

Making Your Public Works Contracts More Inclusive



DISCLAIMER: The information contained in this article is for general educational purposes and is not legal advice. The article is opinion based on professional experience.

Introduction

In 2023, there is a lot going on with public works contracting. Supply chains are still trying to recover, labor is struggling to keep up, post-pandemic businesses are in flux, and the cost of goods, materials, and equipment is more volatile than ever. As procurement professionals, it can be a full-time job trying to keep up with the ever-changing construction market attempting to plan, bid, and execute public work contracts.

This article outlines a few strategies that may help you manage current challenges in public works contracting. The strategies focus on the **good practice** of being as inclusive as possible when planning, preparing, and managing your public works contracts.

What do we mean by “inclusion”?

In this context, inclusion is a term-of-art derived from the notion of “public” procurement. Public being the operative word, meaning to relate to, or related to, those in the community, the industry, or a specific topic. Inclusion embodying the concept of being “public” means creating as **many opportunities as possible** that mirror the community, industry, or need.

Inclusion is reaching a broad pool of bidders or businesses. Inclusion is making procurement accessible to those interested, willing, and able to do work.

Why “inclusion” – what’s in it for me?

Making an active effort to be inclusive in public works contracting leads to:

- More **bidders**, *which means*
- More **competition**, *which can lead to*
- **Better pricing**, *which can lead to*
- **More work accomplished**, *which can mean*
- **Money can go farther** and/or more money can be received

The benefits can be many. Incorporating the following good practice strategies in public works contracting can assist in maximizing and spending the public dollar the best way possible.

STRATEGIES TO BE MORE “INCLUSIVE”

Strategy #1: Engage your Target Bidders

Engaging your bidders implies there is information given and received. The first strategy is encouraging those involved in planning and preparing public works contracts to go beyond reaching out to the bidding community and your target bidders by engaging them: talk with them, ask questions, and take the information you learn and modify, adjust, or change your contracting approach.

So, what kind of information will help you understand the type of contract that is best suited for your target bidders?

- Where they are **located**
- The **business size**
- The **work they do**
- **How** they do business
 - **Where** they look for work
 - The ideal **time** and **length of time** needed to prepare bids
 - What **type of bidding** they prefer
- **Obstacles** or challenges they might have in working, or trying to work, for your agency

Where do you look for bidders? Often that is the first question we ask. It is key to understanding the size of your “bidding pool” and if that bidding pool can do the work or if you need to expand your search.

You may already have a way to look for bidders, but if not here are some suggested places:

- [MRSC Rosters](#)
- [OMWBE Directory](#)
- Google search
- Local business centers
- Association of General Contractors of America (AGC), Washington Chapter [local district office](#)

Perhaps you can help the potential bidders find you. You might consider putting an ad in the local paper, hosting an “open house,” or attending a [regional contracting event](#). You may also consider leveraging community support organizations such as Apex Accelerators, [Washington PTAC](#), or local economic development alliances whose mission is centered around helping businesses and public agencies connect.

Business Size

The size of a business is often linked with the company’s ability, capacity, and/or capability. However, it may not be prudent to make that correlation. The size of a business considers such things as the number of employees, if equipment is rented or owned, if partners are brought in to expand the work they do, if they have employees who are certified or licensed in specialty scopes (electricians, plumbers, etc.), whether they are union or “open shop,” bonding limits, and how many projects can be running at the same time comfortably. Business size is important to understand when planning work to be contracted, as it is best to make an intentional link between the work required by a contract and the amount of work that can be performed.

Type of Work Performed

As part of the business size consideration, it is a good practice to understand the type of work a business performs. This can be different from how a business may be registered or what general classifications a business may hold.

For instance, businesses are often classified for purposes of general licenses or certifications using the North American Industry Classification System ([NAICS](#)) which may signal a general category of work – e.g., 238160 Roofing Contractors (non-residential) – but they may perform several supporting scopes such as demolition, weatherization, finish carpentry, mechanical system work, plumbing, and energy performance scopes which can be involved in a broad category of work like “roofing.” It is good to remember that even within what seems to be a self-explanatory category of work, there can be many scopes and types of work involved.

Type of Staff Employed

The conversation about how staff is classified, or labeled, versus the work they may be performing is also important. Our minds jump to prevailing wage rates and having to choose a worker classification to ensure proper rate of pay, but when we stop to think about any project, we realize that an individual worker may be performing several types of work, not just one general classification of work. Perhaps you have had that conversation with a contractor before: “What rate should be paid when a worker is classified as one thing but doing different/other types of work?” That specific question is something to talk with [Labor and Industries](#) about, but the idea here is **classification, categorization, or similar are not necessarily indicators of what work can be performed.**

How a Bidder Does Business

Another thing to think about learning when engaging potential bidders is how they do business. The “how” in this article is considering things like whether target businesses prefer to **bid on work** or **propose work**, and if they prefer bidding work what type of bids they are most familiar with: lump sum, unit price, online, paper, etc. Also understand if site walks are preferred or necessary, whether detailed plans and drawings are critical for a bidder, and whether a bidder has experience in pulling permits for the work they perform. Even something like when a bidder prefers to bid can have a significant impact on bid preparation and how as an agency you can strategize around including the greatest number of bidders. Consider if a bidder is limited to weekends to prepare bids, or they only look for seasonal work.

Learning this type of information about a bidder can help you to be thoughtful in how you prepare your bidding documents and how long you should give bidders to respond to the advertisement or request for bids.

Obstacles to Doing Work with Your Agency

Finally, when engaging your bidding pool, it can be valuable to understand what obstacles, or barriers, bidders may have to doing business with your agency. Obstacles can be less complicated, like bids not posted where bidders look, or more complicated, like payment processes that are too labor-intensive or slow.

Anecdotal evidence suggests that the most common obstacles, or barriers, in bidding public works are:

- Bids are not posted where they are **easy to access**
- Advertisements are not posted in locations **where bidders look**
- Bidding document, requirements, and/or processes are **hard to understand**
- There is **not enough information** to accurately bid
- There is **not enough time** to bid

To *remove these obstacles* and be more inclusive, consider:

- Asking bidders where they look to find bidding opportunities **and post there**,
- Ensuring your bids and bidding documents (wherever you post) **can be downloaded** (in 2-3 clicks),
- Providing **complete information**
- Allowing more than the standard 3-4 weeks to bid



Practice Tip: If you engage your bidding pool, you can use contracting processes, contracts, and methods that have the highest likelihood of reaching the most firms, you can understand the terms that make the most sense and work for your bidders, and you can plan your public works projects in the *right size*.

Right Sizing is packaging public work projects into contracts that consider the full scope of work, the target bidding pool, the type, form, and method of contract, and THEN the dollar amount.

Strategy #2: Provide a Comprehensive Scope of Work

The second strategy to being more inclusive in public works is around writing a comprehensive scope of work and being clear about all the **required elements of a project that would take time, resources, and/or expertise**. A true comprehensive scope of work may also be a good foundation for a “short form” contract.

It is common for scopes of work to be more general than specific. Even when attempting to write a “detailed” scope of work we might forget a critical piece of information. There is a form to help at the end of this article.

The key to writing a comprehensive scope is including information on the following **critical topics**:

- General description of the project with the intended outcome
- Bidding process/steps
 - Bidder responsibility
 - Date
 - Time
 - Questions
 - Forms
- Schedule
- Budget or estimate
- Existing (site) conditions
- Site preparation (or pre-work)
- Functional elements or requirements
 - Style
 - Specifications

- Permitting
- Prevailing wages
- Bonding and insurance
- Payment process (requirements)
- Change order process
- Work acceptance
- Records requirements
- Legal requirements
 - Applicable laws
 - Dispute resolution
 - Funding requirements
 - Other



Practice Tip: Have you ever considered using a picture instead of trying to write requirements or existing conditions in words? They say a picture is worth a thousand words.

The more comprehensive and complete a scope, the more bidders may be interested.

Think about a project installing new LED light fixtures. A basic scope may include a **simple description**, like replace old lighting assemblies with new LED assemblies of the same dimension. Which bidders do you think might respond using this simple description? Electricians, lighting installers? What types of work or workers may be left out with this simple description? This simple description has not addressed almost any of the critical topics from the list above. *How would you rewrite this scope to be comprehensive?*

Another helpful piece to remember is that a comprehensive scope should not only convey the requirements of the work, but the expectations as well.

Strategy #3: Use Plain Language

The third strategy in making your public works contracts more inclusive is using easy-to-understand language. Like a clear and comprehensive scope, plain language will help to avoid confusion and may attract a larger bidder pool.

When you use clear, easy-to-understand speech, the writer (or speaker) may also come across as more open, honest, and trustworthy. At the very least, understanding what is being written provides a sense of security that there are no hidden or unknown requirements in the document.

On the next page are some examples of how even basic definitions can be re-written in a simple, shorter, and easier-to-understand way. *Can you see the difference? Which version are you drawn to?*

Term	Original Definition	Plain Language Definition
Scope of Work	A written statement that lists the tasks, reached through consultation with city personnel, and defines the actual scope of work to be done.	A written document detailing the work of the project.
Estimate	An approximation of the expected costs to complete the work as outlined in the scope of work.	The owner’s budget expectation for the work.
Change Order	A written document between the owner and the contractors authorizing a change in the work or an adjustment in the contract sum or time.	A written adjustment to the contract, signed by the owner and the contractor.

Did you know? The Plain Writing Act of 2010 was signed by President Obama October 13, 2010 and directs federal agencies to use clear communication that the general public can understand and use. While this law does not apply to local governments, the [Federal Plain Language Guidelines](#) can still be helpful. The guidelines give several examples and helpful tips on writing in the active voice, avoiding confusing plurals, and other common language and writing topics.



Practice Tip: Try reading out loud a scope or description of work you are about to post for bidding. Act as if you were going to tell a bidder over the phone. Can you read it aloud without making modifications for speaking? If you had to adjust what was written to read it out loud, that could be an indicator that the description could be written more simply.

Strategy #4: Track

The fourth strategy in making your public works contracts more inclusive is tracking. Tracking is another way of saying “document your procurement.” Documenting is the best way to be prepared for oversight and responsibility functions in public procurement such as financial and accountability audits, as it demonstrates the level of [internal control](#) your agency has. Hopefully, some tracking is already taking place.

How does tracking help you to be more inclusive? Simply put, tracking allows you to collect data and information that can be assessed or analyzed in the future and can help you make better business decisions regarding how to get better bidding outcomes.

So, what should you track?

- Types of projects and work (e.g., repair, improvement, new construction, etc.)
- Where you looked for bidders.
- Which businesses you engaged and what their feedback was.
- What, if any, adjustments you made because of the feedback.
- Procurement method (e.g., low bid, small works, etc.)
- Where you advertised
- How long you advertised for.
- Which bidders reviewed your bidding documents (also known as a “plan holders” list).
- How many businesses bid.

- Any bidding issues such as rebids or protests, the reasons, and outcomes.
- Contractor, subcontracts, vendors, and suppliers paid on the project
- Schedule (also known as the term or period of performance)
- How many change orders were issued with rationale (e.g., changed or unforeseen conditions, etc.)
- The estimate or budget, award amount, and actual cost/final amount paid.



Practice Tip: For more information regarding change orders, consider the State Auditor’s Office [Best Practices for Change Orders](#) manual.

The information you collect helps provide awareness of potential bidders and current market conditions. Tracking helps gauge interest and identify those barriers or unintended challenges to bidding. Tracking can help you *right size* your projects and contracts. On the human-interest side, tracking shows you care.

Strategy #5: Report

The final strategy in making your public works contracts more inclusive is reporting, the other side of the tracking coin. Like tracking, reporting what you track helps you be inclusive because data provides business intelligence. Data enables decision making. Data helps tell the story and keeps information current, relevant, and unique to your local government.

How to report?

A report can be a **simple checklist** or **spreadsheet**, it can be a **financial tool**, a predetermined format such as your agency’s **briefing template**, or information posted to your **website**. The most important aspect of reporting is sharing, being transparent, and keeping stakeholders and leaders informed. A report should also seek to inform your bidding community.

The most common form of reporting is tied to *financial reporting*. Often financial software systems come with reporting functions, many of which can be easily modified.

What to report?

Simply put, you should report the key data points that you track. These should be things that finance staff, elected officials, and/or auditors would be interested in – things such as types of projects and work, estimated vs. actual costs, change orders and reasons, etc.



Practice Tip: Where to report or document? Keep a good contract or procurement file (either electronic or hard copy). Report to leadership and get in the habit of preparing bidding and procurement reports annually, if not more frequently. Report to the public by posting bid results, awarded contracts, and similar information on your website or procurement software. This can also curb public disclosure requests.

RESOURCES

To help you implement some of the strategies in this document, we have included two documents on the following pages:

- Comprehensive Scope Development Worksheet
- Procurement Tracking/Reporting Template

Developing a Comprehensive Scope Checklist

Project Name: _____

No.: _____

General Description	[Example: Install new pre-manufactured 20x40 storage building at (address)]
Bidding Process [including schedule]	Site Walk: _____ Pre-Bid: _____ Bidder Responsibility Requirements Questions Due/Process: _____ Bid Bond: _____ Due Date: _____ Time: _____ Format: _____ Bid Forms (other forms, bidders' checklist) Other: _____
Schedule [Dates]	Project Schedule [Notice to Proceed: _____ Substantial Completion: _____]
Budget	[Estimate, range, or budget] \$ _____
Existing Conditions [include any surveys, pictures, studies, covenants, restrictions, permits, etc.]	[Example: Current installation site is heavily vegetated with weeds, brush, and other similar debris.]
Site Preparation	[Site and install area is to be cleared and grubbed, to allow for a clean and level install site. All debris is to be removed. Organic yard waste to be deposited properly. Trash and non-organic and non-compostable items to be disposed. Trees and native plants are to remain, Owner has marked items to remain.]
Detailed Description [If products have been the basis of "design" include what is expected and if necessary, use "or approved equal"]	[From start to end all the expected deliverables and outcomes. Include items such as foundation, style, color, heated/cooled, lighting, code requirements, etc. A bullet list often works.]
Permitting [Is permitting required by the contractor? If the owner has permitted also indicate and attach as existing information]	Yes: _____ No Unknown
Prevailing Wage	Yes, Effective Date: _____ Region/Location: _____
Bonding	Bid Bond Payment Bond Performance Bond Other: _____
Insurance [Include evidentiary requirements]	General Liability Auto Products Completed Operations Additional Insured Other Employer Liability (Title 51/52)
Payment Process	Application Date (i.e., 5th day of the month): _____ Electronic Paper Cover Page Form Backup Requirements: _____
Change Order Process	Change Request Form Criteria under which a change will be considered
Work Acceptance	[How will the agency review and verify work? Best practice to tie to payment process]
Records Requirements	Format: _____ List of required submittals Retention Period
Legal Requirements	[If unknown, consult your legal counsel or see other resources on MRSC.org]

Procurement Tracking/Reporting Template

Project Name: _____

Bidding Method: _____

Part 1: Engagement

Identifying and talking with bidders prior to releasing the solicitation about how you may improve the bidding or project environment.

Where: 1) _____ 2) _____ 3) _____

Who (businesses and contact info):

A. _____

B. _____

C. _____

Notes:

Part 2: Planning

Getting feedback from potential bidders, adjusting if can. (e.g., timing changes, product changes, bidding method, etc.)

What: _____

Part 3: Bidding (basic facts of bidding)

How long is the solicitation period? _____

How many businesses looked (plan holders) at your bids? _____

Questions? _____

How many bids? _____

Bid Tab [List of all the bidders, and their bids] _____

Bidding Issues? _____

Part 4: Award

Estimate: _____

Award Amount: _____

Part 5: Administration

Subcontractors (businesses, suppliers, services) : _____

Prevailing Wage (workers): _____ [L&I]

Change Orders: _____

Part 6: Conclusion

Final Contract Cost:

Analysis: [briefly describe any differences from Award Amount to TCC, recommend a menu of possible scenarios (e.g., changed/unforeseen conditions, owner directed change, force majeure, etc.)]

Schedule:

Analysis: [briefly describe any differences from bid to substantial completion]