

DATE: November 9, 2023

MEMO TO: Gina Roberts, Chair
Finance Committee

FROM: Steve Neaman
Director of Finance

REQUEST: Provide policy direction regarding amendments to the District’s Purchasing Policy (the “Policy”) concerning “Responsible Bidders”.

STRATEGIC DIRECTION SUPPORTED: Leadership

FINANCIAL DATA: There is no financial impact at this time, however there could be over time.

BACKGROUND: At the August 31, 2023 Finance Committee meeting, members directed Corporate Counsel to research whether the District can amend its Purchasing Policy (the “Policy”) to provide either (i) that a bidder for a public works (i.e., construction) contract is “responsible” only if the bidder, and its subcontractors, participate in an active apprenticeship and training program approved and registered with the U.S. Department of Labor’s Office of Apprenticeship (a “Program”) or (ii) that having (or not having) a Program is a factor to consider in determining whether such a bidder is “responsible” (e.g., giving preference to such bidders). The Committee asked the question regarding both (a) construction contracts in excess of \$30,000.00 (which require competitive sealed bidding under the Policy) and (b) construction contracts for \$30,000.00 or less (which require competitive quotes, if practicable, under the Policy).

A summary of Corporate Counsel’s findings is set forth below. Also, staff’s August 31, 2023, memorandum to the Finance Committee, setting forth issues to discuss and consider, is attached to this memorandum.

Staff is seeking policy direction on whether to amend the Policy as set forth above and whether to seek the legislative change mentioned by Corporate Counsel below.

Corporate Counsel’s Summary:

Short Answer:

There is no clear legal answer to the questions posed by the Committee. However, there are caselaw and statutes that potentially support the inclusion in the Policy of either a Program requirement (i.e., a bidder is not responsible unless it has a Program) or a consideration of the Program (i.e., having a Program is one consideration as to whether the bidder is responsible).

However, because of the lack of express statutory authority or caselaw directly on point, the imposition of such a requirement or consideration could be subject to legal challenge.

If the District desires to amend its Policy as set forth above, it should consider seeking specific statutory authority to do so from the General Assembly, similar to a recent amendment to the Counties Code that authorizes such an amendment.

Discussion:

Section 8(b) of the Downstate Forest Preserve District Act, 70 ILCS 805/8(b) requires the District to award construction contracts in excess of \$30,000.00 to the “lowest responsible bidder”. That same Section allows the District to award construction contracts for \$30,000.00 or less without advertising for bids, but provides that, whenever practicable, the District must obtain at least three competitive bids before letting such contract. There are no published judicial decisions or other legal authority interpreting a forest preserve district’s ability to consider apprenticeship program participation in determining whether a bidder is “responsible.”

When interpreting other procurement statutes, Illinois courts have held that the word “responsible” means “financially responsible and able to discharge one’s obligations in accordance with what may be expected or demanded under the terms of the contract.” Selection of the “lowest responsible bidder” is up to the reasonable discretion of local authorities and, generally, will not be overturned by courts, unless they are utilizing favoritism or making their decision irrationally or arbitrarily. Courts have held that, where there is a sound and reasonable basis for their decision, local authorities have discretion to interpret “lowest responsible bidder” in a way that suits the public body’s needs and preferences, including with regard to social policy. For example, the Illinois Supreme Court has upheld awards of (i) a food service contract to the second-lowest bidder on the basis that it would provide food service training for mentally disabled persons in connection with performing the contract, and the low bidder would not and (ii) a construction contract, finding that affirmative action efforts are a reasonable basis on which to award a public contract.

The General Assembly has expressly authorized certain other public bodies to consider bidders’ participation in qualifying apprenticeship programs when awarding construction contracts. For example, apprenticeship program participation is required to be a “responsible bidder” for State construction contracts under the Illinois Procurement Code. 30 ILCS 500/30-22. Also, the Counties Code was recently amended (and the amendment will be effective January 1, 2024), to authorize county boards to consider apprenticeship program participation when awarding contracts. There is no case law directly addressing whether the General Assembly’s inclusion of apprenticeship and training program requirements in the Illinois Procurement Code and Counties Code supports (or does not support) District authority to adopt a similar requirement by ordinance. However, courts generally do not draw negative inferences when comparing bidding statutes for different public bodies.

Other non-home rule units of local government in Illinois have adopted ordinances that require a “responsible” bidder for construction contracts to participate in qualifying apprenticeship and training programs, including the DuPage County Forest Preserve District, Will County Forest Preserve District, and County of Lake (prior to amendment of the Counties Code). There are no published judicial decisions addressing the validity of these ordinances.

If the District desires to impose such a requirement, it should consider seeking specific statutory authority to do so from the General Assembly, similar to the recent Counties Code amendment. The first step in this process would be consideration by the District’s Legislative Committee of a recommendation to add this matter to the District’s legislative agenda.

REVIEW BY OTHERS: Executive Director, Chief Operations Officer, Manager of Board Operations, and Corporate Counsel.