractor, to be qualified with State Buildings and Real Estate Programs, must annually file State Form SC-9.1, Contractor's Statement of Experience, and be qualified at least two (2) working calendar days prior to the date fixed for publicly opening sealed bids. This form can be obtained by accessing our website: www.sco.state.co.us/sbrep Print the form, fill it in, and fax it to: 303/894-7478.

NOTE: Vendors/Contractors who are registered with the State of Colorado, Department of Personnel & Administration/Division of Finance and Procurement/State Purchasing Office's Bid Information and Distribution System (BIDS) are eligible to bid on building maintenance projects less than \$150,000 solicited through that system and are not eligible to bid on construction projects that are \$150,000 or greater as publicly advertised unless they qualify with the Colorado State Buildings Programs as stated above.

2. **BID FORM:** Bidders are required to use the Bid form attached to the bidding documents. Each bidder is required to bid on all alternates and indicate the time to substantial completion in calendar days, and if applicable because designated in the Advertisement For Bids, the bidder is required to indicate the period of time agreed to finally complete the project after the date of substantial completion, also in calendar days. Bids indicating times for substantial completion or final acceptance in excess of the number of days indicated in the Advertisement for Bids may be found non-responsive and may be rejected. The bid shall not be modified or conditioned in any manner. Bids shall be submitted in sealed envelopes bearing the address and information shown below. If a bid is submitted by mail, this aforementioned sealed envelope should be enclosed in an outer envelope and sent to the following addressee:

INSERT NAME OF AGENCY AND ADDRESS WHERE BID SHOULD BE DELIVERED

The outside of the sealed inner envelope should bear the following information:

Project #
Project Name
Name and Address of Bidder
Date of Opening
Time of Opening

3. **INCONSISTENCIES AND OMISSIONS:** Bidders may request clarification of any seeming inconsistencies, or matters seeming to require explanation, in the bidding documents at least three (3) business days prior to the time set for the opening of Bids. Decisions of major importance on such matters will be issued in the form of addendum.
4. **APPLICABLE LAWS AND REGULATIONS:** The bidder's attention is called to the fact that all work under this Contract shall comply with the provisions of all state and local laws, approved state building codes, ordinances and regulations which might in any manner affect the work to be done or those to be employed in or about the work. Attention is also called to the fact that the use of labor for work shall be governed by the provisions of Colorado law which are hereinafter set forth in Articles 27 and 52E of the GENERAL CONDITIONS.

5. **TAXES:** The bidder's attention is called to the fact that the Bid submitted shall exclude all applicable federal excise or manufacturers' taxes and all state sales and use taxes as hereinafter set forth in Article 9C of the GENERAL CONDITIONS.
6. **OR EQUAL:** The words "OR EQUAL" are applicable to all specifications and drawings relating to materials or equipment specified. Any material or equipment that will fully perform the duties specified, will be considered "equal", provided the bid submits proof that such material or equipment is of equivalent substance and function and is approved, in writing. Requests for the approval of "or equal" shall be made in writing at least five (5) business days prior to bid opening. During the bidding period, all approvals shall be issued by the Architect/Engineer in the form of addenda at least two (2) business days prior to the bid opening date.
7. **ADDENDA:** Owner/architect initiated addenda shall not be issued later than two (2) business days prior to bid opening date. All addenda shall become part of the Contract Documents and receipt must be acknowledged on the Bid form.
8. **METHOD OF AWARD - LOWEST RESPONSIBLE BIDDER:** If the bidding documents for this project require alternate prices, additive and/or deductible alternates shall be listed on the alternates bid form provided by the Principal Representative. Bidders should note the Method of Award is applicable to this Bid as stated below.
 - A. **DEDUCTIBLE ALTERNATES:** The lowest responsible Bid, taking into account the Colorado resident bidder preference provision of Colorado law, will be determined by and the contract will be awarded on the base bid combined with deductible alternates, deducted in numerical order in which they are listed in the alternates bid form provided by the Principal Representative. The subtraction of alternates shall result in a sum total within available funds. If this bid exceeds such amount, the right is reserved to reject all bids. An equal number of alternates shall be subtracted from the base bid of each bidder within funds available for purposes of determining the lowest responsible bidder.
 - B. **ADDITIVE ALTERNATES:** The lowest responsible Bid, taking into account the Colorado resident bidder preference provision of Colorado law, will be determined by and the contract will be awarded on the base bid plus all additive alternates added in the numerical order in which they are listed in the alternates bid form provided by the Principal Representative. The addition of alternates shall result in a sum total within available funds. If this bid exceeds such amount, the right is reserved to reject all bids. An equal number of alternates shall be added to the base bid of each bidder within funds available for purposes of determining the lowest responsible bidder.
 - C. **DEDUCTIBLE AND ADDITIVE ALTERNATES:** Additive alternates will not be used if deductible alternates are used and deductible alternates will not be used if additive alternates are used.

The Advertisement for Bids can be located at the web site: www.gssa.state.co.us.



State of Colorado

BID

To: Manager

PROJECT NO. _____
BASE BID \$ _____

RECEIPT OF ADDENDA NOS. _____
IS HEREBY ACKNOWLEDGED

PROJECT: _____

1. **BID:** Pursuant to the advertisement by the State of Colorado dated 20 the undersigned bidder hereby proposes to furnish all the labor and materials and to perform all the work required for the complete and prompt execution of everything described or shown in or reasonably implied from the Bidding Documents, including the Drawings and Specifications, for the work above indicated, for the base bid above indicated which bid includes all Local taxes normally payable in respect to such work when done for an entity not entitled to any exemption from such taxes.
2. **EXAMINATION OF DOCUMENTS AND SITE:** The bidder has carefully examined the Bidding Documents, including the Drawings and Specifications, and has examined the site of the work, so as to make certain of the conditions at the site and to gain a clear understanding of the work to be done.
3. **PARTIES INTERESTED IN BID:** The bidder hereby certifies that the only persons or parties interested in this Bid are those named herein, and that no other bidder or prospective bidder has given any information concerning this Bid.
4. **BID GUARANTY:** This Bid is accompanied by the required Bid Guaranty. You are authorized to hold said Bid Guaranty for a period of not more than thirty (30) days after the opening of the Bids for the work above indicated, unless the undersigned bidder is awarded the Contract, within said period, in which event the Director, State Buildings Programs, may retain said Bid Guaranty, until the undersigned bidder has executed the required Agreement and furnished the required Performance Bond, Labor and Material Payment Bond, Insurance Policy and Certificates of Insurance.
5. **TIME OF COMPLETION:** The bidder agrees to complete the entire project within (number of days to be filled in by Agency) calendar days plus ten (10) calendar days from the date of the Notice to Proceed, subject to Article 49. Time of Completion and Liquidated Damages, of The General Conditions of the Contract. If awarded this work, the bidder agrees to begin work within ten (10) days from the date of the Notice to Proceed and agrees to prosecute the work with due diligence to completion.
6. **EXECUTION OF DOCUMENTS:** The bidder understands that if this Bid is accepted, he must execute the required Agreement and furnish the required Performance Bond, Labor and Material Payment Bond, Insurance Policy and Certificates of Insurance within ten (10) days from the date of the Notice of Award, and that the bidder will be required to identify the Contract Documents, including the Drawings and Specifications.
7. **ALTERNATES:** If the Specifications for this project required that prices for either (A) Deductible Alternates, (B) Additive Alternates or (Contractor) Deductible and Additive Alternates be listed, the Methods of Awards are listed on the back of this bid form, and bidder should note the Method of Award that is applicable to this bid.
8. **The right is reserved to waive informalities and to reject any and all Bids.**

(TYPE/PRINT NAME UNDER ALL SIGNATURES)

Dated this _____ day of _____, 20____.

(Corporate Seal)

THE BIDDER:

ATTEST

Address and Phone No.

By: _____
Secretary

SIGNATURES: If the Bid is being submitted by a Corporation, the Bid should be signed by an officer, i.e., President or Vice-President. The signature of the officer shall be attested to by the Secretary and properly sealed. If the Bid is being submitted by an individual or a partnership, the Bid shall so indicate and be properly signed.

METHODS OF AWARD

If the specifications for this project require that prices be listed on Appendix A of this Bid as Alternates, the Bidder should note the below Method of Award that is applicable to this bid.

- A. DEDUCTIBLE ALTERNATES:** Deductible alternates, if used in determining the lowest responsible bidder, shall be deducted from the base of each bidder in the numerical order listed to the extent that the deduction of alternates results in a total within available funds to finance the project.
- B. ADDITIVE ALTERNATES:** The lowest responsible bid, taking into account the Colorado resident bidder preference provision of Colorado Law which is hereinafter set forth in Article 48 of the GENERAL CONDITIONS, will be determined by and the contract will be awarded on the base bid plus all additive alternates, to the extent that the addition of alternates results in a sum total within available funds to finance the contract. If this bid exceeds such amount, the right is reserved to reject all bids. Additive alternates will be used in determining the lowest responsible bidder within the amount available to finance the contract, added in the numerical order listed. An equal number of alternates shall be added to the base bid of each bidder within funds available to finance the contract for purposes of determining the lowest responsible bidder.
- C. DEDUCTIBLE AND ADDITIVE ALTERNATES:** The lowest responsible bid, taking into account the Colorado resident bidder preference provision of Colorado law which is hereinafter set forth in Article 48 of the GENERAL CONDITIONS, will be determined by and the contract will be awarded on the base bid plus all additive alternates, to the extent that the addition of alternates results in a sum total within available funds to finance the contract. If this bid exceeds such amount, the right is reserved to reject all bids. Additive alternates will be used in determining the lowest responsible bidder within the amount available to finance the contract, added in the numerical order listed. An equal number of alternates shall be added to the base bid of each bidder within funds available to finance the contract for purposes of determining the lowest responsible bidder.

If this bid exceeds the funds available to finance the contract, the right is reserved to reject all bids or award the contract on the base bid combined with deductible alternates, deducted in the numerical order in which they are listed in both the Architect/Engineer's Specification and the Proposal, to produce a net amount which is within the available funds. Additive alternates will not be used if deductible alternates are used and deductible alternates will not be used if additive alternates are used.

Schedule of Audit Findings and Responses

City of Redmond King County October 14, 2008

1. The City of Redmond did not comply with competitive bid laws.

Description of Condition

In 2007, the City awarded a \$1,787,100 contract for a sidewalk improvement project.

The Council approved three change orders totaling \$524,774. Our audit found two of the change orders were for work not within the original scope of the project:

- \$140,000 to add two sidewalks in different locations and not within the original scope of the project. This is a separate project and appropriate bidding procedures should have been followed.
- One was \$404,000 to add two sidewalks not included in the original scope of the project. This is a separate project and appropriate bidding procedures should have been followed.

Also in 2007, the City awarded a \$1,847,580 contract for the Sammamish River Habitat Enhancement Phase 4 project.

The Council approved two change orders totaling \$270,886. Our audit found one change order for work not within the original scope of the project:

- One was \$146,463.60 for landscaping and irrigation. These costs were added to the project when additional funding became available. This is a separate project and appropriate bidding procedures should have been followed.

Cause of Condition

The City indicated the change orders were not separately bid due to the convenience of using the original contractor.

Effect of Condition

The City cannot demonstrate it received the lowest price or that all vendors were provided equal access and opportunity to bid.

Recommendation

We recommend the City comply with state laws regarding public works and competitive bidding.

City's Response

2007 Sidewalk Project, 101095 (0703), Change Orders #1 and #2

The Sidewalk Project is an annual capital improvement project that identifies various sidewalk segments in need of repair or missing connections that need to be constructed throughout the City. When the bid for the project is advertised it includes only the sidewalk segments that the City can afford according to the engineers estimate and the project budget.

Change orders 1 and 2 were issued for sidewalk segments that had previously been identified, but were not included in the original bid due to budget constraints. Once the bid was awarded, and construction was in progress, it was determined that additional segments could be added to the project. The amounts of the change orders were considered and because Change Order #2 was for a significant amount City Council approval was required before the change order was issued.

Sammamish River Habitat Improvement 4, 100364 (0150) Change Order

The original bid included grading and soil improvements to an area on the east side of the Sammamish trail. When additional funding became available, through a grant from the Department of Ecology, the planting of this area was added through a change order. The work could not have been completed by another contractor in a timely manner because the area was within the project limits of the original contract.

In our opinion, the change orders, as described above, were consistent with the parameters of the underlying bids and that conducting separate bids for these was not in the best interest of the city or the community. We are committed to spending tax payer's money efficiently and effectively.

The staff understands the position of the auditor and will strive for compliance on future contracts. In addition, the City will be implementing a workshop for our Project Managers, by the Washington State Department of Labor & Industries, that covers competitive bidding requirements and change orders.

Auditor's Remarks

We appreciate the District's commitment to resolving the issue. We will review the status during the next audit.

Applicable Laws and Regulations

RCW 39.04.020 Plans and specifications — Estimates — Publication — Emergencies.

Whenever the state or any municipality shall determine that any public work is necessary to be done, it shall cause plans, specifications, or both thereof and an estimate of the cost of such work to be made and filed in the office of the director, supervisor, commissioner, trustee, board, or agency having by law the authority to require such work to be done. The plans, specifications, and estimates of cost shall be approved by the director, supervisor, commissioner, trustee, board, or agency and the original draft or a certified copy filed in such office before further action is taken.

If the state or such municipality shall determine that it is necessary or advisable that such work shall be executed by any means or method other than by contract or by a small works roster process, and it shall appear by such estimate that the probable cost of executing such work will exceed the sum of twenty-five

thousand dollars, then the state or such municipality shall at least fifteen days before beginning work cause such estimate, together with a description of the work, to be published at least once in a legal newspaper of general circulation published in or as near as possible to that part of the county in which such work is to be done. When any emergency shall require the immediate execution of such public work, upon a finding of the existence of such emergency by the authority having power to direct such public work to be done and duly entered of record, publication of description and estimate may be made within seven days after the commencement of the work.

RCW 39.04.04 – Work to be executed according to plans – supplemental plans

Whenever plans and specifications shall have been filed the work to be done shall be executed in accordance with such plans and specifications unless supplemental plans and specifications of the alterations to be made therein shall be made and filed in the office where the original plans and specifications are filed.

In the event that the probable cost of executing such work in accordance with the supplemental plans and specifications shall be increased or decreased from the estimated cost as shown by the original estimate to an amount in excess of ten percent of such estimate, then a supplemental estimate shall be made of the increased or decreased cost of executing the work in accordance with the supplemental plans and specifications and filed in the office where the original estimate is filed.

Schedule of Audit Findings

City of Ephrata Grant County January 1, 1999 through December 31, 1999

1. The City did not comply with bid law requirements.

Description of Condition

During our review of bid law compliance, we noted the City of Ephrata issued a significant change order for the East Division Avenue Improvements Project. This change order was in the amount of \$416,372 for the reconstruction of an additional 2,100 lineal feet to the original project. The original project cost was \$612,425. This project was originally bid to reconstruct an adjacent portion of East Division Avenue. As this additional work was not in the general scope of the original project, the City should have competitively bid this additional work.

Cause of Condition

The City was awarded a grant by the Transportation Improvement Board (TIB) to reconstruct East Division Avenue from "K" Street to the Airport. Per the grant agreement, TIB would reimburse the City 90 percent of the total construction costs for this approved project. The bids came in significantly less than the grant award and the City was provided funding to reconstruct the additional 2,100 lineal feet of East Division Avenue. The City opted to perform this additional work by agreeing to a change order on the original contract.

Effect of Condition

By not complying with formal bid law requirements, the City cannot be sure they received the lowest possible price for the work performed.

Recommendations

We recommend the City comply with applicable bid law requirements.

City's Response

The City of Ephrata through this letter is respectfully responding to the "draft" copy of the audit finding on the East Division Avenue Improvements Project. The facts that you present within your schedule of audit findings are very accurate. Although I would add that originally the project was scheduled for the entire length that the change order included. Just prior to submission to the Transportation Improvement Board (TIB) the City elected, due to estimated cost, to "shrink" the project down. When the bids came in at approximately half of the Engineer's estimate, we petitioned the TIB to extend the project. They indicated that the only way they would let us utilize the rest of the funding was by change order. So we proceeded on that basis to be able to capitalize on the 90 percent grant. We felt that because we extended existing unit prices to complete more of the same street we originally wanted to do, that a change order was appropriate. I did initially have some concerns about the size of the change order but could not find any RCW citation that limited the size of a change order.

Although in the body of the specifications, proposal and contract for the project, there is reference to a beginning and ending point, the cover sheet (see enclosure) does say East Avenue Improvements Project. Also enclosed is a copy of the actual agreement with the contractor that also references East Division Avenue Improvements Project. I would submit that we extended unit prices to like work on the same street that would fall under a change order. (See reference to WSDOT standards and specifications chapter 1-04.4(5) adding New York.)

The purpose behind the bid laws is the protection of the taxpayer/protection of the public treasury. The Division Street Project was a project contingent on TIB funding. While one may argue that bidding the entire project would have resulted in better or more competitive bids because some contractors may have been able to afford to bid lower unit prices for a larger project, this would have forfeited our TIB eligibility for some or all of the project. So, while strict compliance with the bid law may have generated more competitive bids (pure speculation), it would have cost the Ephrata public treasury a whole lot more in forfeited TIB funds (certainty). I would agree that our actions adhered to the spirit and intent of the public bid laws and that, at a minimum, our audit should include only a management letter rather than a finding.

If the finding does stand, we would appreciate it if you would give us some guidelines and/or authority so that we don't make the same error in the future.

We appreciate the opportunity to respond to your draft audit finding and look forward to your decision.

Auditor's Remarks

After our close review of the City's response, our status is to reaffirm the finding. We appreciate the City's cooperation throughout the audit and will review the condition during our next audit.

Applicable Laws and Regulations

RCW 35.23.352 Public works-Contracts-Bids-Small works roster-Purchasing requirements, recycled or reused materials or products states in part:

. . . a public works project means a complete project. The restrictions in this subsection do not permit the division of the project into units of work or classes of work to avoid the restriction on work that may be performed by day labor on a single project . . . whenever the costs of the public work or improvement, including materials, supplies and equipment, will exceed these figures, the same shall be done by contract . . . the city or town authority may waive the competitive bidding requirements of this section pursuant to RCW 39.04.280 if an exemption contained within that section applies to the purchase or public work

RCW 39.04.280 Competitive bidding requirements-Exemptions states in part:

. . . the purpose of this section is to supplement and not to limit the current powers of any municipality to provide exemptions from competitive bidding requirements. (1) Competitive bidding requirements may be waived by the governing body of the municipality for:

- a) Purchases that are clearly and legitimately limited to a single source of supply;
- b) Purchases involving special facilities or market conditions;
- c) Purchases in the event of an emergency;
- d) Purchases of insurance or bonds; and
- e) Public works in the event of an emergency.

Schedule of Audit Findings and Responses

Northshore Utility District King County June 30, 2008.

1. The Northshore Utility District did not comply with competitive bid laws.

Description of Condition

In July 2007, the District awarded a \$1,384,360 contract for the extension of sewer and water lines in five specific neighborhoods within the District.

The Board of Commissioners approved nine change orders totaling \$332,135, including one that reduced the contract by \$53,163. Our audit found four of the change orders were for work not within the original scope of the project:

- Three of the change orders, totaling \$270,703, were to repair damaged pipes. The District indicated the repairs were an emergency, which would be appropriate for this situation. However, these pipes were in locations outside the neighborhoods included in the project and should have been separately contracted.
- One of the change orders totaled \$84,550 for water and sewer extensions on a separate District project. The developer on that project hired a contractor who did not finish the work. As a result, the District consulted its small works roster to select a new contractor and determined the contractor for the sewer and water project was the lowest quote. The District should have bid this work separately.

Cause of Condition

District staff lacked training and experience in contracting practices.

Effect of Condition

The District cannot demonstrate it received the lowest price or that all vendors were provided equal access and opportunity to bid.

Recommendation

We recommend the District comply with state bid laws.

We also recommend the District provide training to staff on contracting laws and ensure contracts are properly monitored.

District's Response

The original \$1,384,360, publicly bid water and sewer contract was awarded to Buno Construction Company - a contractor with an excellent reputation. All four change-orders cited in the findings were in need of urgent and immediate response. Obviously, the District could not allow the damaged pipes go unattended, creating an environmental hazard, while we advertised for bid. As stated in your findings above, the immediate repair was appropriate for that situation.

There were also compelling reasons for the \$84,550 change order to finish a sewer extension. That small development had been in construction for years as the property owner failed repeatedly to complete the work within the agreed upon time limit. Meanwhile, the deep trench for sewer installation and the roadway narrowed by the construction site, obstructed the only access for a group of homeowners up a dead-end street. As winter approached, the construction site was fast becoming a traffic hazard for the residents in the area. To avoid the safety hazard and any related liabilities, it was prudent for the District to have the installation completed as soon as possible.

By using the contractor, the District was not charged for mobilization as his construction equipment was already in the area. Second, we paid the unit price based upon the winning bid of a much larger construction job quoted earlier in the year. If we had re-bid, the then current bid price for a substantially smaller job would no doubt be much higher. Finally, we did consult the small work roster. By comparison, the contractor we used offered the best price. As your auditor had stated at a discussion meeting before the last day of field work, the SAO is not questioning the due diligence aspect of the change orders, but rather that proper procedures require the District to issue a separate contract instead of using change orders as these repairs were not within the scope of the original bid.

We do agree with the need to follow proper procedures for the repair work, but we also want to emphasize the District's desire for prompt service, good value to the community and the concern for the health and safety of those we serve. In the future, the District will make sure that the staff responsible for construction contract administration are properly trained in construction laws. We thank the auditors for their work and professionalism.

Auditor's Remarks

We appreciate the District's commitment to resolving the issue. We will review the status during the next audit.

Applicable laws and Regulations

RCW 39.04.020 Plans and specifications — Estimates — Publication — Emergencies, states:

Whenever the state or any municipality shall determine that any public work is necessary to be done, it shall cause plans, specifications, or both thereof and an estimate of the cost of such work to be made and filed in the office of the director, supervisor, commissioner, trustee, board, or agency having by law the authority to require such work to be done. The plans, specifications, and estimates of cost shall be approved by the director, supervisor, commissioner, trustee, board, or agency and the original draft or a certified copy filed in such office before further action is taken.

If the state or such municipality shall determine that it is necessary or advisable that such work shall be executed by any means or method other than by contract or by a small works roster process, and it shall appear by such estimate that the probable cost of executing such work will exceed the sum of twenty-five thousand dollars, then the state or such municipality shall at least fifteen days before beginning work cause such estimate, together with a description of the work, to be published at least once in a legal newspaper of general circulation published in or as near as possible to that part of the county in which such work is to be done. When any emergency shall require the immediate execution of such public work, upon a finding of the existence of such emergency by the authority having power to direct such public work to be done and duly entered of record, publication of description and estimate may be made within seven days after the commencement of the work.

RCW 39.04.040 – Work to be executed according to plans – supplemental plans, states:

Whenever plans and specifications shall have been filed the work to be done shall be executed in accordance with such plans and specifications unless supplemental plans and specifications of the alterations to be made therein shall be made and filed in the office where the original plans and specifications are filed.

In the event that the probable cost of executing such work in accordance with the supplemental plans and specifications shall be increased or decreased from the estimated cost as shown by the original estimate to an amount in excess of ten percent of such estimate, then a supplemental estimate shall be made of the increased or decreased cost of executing the work in accordance with the supplemental plans and specifications and filed in the office where the original estimate is filed.

RCW 57.08.050 Contracts for materials and work — Notice — Bids — Small works roster — Requirements waived, states:

(1) All work ordered, the estimated cost of which is in excess of ten thousand dollars, shall be let by contract and competitive bidding. Before awarding any such contract the board of commissioners shall publish a notice in a newspaper of general circulation where the district is located at least once thirteen days before the last date upon which bids will be received, inviting sealed proposals for such work, plans and specifications which must at the time of publication of such notice be on file in the office of the board of commissioners subject to the public inspection. The notice shall state generally the work to be done and shall call for proposals for doing the same to be sealed and filed with the board of commissioners on or before the day and hour named therein.

Each bid shall be accompanied by a certified or cashier's check or postal money order payable to the order of the county treasurer for a sum not less than five percent of the amount of the bid, or accompanied by a bid bond in an amount not less than five percent of the bid with a corporate surety licensed to do business in the state, conditioned that the bidder will pay the district as liquidated damages the amount specified in the bond, unless the bidder enters into a contract in accordance with the bidder's bid, and no bid shall be considered unless accompanied by such check, cash or bid bond. At the time and place named such bids shall be publicly opened and read and the board of commissioners shall proceed to canvass the bids and may let such contract to the lowest responsible bidder upon plans and specifications on file or to the best bidder submitting the bidder's own plans and specifications. The board of commissioners may reject all bids for good cause and readvertise and in such case all checks, cash or bid bonds shall be returned to the bidders. If the contract is let, then all checks, cash, or bid bonds shall be returned to the bidders, except that of the successful bidder, which shall be retained until a contract shall be entered into for doing the work, and a bond to perform such work furnished with sureties satisfactory to the board of commissioners in the full amount of the contract price between the bidder and the commission in accordance with the bid. If the bidder fails to enter into the contract in accordance with the bid and furnish the bond within ten days from the date at which the bidder is notified that the bidder is the successful bidder, the check, cash, or bid bonds and the amount thereof shall be forfeited to the district. If the bidder fails to enter into a contract in accordance with the bidder's bid, and the board of commissioners deems it necessary to take legal action to collect on any

bid bond required by this section, then the district shall be entitled to collect from the bidder any legal expenses, including reasonable attorneys' fees occasioned thereby. A low bidder who claims error and fails to enter into a contract is prohibited from bidding on the same project if a second or subsequent call for bids is made for the project.

(2) As an alternative to requirements under subsection (1) of this section, a water-sewer district may let contracts using the small works roster process under RCW 39.04.155.

Schedule of Audit Findings

City of Quincy Grant County January 1, 2000 through December 31, 2000

1. The City did not comply with bid law requirements.

Description of Condition

During our review of bid law compliance, we noted the City issued a significant change order of \$42,190 for a street repair project. The work to be done through the change order was not part of the original \$117,750 project a contract was awarded for. Because this additional work was not in the scope of the original project, the City should have competitively bid the work.

Cause of Condition

Each year, the City budgets an amount of money for street repairs. As the low bid on this project was less than the City had budgeted for the work in 2000, the City felt it appropriate to increase the scope of the repairs. The City opted to have this additional work done by agreeing to a change order on the original contract.

Effect of Condition

By not complying with formal bid law requirements, the City cannot be sure it received the lowest possible price for the work performed.

Recommendations

We recommend the City comply with applicable bid law requirements.

City's Response

The City is willing to accept the auditor's finding on exceeding the bid law for street work. We consider this a learning experience, although we feel what we did by adding additional streets to the bid, was covered in our bid specifications.

In the future, we will try to be more specific and detailed in what the auditor would like to see.

Auditor's Remarks

We reviewed the City's response and confirm our finding.

Applicable Laws and Regulations

RCW 35.23.352 Public Works-Contracts-Bids-Small Works Roster-Purchasing requirements, recycled or reused materials or products states in part:

. . . a public works project means a complete project. The restrictions in this subsection do not permit the division of the project into units or classes of work to avoid the restriction on work that may be performed by day labor on a single project . . . whenever the costs of the public work or improvement, including

materials, supplies and equipment, will exceed these figures, the same shall be done by contract . . . the city or town authority may waive the competitive bidding requirements of this section pursuant to RCW 39.04.280 if an exemption contained within that section applies to the purchase of public work

RCW 39.04.280 Competitive bidding requirements-exemptions states in part:

. . . the purpose of this section is to supplement and not to limit the current powers of any municipality to provide exemptions from competitive bidding requirements. (1) Competitive requirements may be waived by the governing body of the municipality for:

- (a) Purchases that are clearly and legitimately limited to a single source of supply;
- (b) Purchases involving special facilities or market conditions;
- (c) Purchases in the event of an emergency;
- (d) Purchases of insurance or bonds; and
- (e) Public works in the event of an emergency.

Schedule of Audit Findings and Responses

City of Edmonds Snohomish County January 1, 2007 through December 31, 2007

1. City of Edmonds did not comply with competitive bid laws.

Description of Condition

In June 2005, the City awarded a \$4,322,113 contract for improvements along 220th Street.

The Council approved 19 change orders totaling \$630,639. Our audit found three of the change orders were for work not within the original scope of the project:

- One was for \$30,197.97 to install equipment requested by a water/sewer district to avoid future cuts into the pavement. This is a separate project and appropriate bidding procedures should have been used.
- One was \$66,143.14 for playground improvements at an elementary school through an inter-local agreement with a school district. This is a separate project and appropriate bidding procedures should have been used.
- One was \$341,700 for increased traffic control costs due to the project taking longer than expected to complete. We were unable to determine how much of these costs were associated with the original project.

Cause of Condition

The City indicated the change orders were not separately bid due to the convenience of using the original contractor.

Effect of Condition

The City cannot demonstrate it received the lowest price or that all vendors were provided equal access and opportunity to bid.

Recommendation

We recommend the City comply with state laws regarding public works and competitive bidding.

City's Response

The work noted above by the audit may constitute "public works," but it does not constitute public works by or for the City of Edmonds. Under RCW 39.04.010, "public works" means all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the municipality. None of the three change orders noted above was executed at the cost of the City of Edmonds. The first change order was executed at the cost of the Olympic View Water and Sewer District. The second change order was executed at the cost of the Edmonds School District. And finally, the increase in traffic costs attributable to the delay caused by the first and second change orders was prorated and executed at the cost the Olympic View Water and Sewer District and the Edmonds School District. The City of Edmonds, Olympic View Water

and Sewer District and Edmonds School District are separate and distinct municipalities. Because none of the three change orders was executed at the cost of the City of Edmonds, public works resulting therefrom were not public works by or for the City of Edmonds. As a result, they should not be included in audit findings for the City.

Bullet #1

The additional work, which was within the scope of the work of the original contract, constitutes incidental alterations and additions common to projects of this scale. The expenditure was reasonable compared to the original cost for similar work, and the timing of the work provided savings and advantages - traffic, mobilization, repetition of work performed on surface, and preservation of condition of new pavement. Finally, the additional work was not requested by the City, but part of Olympic View Water and Sewer District's (OVWSD) "piggyback." Ultimately, the obligation to ensure compliance with bid laws should fall upon OVWSD pursuant to RCW 39.34.030. The additional work was not executed at the cost of the City.

Bullet #2

This work was done at the request of and through an interlocal agreement with the Edmonds School District. This was a case of another municipality "piggybacking" on the City's contract to accomplish their objectives. There was no mention of the City being required to competitively bid the school district's project in the interlocal agreement. Should the project have been required to have been bid separately, the obligation was upon the school district to do so instead of piggybacking, see RCW 39.34.030. Again, additional work was not executed at the cost of the City.

Bullet #3

All the additional traffic control costs were due to the original project taking longer than anticipated, as well as, the need to increase traffic control due to continued problems with traffic not complying with road closures. Traffic control was bid as a unit price per hour. Hours increased, therefore costs increased. The contract provisions allowed for this. Additional traffic control costs attributable to work referenced in bullets 1 and 2 were paid in full by the respective municipalities for which and at the cost of which they were executed.

In two of the exceptions noted by the auditor the City indicated that the work was within the original scope of the contract and not required to be separately bid. The convenience of using the original contractor was not the reason change orders were issued.

The City of Edmonds makes every effort to assure compliance with state laws regarding public works and competitive bidding and will continue to do so.

Auditor's Remarks

RCW 39.04.010 defines the term "public work" to include "all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of **any** municipality[.]" [Emphasis added.] Since the costs of change orders were paid by a municipality, the water-sewer and school district respectively, these projects were "public works" subject to bid law. The municipality that contracts with an entity to do a public work is responsible for ensuring bid laws are followed. We reaffirm our finding.

Applicable Laws and Regulations

RCW 39.04.010 Definitions.

The term public work shall include all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein.

RCW 39.04.020 Plans and specifications — Estimates — Publication — Emergencies.

Whenever the state or any municipality shall determine that any public work is necessary to be done, it shall cause plans, specifications, or both thereof and an estimate of the cost of such work to be made and filed in the office of the director, supervisor, commissioner, trustee, board, or agency having by law the authority to require such work to be done. The plans, specifications, and estimates of cost shall be approved by the director, supervisor, commissioner, trustee, board, or agency and the original draft or a certified copy filed in such office before further action is taken.

If the state or such municipality shall determine that it is necessary or advisable that such work shall be executed by any means or method other than by contract or by a small works roster process, and it shall appear by such estimate that the probable cost of executing such work will exceed the sum of twenty-five thousand dollars, then the state or such municipality shall at least fifteen days before beginning work cause such estimate, together with a description of the work, to be published at least once in a legal newspaper of general circulation published in or as near as possible to that part of the county in which such work is to be done. When any emergency shall require the immediate execution of such public work, upon a finding of the existence of such emergency by the authority having power to direct such public work to be done and duly entered of record, publication of description and estimate may be made within seven days after the commencement of the work.

RCW 39.04.040 – Work to be executed according to plans – supplemental plans

Whenever plans and specifications shall have been filed the work to be done shall be executed in accordance with such plans and specifications unless supplemental plans and specifications of the alterations to be made therein shall be made and filed in the office where the original plans and specifications are filed.

In the event that the probable cost of executing such work in accordance with the supplemental plans and specifications shall be increased or decreased from the estimated cost as shown by the original estimate to an amount in excess of ten percent of such estimate, then a supplemental estimate shall be made of the increased or decreased cost of executing the work in accordance with the supplemental plans and specifications and filed in the office where the original estimate is filed.