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**TO:** Detroit City Council

**FROM:** David Whitaker, Director   
Legislative Policy Division Staff

**DATE:** July 7, 2021

**RE:** **Federal Procurement Regulations for Grant Recipients**

The Legislative Policy Division (LPD) has been requested to provide an opinion on whether the Detroit City Council has the ability to approve and award a contract to an entity other than one identified under the federal procurement regulations as the lowest responsible bidder.

**Summary**

At issue are the proposed contracts to provide services to the City's Department of Transportation:

6003479 100% Grant Funding – To Provide Emergency Covid-19 Cleaning/Sanitizing Services for DDOT Administration, Shoemaker and Gilbert Buildings. – Contractor: Kristel Group, Inc. – Location: 136 S Rochester Road, Clawson, MI 48017 – Contract Period: Upon City Council Approval through June 30, 2022 – Total Contract Amount: \$178,320.00.

6003480 100% Federal Transit Administration Funding – To Provide Covid-19 Cleaning/ Sanitizing Mitigation Services for Buses at the End of the Line. – Contractor: Kristel Group, Inc. – Location: 136 S Rochester Road, Clawson, MI 48017 – Contract Period: Upon City Council Approval through June 30, 2022 – Total Contract Amount: \$2,092,320.00.

The contract number 6003480 was resubmitted for a second time to City Council approval at the Formal Session of June 29, 2021<sup>1</sup>. During deliberations questions were presented on whether the contracts could be re-bid and awarded to a different contractor if City Council rejects the award of the contract to the current selected entity. The Office of Contracting and Procurement (OCP) indicated that according to federal guidelines the contracts had to be awarded to the lowest responsible bidder. It was also OCP's position that if City Council rejected the entity selected as the lowest responsible bidder, the contract could not simply be substituted with the next lowest responsible bidder without facing legal consequences and/or jeopardizing the grant funding.

City Council maintains the authority to vote down any contract submitted to it for approval. The federal regulations indicate the local procurement process shall be used while complying with federal regulations. The City Council still has the authority to reject the contract submitted. However, should City Council reject the identified lowest responsible bidder or request all the bids be rejected and the contract be re-bid, the City would have to award the contracts using City general funds or some other unrestricted revenue source. The Federal Transit Administration (FTA) grant dollars would not be applicable due to the failure to follow the federal regulations.

## **Analysis**

LPD begins the analysis of this issue with a review of the City Charter and City Code provisions governing contracts. The procurement, selection, and approval of contracts for the City of Detroit (City) is generally governed by the Detroit City Charter and City Code. Beginning with the Article 4, Chapter 1, Section 4-122, *Approval of Contracts and Disclosure*, which provides in pertinent part:

The City may not purchase or in any way procure property or the services of independent contractors without approval by resolution of the City Council, except as provided by ordinance.

This provision provides the general authority of City Council to approve contracts for the procurement of property or services of independent contractors. The City Code provides provisions that govern how contracting for services are generally conducted prior to submittal to City Council for approval. Where the contracts for services are paid for with City general fund dollars, the method of procurement are required to comply with Section 17-5-11 which provides:

- (a) Unless otherwise provided for in this article or by state or federal law, all goods and services that are purchased by the City, and its departments and agencies, shall be made in accordance with this article.

The general method in which the Office of Contracting and Procurement selects an entity to be awarded a contract that is submitted to City Council for approval, is by following Section 17-5-11<sup>2</sup>. However, pursuant to Section 17-5-7:

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<sup>1</sup> LPD notes that the above referenced contract # 6003480 for Kristel Group Inc. was previously submitted to City Council for approval and was rejected as part of the New Business Agenda at the Formal Session of May 18, 2021.

<sup>2</sup> Section 17-5-11(b) requires that the Purchasing Director apply a three step equalization process to the selection and awarding of contracts. However, where grant funds are utilized, the equalization provisions give way to the guidelines if those guidelines prohibit their use.

Where a contract for goods or services is funded by a grant for which City Council approval is required by Section 17-4-2 of this Code, acceptance of the grant by the City Council shall be deemed an acceptance of the procurement regulations and procedures specified by the grant.

Under Section 17-5-7 contracts funded by a grant shall follow the procurement regulations specified in the grant. The above referenced contracts to “Provide Emergency Covid-19 Cleaning/Sanitizing Services for DDOT Administration” is to be paid with Federal Transit Administration Funding. This grant funding is governed by the Code of Federal Regulations, 49 CFR, Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

Pursuant to the Code of Federal Regulations 49 CFR 18.36 *Procurement*,

(b) *Procurement standards.*

(1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable federal law, the standards identified in this section.

The federal regulation provides the City’s procurement process will be used as long as it conforms to the federal requirements. Under 49-18-36(c)(1) all procurement transactions must be conducted in a manner providing for full and open competition and prohibits competitive restrictions<sup>3</sup>. In addition, Section 18.36(c)(2) provides in pertinent part:

Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference.

The federal regulations prohibit the use of local geographical preferences in the evaluation of bids or proposals. This would eliminate the City’s use of equalization credits under the City Code. The removal of the use of any geographical preference and any competitive restrictions require that any bids or proposals be evaluated under specified procedures for procurement.

Section 18.36(c)(3) provides in pertinent part:

Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

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<sup>3</sup> Some of the situations considered to be restrictive of competition include but are not limited to: (i) Placing unreasonable requirements on firms in order for them to qualify to do business, (ii) Requiring unnecessary experience and excessive bonding, (iii) Noncompetitive pricing practices between firms or between affiliated companies, (iv) Noncompetitive awards to consultants that are on retainer contracts, (v) Organizational conflicts of interest, (vi) Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance of other relevant requirements of the procurement, and (vii) Any arbitrary action in the procurement process.

- (i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use.
- (ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

The City has developed written procedures specifically for procurement under the Department of Transportation. The FTA Procurement Policies and Procedures for DDOT have been approved by the FTA. These written procedures follow the federal regulations guidance in compliance with Section 18-36(c)3.

According to OCP, the two contracts were procured pursuant to OCP's advance procurement process that emulates the sealed bid process, since the only person that opens and has access to bids is the buyer. Section 18-36(d)(2) identifies how the procurement is to be conducted for sealed bids and provides:

Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in 18.36(d)(2)(i) apply.

- (i) In order for sealed bidding to be feasible, the following conditions should be present:
  - (A) A complete, adequate, and realistic specification or purchase description is available;
  - (B) Two or more responsible bidders are willing and able to compete effectively and for the business; and
  - (C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.
- (ii) If sealed bids are used, the following requirements apply:
  - (A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;
  - (B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

If the preferred method of sealed bids is utilized to select the contractor, Subsection (d)2(ii)(D) indicates that “a firm fixed-price contract will be made in writing to the lowest responsible bidder”. This language requires that the entity identified as the lowest responsible bidder must be awarded the contract<sup>4</sup>. Subsection (d)2(ii)(E) provides that any or all bids may be rejected if there is sound documented reason.

LPD notes that with regard to Contract #6003480, OCP rejected the bidder with lowest price and selected Krystel Group, Inc. as the lowest responsible bidder. OCP indicates that the lowest price bidder was Truly Devoted Cleaning Services of which the Department indicates was rejected due to the lack of experience to meet the requirements for this critical service. Based upon this determination, the rejection of the bid pursuant to Subsection (d)(2)(ii)(E) would be appropriate and the lowest responsible bidder would be the Krystel Group, Inc.

In accordance with the federal regulation, in order to reject any or all bids, there must be sound documented reason. To place the contract out for re-bid would arguably be a rejection of all bidders which can only be done if there is sound documented reasons, if the federal grant dollars will be used. The inference drawn from the language is that the documented reason would be one in which any or all bidders fail to meet the required specifications to fulfill the contract. Absent the sound documented reasons, the bid must be awarded to the identified lowest responsible bidder.

LPD further notes that City Council maintains the authority to vote down any contract submitted to it for approval. The federal regulations indicate the local procurement process shall be used while complying with federal regulations. The City Council still has the authority to reject the contract submitted. However, should City Council reject the identified lowest responsible bidder or request all the bids be rejected and the contract be re-bid, the City would have to award the contracts using City general funds. The FTA grant dollars would not be applicable due to the failure to follow the federal regulations under Section 18-36(d)2(e) rejecting any or all bids for sound documented reasons.

If we can be of further assistance please call upon us.

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<sup>4</sup> The City’s FTA/DDOT procurement manual defines Responsible Bidder as – “A contractor or vendor who has the financial capability, resources and experience and references to manage, as the general contractor or vendor, a project of the size and type described in the contract documents as graded against criteria established by the DDOT for purposes of evaluating contractors.” The lowest responsible bidder would be the “Responsible Bidder” with the lowest price.