

## **ORDINANCE NO. 2024-03**

### **AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ENCINITAS, CALIFORNIA, AMENDING CHAPTER 7.18, "PURCHASING AND CONTRACTS," OF THE CITY OF ENCINITAS MUNICIPAL CODE TO ADD A NEW SECTION 7.18.035, "DESIGN-BUILD PROCUREMENT"**

**WHEREAS**, Encinitas Municipal Code (EMC) Section 7.18.030 authorizes the City Council of the City Encinitas to establish Competitive Bidding Requirements and Exemptions; and

**WHEREAS**, California Public Contracts Code Sections 22160 *et seq* and 22170 *et seq* allow for the procurement of design and construction services by public entities within a single contract, referred to as "design build"; and

**WHEREAS**, the City Council desires to amend EMC Chapter 7.18 to add a new section to provide for design-build procurement pursuant to California Public Contracts Code Sections 22160 *et seq* and 22170 *et seq*; and

**WHEREAS**, the City Council finds that it is the best interest of the City of Encinitas to amend EMC Chapter 7.18 to allow for design-build procurement by the City of Encinitas.

**NOW, THEREFORE**, the City Council of the City of Encinitas, California, hereby ordains as follows:

#### **SECTION ONE:**

That Encinitas Municipal Code Chapter 7.18 is hereby amended to add Section 7.18.035, Design-Build Procurement, as shown in Exhibit A to this Ordinance.

#### **SECTION TWO: ENVIRONMENTAL COMPLIANCE.**

The action being considered by the City Council is exempt from the California Environmental Quality Act (CEQA) because it is not a "project" under Section 15378(b)(5) of CEQA Guidelines. The action involves an organizational or administrative activity of government that will not result in the direct or indirect physical change in the environment.

#### **SECTION THREE: CONSISTENCY.**

Any provision of the Encinitas Municipal Code or appendices thereto inconsistent with the provisions of this Ordinance, to the extent of such inconsistencies and no further, is hereby repealed or modified to that extent necessary to affect the provisions of this Ordinance.

#### **SECTION FOUR: SEVERABILITY.**

If any chapter, article, section, subsection, subdivision, sentence, clause, phrase, word, or portion of this Ordinance, or the application thereof to any person, is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portion of this Ordinance or its application to other persons. The City Council hereby declares that it would have adopted this Ordinance and each chapter, article, section, subsection, subdivision, sentence, clause, phrase, word, or portion thereof, irrespective of the fact that any one or more subsections, subdivisions, sentences, clauses, phrases, or portions of the application thereof to any person, be declared invalid or unconstitutional.

**SECTION FIVE: EFFECTIVE DATE.**

This Ordinance shall take effect and be in force 30 days after its passage and the City Clerk of the City of Encinitas is hereby authorized to use summary publication procedures pursuant to Government Code Section 36933 utilizing the Coast News, a newspaper of general circulation published in the City of Encinitas.

This Ordinance was introduced at a regular meeting of the City Council held on August 14, 2024.

**PASSED, APPROVED AND ADOPTED** at a regular meeting of the City Council held on the 28<sup>th</sup> day of August, 2024.

\_\_\_\_\_  
Tony Kranz, Mayor

ATTEST:

\_\_\_\_\_  
Kathy Hollywood, City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
Tarquin Preziosi, City Attorney

**CERTIFICATION:**

I, Kathy Hollywood, City Clerk of the City of Encinitas, California, do hereby certify under penalty of perjury that the foregoing ordinance was duly and regularly introduced at a meeting of the City Council on the 14<sup>th</sup> day of August, 2024 and that thereafter the said ordinance was duly and regularly adopted at a meeting of the City Council on the 28<sup>th</sup> of August, 2024 by the following vote, to wit:

AYES:           **Blackwell, Ehlers, Kranz, Lyndes**  
NOES:           **None**  
ABSENT:       **Hinze**  
ABSTAIN:       **None**

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the City of Encinitas, California, this 28<sup>th</sup> day of August, 2024

\_\_\_\_\_  
Kathy Hollywood, City Clerk

**Section 7.18.035 DESIGN-BUILD PROCUREMENT****A. Definitions.**

"Best value" means a value determined by stated criteria that may include, but is not limited to, price, features, functions, life-cycle costs, experience and other criteria deemed appropriate by the Purchasing Authority.

"Competitive negotiation" means a competitive sealed proposal procurement method which includes, but is not limited to, all of the following requirements: (1) generally describes the services sought to be procured by the City; (2) sets forth minimum criteria for evaluating proposals submitted in response to a request for proposals; (3) generally describes the format and content of proposals to be submitted; (4) provides for negotiation of scope and price; and (5) may place emphasis on described factors other than price to be used in evaluating proposals.

"Design-build" means a process authorized by Cal. Public Contracts Code Sections 22160 *et seq* and 22170 *et seq.* involving contracting with a single entity for both the design and construction of a public works project pursuant to a competitive negotiation process. Design-build also includes projects where in addition to design and construction, other services may be furnished by the design-build entity including, but not limited to, financing, soil/materials testing and soil remediation, or the provision of products, such as solar energy devices or playground equipment.

"Design-build contract" means a contract between the City and a design-build entity to furnish the architecture, engineering, and related services as required for a given public works project, and to furnish the labor, materials and other construction services for the same project. A design-build contract may be awarded conditioned upon subsequent refinements in scope and price during the development of the design, approval by the City of a guaranteed maximum price for project construction and may permit the City to make changes in the scope of the public works project without invalidating the design-build contract.

"Design-build entity" means the entity (whether natural person, partnership, joint venture, corporation, business association, or other legal entity) that proposes to enter into a contract with the City to design and construct any public works project under the procedures of this chapter.

"Design-build entity member" means any person who provides licensed contracting, architectural or engineering services.

"Director" means and includes the Director of Public Works, the Director of Utilities, the General Manager of the San Dieguito Water District, and/or the Director of Engineering, including their designees.

"Major contract" means any contract let by the City for the performance of a public works project in an amount exceeding the cost limit established by Section 22162 of the Public Contract Code.

"Performance criteria" means the requirements for the public works project, including as appropriate, capacity, durability, production standards, ingress and egress requirements, or other criteria for the intended use of the public works project, expressed in conceptual documents, performance-oriented preliminary drawings, outline specifications and other documents provided to the design-build entity by the Director or the Purchasing Authority, establishing the project's basic elements and scale, and their relationship to the work site suitable to allow the design-build entity to make a proposal.

"Proposal" means an offer to enter into a design-build contract, as further defined in

this chapter.

"Public work" shall have the same meaning as defined in Cal. Public Contracts Code 1101, as amended from time to time.

"Purchasing Authority" means the City's Purchasing Authority referred to in section 7.18.020 of the Encinitas City Code.

"Request for proposals" means the document or publication whereby the City solicits proposals for a design-build contract.

## **B. Authorization for use of design-build contracts.**

Prior to issuing a design-build request for qualifications for a major contract the Purchasing Authority shall obtain approval of the City Manager to determine that the use of a design-build procurement is in the best interest of the City. All design-build contracts shall be approved as to form by the City Attorney.

## **C. Prequalification.**

The Director or the Purchasing Authority shall issue a Request for Qualifications (RFQ) for design-build entities on a project-by-project basis that specifies the prequalification criteria or minimum qualifications, that uses a standardized questionnaire, and that includes the manner in which the design-build entities will be selected to proceed to the Request for Proposals (RFP) selection phase.

Notice of an RFQ shall be advertised in the same manner in which formal bids generally are solicited for public works projects for the City.

### **1. Prequalification criteria.**

Prequalification may be limited to consideration of all or any of the following criteria supplied by a design-build entity and specified in the RFQ:

- i. Submission of documentation establishing that the design-build entity entering into the design-build contract is a licensed contractor (Class A, B, C, or other as specified in the RFP) and holds an architect or engineering license or subcontracts with a licensed architect or engineer, as specified in the RFP.
- ii. Submission of documentation establishing that the design-build entity or its members have completed projects of similar size, scope, structure or building type, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the design-build public works project.
- iii. Submission of a proposed project management plan establishing that the design-build entity has the experience, competence, and capacity needed to effectively complete the design-build public works project on schedule.
- iv. Submission of documentation establishing that the design-build entity has the capacity to obtain all required funding, payment and performance bonding, liability insurance, and errors and omissions insurance, as well as a financial statement assuring the City that the design-build entity has the capacity to complete the design-build public works project.
- v. Provision of a declaration that neither the design-build entity, nor any

design-build entity member, under its current or former name, has had a surety company complete any project within the past five years.

- vi. Provision of a declaration providing detail for the past five years concerning all of the following:
  - Civil or criminal violations of the Occupational Safety and Health Act against any design-build entity member.
  - Civil or criminal violations of the Contractors' State License Law against any design-build entity member.
  - Conviction of any design-build entity member for submitting a false or fraudulent claim to a public agency.
  - Civil or criminal violations of Federal or State law governing the payment of wages, benefits, or personal income tax withholding, or of Federal Insurance Contribution Act (FICA) withholding requirements, State Disability Insurance withholding requirements, or unemployment insurance payment requirements against any design-build entity member. For purposes of this subsection, only violations by any design-build entity member, as an employer, shall be deemed applicable, unless it is shown that the design-build entity member in his or her capacity as an employer had knowledge of a subcontractor's violation or failed to comply with the conditions set forth in Section 1775(b) of the State Labor Code.
  - Civil or criminal violations of Federal or State law against any design-build entity member governing equal opportunity employment, contracting or subcontracting.
- vii. Provision of a declaration that the design-build entity will comply with all other provisions of law applicable to the design-build public works project. The declaration shall state that reasonable diligence has been used in its preparation and that it is true and complete to the best of the signer's knowledge.

## **2. Qualifications Selection Committee.**

The Director or Purchasing Authority shall appoint a selection committee to review and rank the qualifications of the design-build entities. The selection committee shall use the evaluation criteria set forth in this chapter and the applicable request for qualifications in its review. The composition of the committee shall be within the discretion of the Director or Purchasing Authority and may include, but not be limited to: members of department administration or staff, and any person having special expertise relevant to selection of a design-build entity (design or construction experience).

The Qualifications submittal should list consulting firm details, names of principals, office locations, personnel by discipline, project experience and examples, current workload, types of service the firms are qualified to perform, and previous performance. Also, resumes of key persons, specialists, and other associates that may be assigned to the project or projects should be included. This information should be the basis for evaluating and placing a consulting firm on a prequalification short list.

Only those design-build entities that were determined by the Qualifications Selection

Committee to have met the required qualifications will be short-listed and invited to participate in the Request for Proposals process.

#### **D. Proposal Performance Criteria.**

Performance criteria shall be prepared by the Director, the Purchasing Authority, or a design professional duly licensed by the State of California who shall be referred to as the "performance criteria developer." The performance criteria developer shall be disqualified from submitting a proposal to enter into the design-build contract as a design-build entity or as a subcontractor or team member of a design-build entity. The design-build entity shall not be permitted to delegate services under the design-build contract to the performance criteria developer.

The Director or Purchasing Authority, in consultation with the performance criteria developer, shall determine the scope and level of detail required for the performance criteria. The performance criteria shall be detailed enough to permit qualified design-build entities to submit proposals in accordance with the request for proposals, given the nature of the design-build public works project and the level of design to be provided in the proposal.

#### **E. Request for Proposals (RFP).**

##### **1. Required RFP Elements**

For purposes of this chapter only, prior to procuring a design-build contract, the Director or Purchasing Authority shall prepare a request for proposals (RFP) that will invite only those design-build entities that were short-listed during the Request for Qualifications phase to provide, at a minimum, the following elements:

- i. The procedures to be followed for submitting proposals, the criteria for evaluation of the proposals and their relative weight, the procedure for selection of a design-build entity and the timing for making awards.
- ii. The proposed terms and conditions for the design-build contract.
- iii. The performance criteria.
- iv. A description of the project approach, work plan or other submittals to be submitted with the proposal, with guidance as to the form and level of completeness required.
- v. A schedule for planned commencement and completion of the design-build public works project.
- vi. Any requirements of state or federal funding or grants to be used for the project.
- vii. The minimum qualifications that the design-build entity will be required to possess to be deemed responsive.
- viii. Requirements for performance bonds, payment bonds and insurance (including professional liability insurance) as determined by the Risk Manager and the City Attorney.
- ix. The required bidding process for subcontractors not listed at the time of submission of the proposal, in accordance with Section 7.18.035.
- x. Any other information that the Director or Purchasing Authority in his or her discretion chooses to supply, including without limitation, surveys,

soils reports, drawings or models of existing structures, environmental studies, photographs, or references to public records.

## **2. RFP Advertisement.**

Notice of request for proposals shall be advertised in the same manner in which formal bids generally are solicited for public works projects for the City. Only those design-build entities that were determined by the Qualifications Selection Committee to have met the required qualifications will be short-listed and invited to submit a proposal.

## **3. Withdrawal of proposals.**

Proposals may be withdrawn by written notice to the City in accordance with the RFP for any reason at any time prior to the deadline set forth in the RFP and any proposal guarantee for the proposal shall be returned. Timely withdrawal of a proposal shall not prejudice the right of a design-build entity to timely file a new proposal.

## **4. Proposal Selection Committee.**

The Director or Purchasing Authority shall appoint a selection committee to review and rank the proposals of the design-build entities. The selection committee shall use the evaluation criteria set forth in this chapter and the applicable request for proposals in its review of the proposals. The composition of the committee shall be within the discretion of the Director or Purchasing Authority and may include, but not be limited to: members of department administration or staff, the performance criteria developer, and any person having special expertise relevant to selection of a design-build entity (design or construction experience).

## **5. Review and Evaluation of Proposals.**

Once received, proposals shall be submitted to the Proposal Selection Committee, as defined above. Clarifications may be required to ensure proposals are responsive to the RFP. Clarifications may require revised cost and/or technical proposals. No proposal shall be considered if the performance criteria developer confirms that the proposal is not consistent with the information required by the request for proposals. Proposals will be opened in confidence. Adequate precautions shall be taken to treat each proposer fairly and to ensure that information gleaned from competing proposals is not disclosed to other proposers. Prices and other information concerning the proposals shall not be disclosed until a recommendation for award is made to the Director or Purchasing Authority. All proposals received shall become a matter of public record and shall be regarded as public, with the exception of those elements of each proposal which are identified by a proposer as business trade secrets and plainly marked "Trade Secret," "Confidential" or "Proprietary." If disclosure is required or permitted under the California Public Records Act or otherwise by law, the City and its employees and representatives shall in no way be liable or responsible for the disclosure of any such records or any part thereof.

## **6. Selection method.**

The following method shall be utilized in evaluating design-build proposals and selecting a design-build entity for award of a design-build contract:

- i. Criteria utilized may include, but are not limited to:
  - An evaluation of overall quality, capability, resource availability and financial stability of the design-build entity.

- An evaluation of references provided with respect to responsiveness, quality of work, timeliness and overall performance.
- An evaluation of the design-build entity members' experience, training and qualifications.
- Consideration of items such as proposed design approach, initial and/or life cycle costs, project features, quality, capacity, schedule, and operational and functional performance of the facility.
- The extent to which the design-build entity's proposal meets the performance criteria and other requirements set forth in the request for proposals.
- Analysis of the cost relative to the design-build entity's ability to meet the performance criteria and other requirements set forth in the request for proposals.
- Whether the cost as provided in the proposal is guaranteed firm, evidenced in writing and signed by an authorized representative of the design-build entity.

- ii. Depending on the number of proposals received, the Director, Purchasing Authority, or the selection committee may develop a "short list" of top ranked design-build entities based on their proposal.
- iii. The Director, Purchasing Authority, or selection committee may require "short listed" design-build entities to submit to an interview and/or make a presentation to establish a final ranking.
- iv. The Director, Purchasing Authority, or selection committee will then begin negotiations with the top ranked design-build entity. The negotiations may include, but not be limited to, project costs, scope, and schedule. If negotiations are unsuccessful, negotiations will cease with the top ranked design-build entity and may begin with the next highest ranked design-build entity.
- v. Award shall be recommended by the Purchasing Authority and brought to the City Council for approval of a contract with the design-build entity whose proposal is judged as providing the best value to the City while meeting the objectives of the design-build public works project.

#### **7. False declaration unlawful.**

The information concerning the design-build entity's qualifications and experience shall be verified under oath by the design-build entity and its members. It is unlawful to submit any declaration under this chapter containing any material matter that is false.

#### **8. Right to reject proposals.**

Nothing in this chapter shall require the City to accept any proposal and the City hereby reserves the right to reject any and all proposals. City assumes no responsibility for the costs incurred by any design-build entity in preparation of any proposal.



**F. Contract Retention.**

If the Purchasing Authority awards a design-build contract, retention of at least five percent of the contract in accordance with the Public Contract Code shall be withheld from progress payments, subject to the City's right, in its sole discretion, to permit progress payments for design services to be made without withholding retention.

**G. Indemnification.**

The successful design-build contract entity shall be required to defend and indemnify the City and its officers, agents, and employees in accordance with the terms of the design build contract.