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November 1, 2016

Mayor Tom McMasters  
Councilmembers:  
Richard Shaw  
Janell Smith  
Tyler Starline  
Mark Campbell  
Glen Otto  
Nancy Byrge  
Judy Blankenship  
Ed Lyons

6131 Taylorsville Road  
Huber Heights, Ohio

*VIA EMAIL to Clerk of Council for distribution*

***PERSONAL & CONFIDENTIAL, ATTORNEY/CLIENT PRIVILEGE  
CLAIMED***

Re: Energy Aggregation Bid Process

Dear Mayor McMasters & Councilmembers:

I have been asked to review the bidding process undertaken by the City to identify an energy aggregation expert. I set forth below, first the summary of my opinion followed by the opinion itself. If you have any questions please don't hesitate to contact me.

## **SUMMARY:**

The role of Council in this matter, as it is with all matters coming before Council, is ensuring that the Energy Aggregation Process occur using the best available resources employing "best practices" to get the best available rate at the lowest cost for the citizens of Huber Heights.

Because the bid process to date has experienced some rough waters at the Staff level; Because of some disagreement about information provided at the Council

level; Given the fact that communications directly between one bidder and one councilmember which contained substantive matters about that bidder's bid as well as pertinent information about energy aggregation generally that does not appear to have been shared with all of Council, with all of the other bidders or with Staff and because the bid documents allow the City to reject any and all bids, for the sake of ensuring that the City get the best deal at the lowest price for the Citizens of Huber Heights, I recommend that all bids be rejected and that the City reissue the RFP.

### **OPINION:**

On the 12<sup>th</sup> day of April, 2016 City Council authorized Staff to issue a Request for Proposals for the purpose of seeking an Energy Aggregation Specialist to assist the City through the Energy Aggregation Process which was approved by the Voters of the City in the March, 2016 election. (See Legislation attached).

Subsequently the City Staff issued a REQUEST FOR PROPOSALS for the purpose of obtaining professional assistance in the establishment of an **"Opt – Out" Electricity Aggregation Program** (RFP). (See RFP attached)

Although the Ohio Revised Code sets forth certain competitive bidding requirements applicable to statutory municipalities, the City of Huber Heights is a charter home rule community as provided for in the Ohio Constitution. Accordingly we look to the Charter and Ordinances of the City to determine what, if any, rights/powers it has reserved to itself specifically relating to the Building Process.

In doing so we find that at Part One - Administrative Code, Title Seven – Finance, Chapter 171 there is an entire chapter devoted to Bidding and Purchasing, being sections 171.01 through 171.15. Similar to the Ohio Revised Code Huber Heights Ordinances generally require competitive bidding in the award of contracts for goods and services to be provided to the City. Unlike the Ohio Revised Code however the City Ordinances vastly expand how the bidding process will be conducted in the City. (See attached). This is consistent with the powers given to charter home rule communities by the Ohio Constitution and with the Huber Heights Charter specifically.

Under Section 171.02 there are various breakpoints on the dollar amount of bids that allows different formalities in the bidding process. In all cases however from "informal offers" to "written informal bids" to "formal competitive bidding procedure" some sort of competitive bidding is required.

Under 171.12 of the Huber Heights Charter there are certain stated exceptions identified which allows the City to acquire goods or services without resorting to competitive bidding.

Staff brought to City Council for approval the request to proceed with an RFP which would be generally conducted pursuant to 171.12 of the Huber Heights Ordinances. At the same time Staff included elements of competitive bidding similar to those found in 171.04 (c) of the Huber Heights Ordinances and 153.65 et. al. of the Ohio Revised Code. This approach is totally consistent with the home rule powers of the City.

Note that at 171.12 Exceptions to Competitive Bidding Procedures at subsection (b) there is an assumption that competitive bidding procedures in some way, shape or form may be employed.

The RFP was responded to by four potential bidders. There was a bit of a hick-up right at the beginning of the process in that the RFP response by one of the bidders was not complete. Council directed staff to obtain the additional missing information not originally submitted by that bidder so as to guarantee that the City has as great a selection of experts to choose from as possible. Doing so is not inconsistent with 171.12 of the Huber Heights Ordinances or the language of the RFP itself.

After the City Staff vetted all the bids Russ Bergman, on the 1st day of August , 2016 recommended to City Council Staff's choice of bidder to represent the City in the establishment of an **"Opt – Out" Electricity Aggregation Program**.

Energy Aggregation is a big step for the City and Council took a great interest in the staff recommendation, inquiring as to the various criteria applied by Staff in making its recommendation and showing a special interest in what sort of comparisons between bidders were obtained by Staff during its vetting process.

Staff went back to the drawing board, so to speak, to obtain additional information from the bidders to be able to answer all of the questions of Council.

As a result of the need to respond to questions of Council the recommendation of Staff was continued such that the matter was further discussed at multiple Council Work Sessions, most recently at the October 18, 2016 Work Session.

While Staff was gathering its information from the various bidders a member of the council commenced a dialogue with one of the bidders. It is possible that other Councilmembers also had dialogue with individual bidders. The communications I have seen dealing with energy aggregation all appear to be appropriate in that they were seeking additional information about the Energy Aggregation Process that presumably would allow this particular councilmember to make the best possible decision. I do not opine about the appropriateness of other comments contained in some of the emails.

The inquiring council member's intentions are not in question. However in the course of communication with one of the bidders this particular council member obtained additional

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November 1, 2016

substantive information that does not appear in all cases to have been shared with all of Council, with Staff or with other bidders.

Interestingly enough and as a further indication of the intent of the inquiring council members all of those communications with the single bidder in question that I know of occurred through their HHOH email address. Obviously this address is within the public domain. Even so it can only be accessed properly by a public records request.

Such a public records request has been made. I have had the opportunity to review the same. It is clear to me that substantive information about the bid of the communicating individual bidder as well as more general but pertinent information about the Energy Aggregation Process was received by the councilmember in question.

I have prepared Schedule 1 attached which provides just a smattering of instances taken from a cross-section of the emails between the bidder in question and the councilmember in question documenting pertinent information about the bidders bid that presumably was not shared with other Councilmembers, all of the other bidders or with Staff.

Maintaining the integrity of the bidding process in the public arena is a critical function of government to insure that the people get the best deal. This particular bid process has developed in such a manner that rejecting all bids and rebidding makes the most sense and as noted is a remedy available to the City that is incorporated into the RFP itself.

Yours Very Truly,

PICKREL SCHAEFFER & EBELING CO., LPA



Alan B. Schaeffer

ABS:LAP  
CC: Rob Schommer, City Manager  
Anthony Rodgers, Clerk of Council

## Schedule 1

( Numerical references are to numbered emails as contained in the CD  
representing the fulfillment of that certain  
Public Records Request made by Councilperson Smith  
of Mayor's McMaster's HHOH City email file having  
anything to do with the Energy Aggregation Bid Process.)

123 – Email from Jeff Haarmann of AGE 8/2/16: *"We go so much further with public relations, the DTD ordinance advisements, communications between communities, bulk purchasing opportunities for Smart Thermostats exclusive to our aggregation communities, etc. We simply do it right. But we have to have the commitment of our communities to make it work well."*

157 – Email from Jeff Haarmann of AGE 8/15/16: *"You asked Russ if he verified any of EA's apples to apples numbers. In Russ's response, the savings stated for Energy Alliance's only DPL community is advertised as 33% off DPL's price to compare. The entire council has this answer in their read-aheads and it is a mathematical error. He states clearly that EA's savings are BETTER than AGE's which occurred 4 months later. That is flat wrong. Our percentage of savings as well as gross cents per kwh savings were better than EA's."*

*In verifying the math (see attachment), Russ or Russ using numbers from Energy Alliance, used the wrong divisor in determining the percentage off of the DPL rate. I've done the correct math for EA's percent off and show the full math of AGE's percentage off. EA's savings is actually 25.13% versus our stated number of 27% which is actually 27.35%. Not much of a difference, but a full 8 point difference than advertised and a complete reversal of the message of who got the better rate for their communities."*

163 – Email from Jeff Haarmann of AGE 8/17/16: *"I likely saved your residents and extra 5 to 10% on their rate. EA didn't improperly complete their RFP. They bid "what the market would dictate". That is how commercial sales are done. They would run the bid, then determine how much margin they can add to the rate and still provide a "good" rate, not necessarily the "best" rate. They would have probably made \$75,000 plus a year on the deal and you would have never know differently. They knew exactly what they were doing. At least I made them commit to a "fee" specifically. Of course, after our fee is known, I knew they would come in lower. I didn't have the time or energy to try to battle through explaining all that with everyone."*

*"That said....in the contract with EA as a consulting services agreement, make sure that is "fee" is specifically spelled out. Similarly, in the RFP to suppliers, make sure that fee is in the RFP as*



*the only fee to be received by EA from the winning bidder. Finally, when you initiate a contract with the winning bidder...make sure that "fee" is broken out in the rate so you have absolute certainty that is all they are getting paid. Our contracts with suppliers are easily available online for most of our communities. They are all the same and spell out all of this specifically. Of course, our transparency is used against us all the time, but I've never not been able to overcome that. EA has nothing publicly available but we can tell from their apples to apples chart that there are some communities that they are likely raping on fees."*

168 – email from Jeff Haarmann of AGE 8/18/16: *"I hope that I can get a couple minutes of your time to help make sure I am presenting AGE data correctly in the excel attachment. I concluded the rate you gave was in cents per KWH so I converted to dollars per KWH. Also, I could not tell if the rate given included the AGE addition or if the rate given was the total energy supplier rate. Could you help clarify. Additionally, could you refresh my memory on what is the AGE addon rate that was in the RFP given in dollars per KWH?"*

170 – Email from Tom McMasters to Jeff Haarmann 8/20/16:

[http://huberresidents.org/index.php?page=news&type=view&id=huber-heights-city\\_2%2Fenergy-aggregation&filter=1%2C8%2C9%2Cpersonal&redirected=1](http://huberresidents.org/index.php?page=news&type=view&id=huber-heights-city_2%2Fenergy-aggregation&filter=1%2C8%2C9%2Cpersonal&redirected=1) “

Note, I include this email from the Mayor because he included a web address which is an article the Mayor wrote and posted on HuberResidents.Org web site that contains much valuable information about energy aggregation and asks some great questions. Was any of this information shared with Council, with staff, with other bidders?

Posting on a 3<sup>rd</sup> party web site does not constitute notice.

174- Email from Jeff Harrmann 8/20/16: The attachments to this email could be of great assistance to Staff in its evaluation process. Were other bidders given the same opportunity to provide such data? Has Council seen these attachments?

### CASE LAW

Although there is no suggestion that any Huber Heights party who has participated in the energy aggregation bidding process has knowingly acted in such a way as to subvert the bidding process, under Ohio Law such a finding is not necessary in order for a court to determine that the integrity of the bidding process has been violated. I have set forth below two representative cases commonly quoted when courts deal with the subject as well as a statement from a well respected treatise on the subject.

**60 Ohio App.2d 195 (Ohio App. 5 Dist. 1978)**  
**396 N.E.2d 1059**  
**BOGER CONTRACTING CORPORATION, Appellant,**  
**v.**  
**BD. OF COMMISSIONERS OF STARK COUNTY et al., Appellees. <sup>[1]</sup>**  
**Court of Appeals of Ohio, Fifth District, Stark.**  
**August 24, 1978**

*"Where mandatory competitive bidding is required, it is axiomatic that every prospective bidder should have identical information upon which to submit a proposal."*

*"In our view, where a board of county commissioners undertakes to modify the plans and specifications after publication of the required statutory notice, notice of the fact of the new addition, i. e., the addendum, to prospective bidders must, at a minimum, be in accordance with a procedure which is beyond challenge so as to insure the integrity of the competitive bidding process."*

*"Accordingly, as a matter of law, the Court of Common Pleas of Stark County should have ordered the Stark County Board of Commissioners to reject all bids received by it on December 20, 1977, with respect to Project 405 and enjoined the Stark County Board of Commissioners from entering into a construction contract for Project 405 with respect to any of the bidders, including the plaintiff, Boger Contracting Company, and the defendant, Crano Construction Company."*

**67 Ohio St.2d 356 (Ohio 1981)**  
**423 N.E.2d 1095**  
**CITY OF DAYTON, ex rel. SCANDRICK, Appellee,**  
**v.**  
**City of Dayton Mayor McGEE et al., Appellants.**  
**No. 80-1564.**  
**Supreme Court of Ohio.**  
**July 29, 1981**

*"The evil here is not necessarily that "resident" bidders are preferred but that there are absolutely no guidelines or established standards for deciding by how "many percentages" a bid may exceed the lowest bid and yet still qualify as the "lowest and best" bid. Absent such standards, the bidding process becomes an uncharted desert, without landmarks or guideposts, and subject to a city official's shifting definition of what constitutes "many percentages." Neither contractors nor the public are well served by such a situation."*

*"In its opinion, the trial court stated that: " \* \* \* (t)he lack of an announced standard and priority of miscellaneous considerations allows unbridled discretion .... "...[W]e ... find, due to the lack of announced standards, that appellants' action in this case was arbitrary."*

Ohio Public Contract Law & Construction Claims, 3<sup>rd</sup>  
Edition, 1994

*"One basic underlying tenet of competitive bidding of public contracts is that each bidder must be basing his bid upon the same thing. In order to accomplish this, it is essential that the solicitation of bid ...be clear and unambiguous. If it is not, the bidders are not on equal footing and any resulting contract may be declared to be illegal."(6.04.1).*



CITY OF HUBER HEIGHTS  
STATE OF OHIO

RESOLUTION NO. 2016-R-6351

AUTHORIZING THE CITY MANAGER TO SOLICIT A REQUEST FOR PROPOSALS FROM CONSULTANTS WITH EXPERIENCE IN ESTABLISHING AN "OPT-OUT" ELECTRICITY AGGREGATION PROGRAM.

WHEREAS, it is necessary to obtain outside services to implement an electricity aggregation program.

NOW, THEREFORE BE IT RESOLVED by the City Council of Huber Heights, Ohio that:

Section 1. The City Manager is hereby authorized to solicit a Request For Proposals as attached hereto in Exhibit A for the "Opt-Out" Electricity Aggregation Program.

Section 2. It is hereby found and determined that all formal actions of this Council concerning and relating to the passage of this Resolution were adopted in an open meeting of this Council and all deliberations of this Council and of any of its Committees that resulted in such formal action were in meetings open to the public and in compliance with all legal requirements including Section 121.22 of Ohio Revised Code.

Passed by Council on the 11<sup>th</sup> day April, 2016;  
8 Yeas; 0 Nays.

Effective Date: May 11, 2016

AUTHENTICATION:

*Anthony C. Rous*  
Clerk of Council

Date

4-12-16

*Thom J. McManis*  
Mayor

Date

12 April 16

## REQUEST FOR PROPOSALS

### MUNICIPAL ELECTRICITY AGGREGATION CONSULTING SERVICES

The City of Huber Heights, Ohio took a ballot issue to the voters of Huber Heights in March, 2016, for the establishment of an "Opt-Out" Electricity Aggregation Program. The ballot issue was approved. To help complete this endeavor, the City is seeking qualified consultants with experience in establishing such Energy Programs.

The City is seeking Consultants who can provide Electrical - Residential and Small Commercial opt-out consulting services, including but not limited to preparation and management of opt-out notices, scrubbing of eligibility customer lists, and supervision of all other notices and publications required under the Act to facilitate the adoption and operation of the Program.

In addition, Consultant shall be expected to perform Education, Marketing and Approval Services in a manner consistent with the best practices established for electrical aggregation program consulting services. These services would include, but not limited to the following: Marketing support; Development of Opt-Out Notification Forms; Attendance at Public Hearings; Load Data Collection and Verification; Energy Savings Estimates; Energy Buying and Regulatory Consultation; Develop the RFP to Energy Suppliers; Act as Point-of-Contact for potential Energy Suppliers; Contract Negotiation with selected Supplier; Filing of PUCO Reports; Monitor Energy Cost Savings and Provide Quarterly Reports and such other related activities and services which may be deemed necessary to further and finalize the objectives of this proposal.

Interested Consultants with experience in providing the services outlined above are encouraged to respond to this Request for Proposal (RFP). The RFP shall include the following information:

- History, Profile, and Background of Company. PUCO Certification.
- Qualifications of Key Staff, including the personnel who will be directly working on this project.
- Names of Other Communities the Consultant has provided the same services, including the names and contact information of the municipal official(s) you worked with in these communities.
- Examples of marketing materials used in other communities.
- Any other information detailing the company's qualifications and/or experience in Electric Aggregation.

Responses to the RFP shall be received by the City of Huber Heights not later than **Friday, May 27<sup>th</sup> @ 11:00 AM, 2016**. Responses should be sent to:

City of Huber Heights  
RE: Electric Aggregation  
6131 Taylorsville Road  
Huber Heights, OH 45424

### **RFP SUBMISSIONS**

The Offeror shall develop a written response to this RFP. While each proposal will be considered objectively, the city assumes no obligation to accept to take action on any proposal. The City assumes no liability for any costs incurred in preparing or submitting any proposals.

### **PROCESS FOR ENTERING INTO AGREEMENT**

The Offeror(s) whose proposal is/are found to be the "Most Advantageous" to the City of Huber Heights will be offered the opportunity to enter into an Agreement with the City. The scope, terms and conditions of that Agreement shall be in substantial conformance with the terms, conditions and specifications described in this RFP and with the proposal that is submitted by the Offeror whose proposal is found to be the "Most Advantageous" to the City.

The Offeror should be prepared to begin contract negotiations upon submitting a proposal. If the Offeror is not able to begin contract negotiations, the City may disqualify that Offeror.

The City reserves the right to negotiate the Agreement to include any portion or portions of the services covered by this RFP. The City reserves the right to reject any and all proposals in total or by components.

The City reserves the right to make one or multiple awards, whichever is Most Advantageous to the City, as a result of this RFP process."

The City reserves the right to reject any and all proposals, to waive any irregularities in a proposal, or to accept the proposal(s) which in the judgment of proper officials, is in the best interest of the City.

The City reserves the right to accept a part or parts of a proposal unless otherwise restricted in the RFP or issue subsequent Requests for Proposal.

The City reserves the right to approve or reject any sub-Contractors proposed for work under this proposal or waive any minor irregularities.

The City reserves the right to select the successful proposer on the basis of proposals received, without seeking further information for clarification from proposers. Upon review of proposals, the City may designate the most qualified proposals as finalists. These finalists may be invited to make oral presentations and participate in a question and answer session with the City.

The City shall have the right to visit selected user sites, should this be deemed necessary.

Cost Of Services – Please identify the total amount of financial participation that you are requesting from the City to provide Professional Broker Services for Electric Power Aggregation. Provide options for methods of payment that are available.

The Agreement shall commence upon execution by the City with approval from the City Council.

The City intends to enter into a Service Agreement with the Selected Proposer for an agreed upon term typically the length of the initial contract. Upon mutual agreement of both parties, the Service Agreement may be extended for up to an additional period of time.



The City will furnish the Contractor, at no cost or expense, all reports, records, data that might be necessary or useful to complete the Services required under this Agreement.

Contractor shall not assign any rights or duties under this Agreement without the prior written consent of the City.

Unless otherwise stated in the written consent to an assignment, no assignment will release or discharge the assignor from any obligation under this Agreement. Nothing contained in this Article shall prevent Contractor from employing independent Contractors, associates, and subcontractors to assist in the performance of the Services.

Communications regarding this RFP and project shall be directed to: Russ Bergman, Huber Heights City Engineer, (937) 237-5816. E-mail: [rbergman@hhoh.org](mailto:rbergman@hhoh.org)

### TITLE SEVEN - Finance

- Chap. 171. Bidding and Purchasing.
- Chap. 173. Procedure for Advance County Payments.
- Chap. 175. Special Assessment Policy.
- Chap. 177. Recovery of Third Party Costs.
- Chap. 179. Funds.

### CHAPTER 171 Bidding and Purchasing

- |         |  |        |   |
|---------|--|--------|---|
| 171.01  | Purchasing agent.  | 171.08 | Inspection.   |
| 171.02  | General provisions.                                      | 171.09 | Cooperative purchases.                                      |
| 171.03  | Formal competitive procurement procedure.                | 171.10 | Blanket purchase orders.                                    |
| 171.031 | Procurement of design-build construction project.        | 171.11 | Emergency purchases.  |
| 171.04  | Opening and tabulation of responses: award of contracts. | 171.12 | Exceptions to competitive bidding procedures.               |
| 171.05  | Change orders and contract modifications.                | 171.13 | To provide for single bids for public improvement projects. |
| 171.06  | Purchase requisitions.                                   | 171.14 | Disposal of surplus personal property.                      |
| 171.07  | Multi-year contracts.                                    | 171.15 | Sale of surplus realty.                                     |

### CROSS REFERENCES

- Contracts - see CHTR. Sec. 6.02(9), 10.05; Ohio R.C. 731.05, 735.05 et seq., 737.02 et seq.
- Restrictions - see Ohio R.C. 715.68, 731.48
- Unlawful contract interest - see GEN. OFF. 525.10

#### **171.01 PURCHASING AGENT.**

The City Manager or designee shall serve as "Purchasing Agent" for the City, making all purchases required by the various departments/divisions and selling unused, worn out, surplus of obsolete equipment and materials. The Purchasing Agent may designate others from time to time to perform tasks required of the Purchasing Agent under this Chapter.  
(Res. 97-R-2060. Passed 8-25-97.)

**171.02 GENERAL PROVISIONS.**

(a) Whenever the estimated cost of a purchase is less than seven thousand five hundred dollars (\$7,500), the head of a department/division wanting the supplies, materials, equipment or contractual services to be purchased or secured, shall secure from potential suppliers the cost of purchase, in the form of informal offers to supply the items or services required. In these cases the department/division heads shall then secure an approved Purchase Order from the Finance Director prior to proceeding with the purchase. No purchase requisition or approval by the Purchasing Agent is required for these purchases.

(b) Whenever the estimated cost of a purchase will be at least seven thousand five hundred dollars (\$7,500) but less than fifteen thousand dollars (\$15,000), the head of a department/division wanting the supplies, materials, equipment or contractual services to be purchased or secured shall secure from potential suppliers the cost of purchase, in the form of informal offers to supply the items or services required, and shall present this in writing on a purchase requisition to both the City Manager and the Finance Director for approval prior to proceeding with the purchase. Upon approval by the City Manager and Finance Director, the department/division heads shall then secure an approved Purchase Order from the Finance Director prior to proceeding with the purchase.

(c) Whenever the estimated cost of a purchase will be at least fifteen thousand dollars (\$15,000) but less than twenty-five thousand dollars (\$25,000), the head of the department/division wanting the supplies, materials, equipment or contractual services to be purchased or secured shall secure at least three written informal bids, or a statement in writing as to why three bids are not available, and shall present this on a purchase requisition to both the City Manager and the Finance Director for approval prior to proceeding with the purchase. Upon approval by the City Manager and Finance Director, the department/division heads shall then secure an approved Purchase Order from the Finance Director prior to proceeding with the purchase.

(d) If the cost of a purchase is estimated to be twenty-five thousand dollars (\$25,000) or more, the Purchasing Agent shall resort to a formal competitive bidding procedure, as hereinafter provided, with such exceptions as are described in this chapter, and shall present the results on a purchase requisition to both the City Manager and the Finance Director for approval prior to proceeding with the purchase. Upon approval by the City Manager and Finance Director, the department/division heads shall then secure an approved Purchase Order from the Finance Director prior to proceeding with the purchase.

(e) Contract amount thresholds set out in subsections (a) to (d) hereof for determining the type of procurement procedure to be followed shall be calculated for each City Division or Department independently during each calendar year.

- (1) The estimated costs of proposed purchases shall not be added to each other or to the cost of other contracts with the same vendor by the City Division or Department during the same calendar year, including any which may be authorized by the City Council for the same goods or services, to determine whether the proposed purchase shall be done pursuant to subsections (a), (b), (c) or (d) provided the proposed purchase is a reasonably discrete scope of goods and/or services compared to prior purchases from the same vendor. The City Manager shall determine whether a proposed purchase is a reasonably discrete scope of goods and/or services.



- (2) If the proposed purchase is for the same scope of goods and/or services purchased from the same vendor previously in the calendar year, the amounts of the prior purchase and the proposed purchase shall be added together to calculate whether the proposed purchase shall be done pursuant to subsections (a), (b), (c) or (d) unless the City Manager determines that the City Division or Department could not have reasonably anticipated the additional purchase at the time the earlier contract was procured, based on a written statement by the head of the City Division or Department to the City Manager. On a quarterly basis, the City Manager shall prepare and provide to Council a report of all additional purchases the City Manager determined could not have been reasonably anticipated at the time the earlier contract was procured.
- (3) Purchases of related items shall in no event be deliberately split to avoid competitive procurement procedures. The centralized purchase of related items across different City Departments/Divisions shall be encouraged whenever deemed feasible and appropriate by the City Manager.  
(Ord. 2011-0-1869. Passed 3-14-11.)

#### **171.03 FORMAL COMPETITIVE PROCUREMENT PROCEDURE.**

(a) Whenever it is determined that formal competitive procurement is necessary because of the dollar amount involved, the Purchasing Agent shall prepare or cause to be prepared specifications for the goods or services required and an estimated cost figure. The Purchasing Agent shall determine the method of obtaining competitive responses which best serves the City, including but not limited to, sealed competitive bids, competitive proposals or two-step competitive proposals.

- (1) If the contract cost is estimated to be at least twenty-five thousand dollars (\$25,000) but less than seventy-five thousand dollars (\$75,000), Council shall then, by ordinance or resolution, authorize and direct the Purchasing Agent to advertise and receive responses, and to determine the lowest and best response. If the lowest and best response is within the set cost ceiling established in Council legislation, the Purchasing Agent is then authorized to secure an approved Purchase Order from the Finance Director and enter into a contract for such articles and services.
- (2) If the contract price is estimated to be seventy-five thousand dollars (\$75,000) or more, Council shall then, by ordinance or resolution, authorize and direct the Purchasing Agent to advertise and receive responses. The Purchasing Agent shall then submit the recommended lowest and best response to Council in an ordinance or resolution for approval. Upon approval by Council, the Purchasing Agent may then secure an approved Purchase Order from the Finance Director and enter into a contract for such articles or services.  
(Ord. 2011-0-1869. Passed 3-14-11.)

(b) Upon authorization to receive formal competitive responses, the Purchasing Agent shall advertise the requirements of the City once each week for two consecutive weeks in a newspaper of general circulation in the City, and, if appropriate, in professional or trade magazines for the purpose, inviting suppliers to tender responses in writing for the furnishing of such requirements.

(c) When required by the Purchasing Agent, responses must be accompanied by a bid bond, the amount of which shall be determined by the Purchasing Agent.  
(Res. 97-R-2060. Passed 8-25-97.)

**171.031 PROCUREMENT OF DESIGN-BUILD CONSTRUCTION PROJECT.**

(a) Whenever it is deemed to be necessary to complete a public improvement project utilizing a design-build firm, upon authorization from Council, the Engineering Division of the City shall develop, or contract for the development of, a scope-of-work statement for that public improvement that defines the public improvement and in the judgment of the Engineering Division provides interested persons with sufficient information regarding the City's requirements for the public improvement to enable those persons to submit proposals for consideration that are consistent with the needs of the City. The scope-of-work statement may include preliminary criteria, design criteria, budget parameters, and schedule and delivery requirements for the public improvement. The City may consult with and seek input from citizens and interested persons, including but not limited to property owners, in preparing the scope-of-work statement and carrying out its other responsibilities under this chapter.

(b) If the City contracts for the development of a scope-of-work statement and uses a professional design firm to prepare the scope-of-work statement, the professional design firm that prepares the scope-of-work statement is ineligible to hold any interest in any design-build construction contract for that public improvement.

(c) The City may utilize either the one-step procurement process or the two-step procurement process as described in this section. The determination of whether to utilize a one-step or two-step procurement process shall be made upon consideration of the following factors:

- (1) Whether the public improvement the City intends to construct is suited to the use of design-build services;
- (2) Whether there exists enough capable and experienced design-build firms which will seek the award of the design-build construction contract such that the bidding process is competitive;
- (3) Whether the City has the capability to manage the selection process and project under a design-build contract;
- (4) How much time and money the City must expend for preliminary design work necessary to enable a design-build contractor to develop a price or cost proposal for the design-build construction contract;
- (5) Whether a design-build construction contract is suitable given the time constraints for the construction of the public improvement;
- (6) Whether the design-build process will provide the opportunity for public comment, if needed, as determined by the City; and
- (7) Any other factors established by the City.

(d) For both the one-step and the two-step procurement processes, the City shall first advertise, in a newspaper of general circulation in the City or other appropriate locations, notice of its intent to use a design-build firm for a public improvement. The City also may advertise in other forms of media, appropriate trade journals, and any other publications considered appropriate and may notify design-build firms believed to be interested in contracting for public improvements. The notice and advertisement of the proposed project shall be in accordance with all of the following specifications:

- (1) For the one-step procurement process, the advertisement shall be published at least once during each of two consecutive weeks, with the second publication appearing at least thirty days prior to the date that proposals are due to be submitted to the City. For the two-step procurement process, the advertisement shall be published at least once during each of two consecutive weeks, with the second publication appearing at least two days prior to the date proposals are due to be submitted to the City.

- (2) The advertisement shall invite interested persons to submit either:
  - A. Proposals for consideration (in the case of a one-step procurement process); or
  - B. Statements of qualification (in the case of a two-step procurement process).
- (3) The advertisement shall include a general description of the public improvement, a statement of the professional design and construction services required for the public improvement, and the method by which a design-build firm may submit a proposal for consideration or statement of qualifications to be considered by the City in awarding the design-build construction contract.
- (4) The advertisement either shall include the scope-of-work statement in the advertisement or a statement that interested persons may obtain the scope-of-work statement from the City.
- (5) When the City is using the two-phase selection procedure, the advertisement shall request a statement of qualifications for the design-builder, and may request a statement of qualifications from any major subcontractors to be used on the project and a general response to the scope-of-work statement but shall not request the technical submission (defined below). When the City is using the one-phase selection procedure, the advertisement shall request a statement of qualifications for the design-builder, and may request a statement of qualifications from any major subcontractors to be used on the project, a response to the scope-of-work statement, and in a separate sealed envelope, the submission of the technical submission. As used herein, the "technical submission" shall describe the technical nature of the design-build proposal, include design concepts and address the requirements set forth in the scope-of-work statement for that improvement, and may include the following items as deemed appropriate by the City:
  - A. Line-item or unit cost proposal;
  - B. Lump sum cost proposal and/or guaranteed maximum price;
  - C. Schedule and date of substantial completion of the project upon which the contract price is based;
  - D. Detailed response to the scope of work; and
  - E. Such other information deemed appropriate by the City.

(e) The City shall evaluate any responses submitted to it pursuant to subsection (d)(5) hereof on the basis of the professional design and construction qualifications and the technical approach to the scope-of-work statement of the design-build firms who submit a response. The City also shall evaluate proposals submitted under the one-phase procedure in accordance with subsection (k) hereof.

- (f)
  - (1) Except as provided in subsection (f)(2) hereof, after completing this evaluation, in the two-phase procedure, the City shall select not less than three nor more than five design-build firms that it considers to be the most qualified to provide the required professional design and construction services.
  - (2) If the City determines that less than three design-build firms are qualified, the City may select less than three design-build firms on the condition that the City issues a written statement that includes the rationale for its determination.

(g) In the two-phase procedure to select a design-build firm, the City shall next request from the most qualified design-build firms selected pursuant to subsection (f) hereof, a technical submission for the public improvement that includes design concepts and addresses the requirements set forth in the scope-of-work statement for that improvement.

(h) The City's request for a technical submission shall provide all of the following information:

- (1) The estimated lump sum price of the public improvement;
- (2) The criteria that the City will use in evaluating a technical submission;
- (3) The deadline for submitting a technical submission.

(i) To the extent information contained in the technical submission of a design-build firm with whom the City does not enter into a design-build construction contract can reasonably be considered a trade secret, such information shall remain the property of the design-build firm. The design-build firm shall prominently mark each document that it considers a trade secret as a trade secret.

Each design-build firm making a submission to the City shall grant the City an irrevocable, fully paid up license to use as it determines proper the information, concepts, ideas, techniques, processes, and similar information in its submission to the City. Except to the extent that the City enters into a contract with a design-build firm, the design-build firm will have no responsibility or liability to the City, its employees, contractors and/or agents related to the use of such information, concepts, ideas, techniques, processes and/or similar information.

(j) When evaluating the qualifications of a design-build firm in either the one-phase or two-phase procedure, the City shall consider all of the following factors relative to the design-build firm:

- (1) Competence of the design-build firm to perform the required professional design and construction services as indicated by the technical training, education, and experience of the firm's personnel, especially the technical training, education, and experience of the firm's employees who would be assigned to perform the services;
- (2) Ability of the design-build firm in terms of the firm's workload and the availability of qualified personnel, equipment, and facilities to perform the required professional design and construction services competently and expeditiously;
- (3) Past performance of the design-build firm as reflected by the evaluations of the City and previous clients with respect to such factors as control of costs, quality of work, and meeting of deadlines;
- (4) Financial responsibility as evidenced by the capability to provide a letter of credit, a surety bond, certified check, or cashier's check in an amount equal to the value of the design-build construction contract, or by other means acceptable to the City;
- (5) Other similar factors.

(k) For selecting a design-build firm after submission of the technical submission, the City shall rank design-build firms in the order of their qualifications from the most to least qualified. The City may enter into negotiations for a design-build construction contract with the design-build firm it ranks most qualified to perform the required professional design and construction services at a compensation the City and design-build firm determined to be fair and reasonable. The City, in ranking design-build firms and their technical submissions may consider the factors in subsection (j) hereof as well as pricing, timing, and other matters deemed appropriate depending on the needs of the project.

(l) The City and design-build firm the City ranks as most qualified shall enter into negotiations for a design-build construction contract to ensure both of the following:

- (1) The design-build firm and the City mutually understand the essential requirements involved in providing the required professional design and construction services.
- (2) The design-build firm will make available the necessary personnel, equipment, and facilities to perform the professional design and construction services within the time required by the design-build construction contract.

(m) If the City fails to negotiate a construction contract with the design-build firm it ranks most qualified, the City shall inform the firm in writing of the termination of negotiations. The City shall then enter negotiations with the design-build contractor it ranked next most qualified. If these negotiations fail, the City shall inform the design-build firm in writing of the termination of negotiations, and the City shall enter negotiations with each next most qualified design-build firm it selected and ranked pursuant to subsection (j) hereof, in order of the firm's ranking, until a design-build construction contract is negotiated or until the City exhausts the number of design-build firms it initially selected.

(n) If the City fails to negotiate a design-build construction contract with any of the design-build firms selected and ranked pursuant to subsection (j) hereof, it may do either of the following:

- (1) Select additional design-build firms, rank those firms on the basis of their qualifications, and enter into negotiations with the firm it ranks most qualified, in the manner specified in subsections (j) and (k) hereof;
- (2) Use any other procedure permitted by law to contract for the construction of the public improvement.

(o) A design-build firm that is awarded a design-build construction contract for the construction of a public improvement shall provide a letter of credit, a surety bond, certified check or cashier's check, or by other means acceptable to the City for not less than an amount equal to the amount of the contract minus the amount of the contract related to providing design services. The design-build firm shall have and maintain, or be covered by, a professional liability insurance policy acceptable to the City. The bond and the liability insurance policy shall be provided by a company that is authorized to do business in this State.

(p) The design-build firm selected by this process is deemed to be the lowest and best bidder pursuant to the City's Charter and Codified Ordinances.  
(Ord. 2003-0-1384. Passed 1-13-03.)

#### **171.04 OPENING AND TABULATION OF RESPONSES: AWARD OF CONTRACTS.**

(a) In the case of sealed competitive bids, the bids shall be opened and tabulated publicly by the Purchasing Agent. An investigation of the responsibility of the bidders and the responsiveness of the bid shall be made as the Purchasing Agent deems necessary. The Purchasing Agent shall determine the lowest and best bid. The Purchasing Agent may reject all bids if the Purchasing Agent determines that it is in the best interest of the City to do so.



(b) In the case of competitive proposals, the responses shall be opened publicly by the Purchasing Agent. The City may discuss the responses with the proposers to clarify responses and to obtain information needed by the City to determine the lowest and best proposal. An investigation of the responsibility of the proposers and the responsiveness of the proposal shall be made as Purchasing Agent deems necessary. The Purchasing Agent shall determine the lowest and best proposal. The Purchasing Agent may reject all proposals if the Purchasing Agent determines that it is in the best interest of the City to do so.

(c) In the case of two-step competitive proposals, the technical responses shall be opened publicly by the Purchasing Agent. The City may discuss the responses with the proposers to clarify responses and to obtain information needed by the City to determine qualified proposers. An investigation of the responsibility of the proposers and the responsiveness of the proposal shall be made as the Purchasing Agent deems necessary.

The Purchasing Agent shall determine the qualified proposers. The qualified proposers shall then be invited to submit price proposals which shall be opened publicly by the Purchasing Agent. The City may discuss responses with the proposers to clarify responses and to obtain information needed by the City to determine the lowest and best proposal. If appropriate, the City may request best and final offers. The Purchasing Agent shall then determine the lowest and best proposal. The Purchasing Agent may reject all proposals if the Purchasing Agent determines that is in the best interest of the City to do so.

(Res. 97-R-2060. Passed 8-25-97.)

(d) Contracts for the purchase of articles or services costing seventy-five thousand dollars (\$75,000) or more shall be approved as to form by the City Attorney. The Purchasing Agent shall report to Council the results of the bidding process and awarding of the contract.

(Res. 2001-R-2730. Passed 5-14-01.)

#### **171.05 CHANGE ORDERS AND CONTRACT MODIFICATIONS.**

(a) When it becomes necessary to make change orders or contract modifications, such alterations or modifications shall be made in accordance with this chapter. All change orders and contract modifications shall be made in writing and must be approved by the Purchasing Agent. If price is increased, the change order or contract modification must also be submitted on a Purchase Requisition and be approved by the City Manager and by the Finance Director in advance and authorizing said change order or contract modification.

(b) Contract change orders may be made within the general scope of work stated in the contract when it becomes necessary to add, delete, or change work, tasks, details, contract cost and/or price, contract duration, or any other element of the contract. Changes to the contract which are within the scope of work of the contract are considered change orders. Changes are considered within the scope of work if they are not of such magnitude that the work or item being procured is no longer essentially the same.

(c) Should a proposed change be outside the scope of work either in nature and/or magnitude, but there is sufficient justification to award this change to the original contractor, the Purchasing Agent may execute a contract amendment, which is a contract awarded and negotiated on a noncompetitive basis as a sole source procurement.

(d) Provided funds are available in the current appropriation, the Purchasing Agent shall be authorized to execute change orders or contract modifications, providing such change orders and modifications do not, in the aggregate, exceed ten percent (10%) of the original contract amount. If the change orders and contract modifications exceed this amount, the Purchasing Agent shall either obtain Council approval and provide an explanation as to the necessity for the increase, or proceed with a new procurement for such additional work.



(e) The Purchasing Agent may authorize payment of invoices for vehicle/equipment repairs or other goods or services which may indicate date of service or purchase prior to purchase order date only if the purchase or service date was actually the date the vehicle was taken in to obtain an estimate or the estimate for the goods or service was requested and a purchase order was obtained prior to authorization of service or purchase of goods, provided the department/division manager indicates this situation in written form attached to the invoice.  
(Res. 97-R-2060. Passed 8-25-97.)

(f) Provided funds are available in the current appropriation, the City Manager may approve up to one thousand dollars (\$1000.00) on any purchase order above the amount originally approved to cover extra costs not anticipated at the time of purchase. The City Manager shall require a written explanation from the department/division head as to the reason for these unanticipated costs. On a quarterly basis, the City Manager shall prepare and provide to Council a report of all such approvals.

(g) Provided funds are available in the current appropriations, in order to avoid possible interruption of credit card service and potential penalties for late payment the Purchasing Agent, upon receipt of written approval of the City Finance Director, may authorize payment of the City credit card invoices that include a disputed charge or other charges that are currently under review or pending final approval. A list of all disputed charges, charges under review, and charges pending final approval and payments shall be maintained by the Finance Department.  
(Ord. 2011-0-1869. Passed 3-14-11.)

#### **171.06 PURCHASE REQUISITIONS.**

Whenever a purchase is authorized pursuant to this chapter, except as provided for otherwise in this chapter, the Purchasing Agent shall prepare a purchase requisition addressed to the successful bidder, directing them to supply the goods or services required in accordance with the terms agreed upon. Such purchase requisition including all proper documentation shall be executed by the City Manager and then submitted to the Finance Director for verification, encumbrance, certification and issuance of an approved Purchase Order in advance of proceeding with the purchase. (Ord. 2011-0-1869. Passed 3-14-11.)

#### **171.07 MULTI-YEAR CONTRACTS.**

All multi-year contracts and obligations shall be resubmitted to the Department of Finance for certification of the amount due for that year by January 15th of each year. All other appropriate requirements of this chapter apply to these multi-year obligations.  
(Res. 97-R-2060. Passed 8-25-97.)

#### **171.08 INSPECTION.**

The Purchasing Agent and/or department/division head shall inspect or supervise the inspection of all deliveries of supplies, materials, equipment or contractual services, to determine their conformance with the specifications set forth in or referred to in the order or contract.  
(Res. 97-R-2060. Passed 8-25-97.)

#### **171.09 COOPERATIVE PURCHASES.**

Formal bidding is not required for any purchases through the Ohio Cooperative Purchasing Act, the Southwest Ohio Purchasers for Government Program, the Ohio Department of Transportation (ODOT) Cooperative Purchasing Program, the Miami Valley Fire/EMS Alliance Program, or any other cooperative purchasing programs offered or sponsored by any other another political subdivision, regional council of government, public agency, the State, or the federal

government, or as a third-party beneficiary under a state or federal procurement contract. The Purchasing Agent is authorized to modify the procedures set out in this chapter, except as to authorization to purchase, as reasonably necessary to participate in these cooperative purchasing programs and to enter into such agreements as are necessary to participate in these programs. (Ord. 2011-0-1869. Passed 3-14-11.)

#### **171.10 BLANKET PURCHASE ORDERS.**

The Purchasing Agent is hereby authorized to issue blanket purchase orders for the fiscal year, providing the applicable policies set forth in this chapter are followed. (Res. 97-R-2060. Passed 8-25-97.)

#### **171.11 EMERGENCY PURCHASES.**

(a) In case of a real and present emergency, the Purchasing Agent may purchase directly in the open market any supplies, materials, equipment or contractual services whose immediate procurement is essential to prevent delays in the work of City departments which may vitally affect the life, health, or welfare of citizens. This provision is to be used only in those instances of a real and present danger. On the next business day, the Department/Division Manager must follow the applicable standard purchasing policy for these purchases as described in this chapter.

(b) The City is obligated, as a matter of law, to provide medical care for prisoners. These expenditures are not foreseeable and are hereby declared to be emergency purchases. The Department/Division Manager whose duties include prisoner care shall, upon receipt of notice of such expenditures for prisoner care, follow applicable standard purchasing policy for these purchases as described in this chapter. (Res. 97-R-2060. Passed 8-25-97.)

#### **171.12 EXCEPTIONS TO COMPETITIVE BIDDING PROCEDURES.**

(a) Competitive procedures under this chapter are not required in any part of the following circumstances:

- (1) The purchase consists of goods or services, or any combination thereof, and after reasonable inquiry the Purchasing Agent finds that only one source of supply is reasonably available.
- (2) The expenditure is for a renewal or renegotiation of a lease or license for telecommunications or electronic data processing equipment, services, or systems, or for the upgrade of such equipment, services, or systems, or for the maintenance thereof as supplied by the original source or its successors or assigns.
- (3) The purchase of goods or services is made from another political subdivision, public agency, the state, or the federal government, or as a third-party beneficiary under a state or federal procurement contract.
- (4) The purchase substantially involves services of a personal, professional, highly technical, or scientific nature, including but not limited to the services of an attorney, physician, surveyor, appraiser, investigator, court reporter, adjuster, advertising consultant, or licensed broker, or involves the special skills or proprietary knowledge required for the servicing of specialized equipment owned by the City.
- (5) Services or supplies are available from a qualified nonprofit agency pursuant to Ohio R.C. 4115.31 to 4115.35.
- (6) The purchase consists of the goods or services of a public utility.

(b) The Council may waive the competitive bidding procedures herein or approve alternate procedures whenever it deems it to be in the best interest of the City to do so.

(c) As used in this chapter:

- (1) "Goods" means all things, including specially manufactured goods, that are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities, and things in action. "Goods" also includes other identified things attached to realty as described in Ohio R.C. 1302.03.
- (2) "Services" means the furnishing of labor, time, or effort by a contractor, not involving the delivery of goods or reports other than goods or reports that are merely incidental to the required performance, including but not limited to insurance, bonding, or routine operation, routine repair, or routine maintenance of existing structure, buildings, real property or equipment, but does not include employment agreements, collective bargaining agreements, or personal services.
- (3) "Construction" means the process of building, altering, repairing, improving, painting, decorating, or demolishing any structure or building, or other improvements of any kind to any real property owned or leased by the City.  
(Res. 97-R-2060. Passed 8-25-97.)

#### **171.13 TO PROVIDE FOR SINGLE BIDS FOR PUBLIC IMPROVEMENT PROJECTS.**

The provisions of Ohio R.C. 153.50 through 153.52, inclusive, shall have no application to any contracts for work and materials on public improvement projects within the City, and the City Manager may, at his discretion, determine that such projects may be bid as a whole and not separately. (Res. 97-R-2060. Passed 8-25-97.)

#### **171.14 DISPOSAL OF SURPLUS PERSONAL PROPERTY.**

(a) All departments/division heads shall submit to the City Manager, reports showing stocks of all supplies, materials or equipment which are no longer in use, or which have been worn out or obsolete. (Res. 98-R-2216. Passed 6-8-98.)

(b) The City Manager may order such items transferred to another department/division which can make use of them.  
(Res. 97-R-2060. Passed 8-25-97.)

(c) The City Manager may declare these items valued at less than twenty-five thousand dollars (\$25,000) on the City's capital asset listing as surplus no longer needed for municipal purposes. The City Manager may then sell the same or trade them in on new items. Council authorization declaring an item as surplus no longer needed for municipal purposes is required in instances where an item has value as shown on the City's capital asset listing of twenty-five thousand dollars (\$25,000) or more. The Council ordinance or resolution shall specify the manner of disposing of the item. Sale or trade-in shall be pursuant to formal bidding if the estimated value is twenty-five thousand dollars (\$25,000) or more; it may be consummated pursuant to formal bidding or auction; or through the use of online asset sales by auction through Montgomery County regardless of the dollar threshold. All proceeds of sale of surplus items shall be paid into the appropriate fund in the City Treasury.  
(Ord. 2011-0-1869. Passed 3-14-11.)

**171.15 SALE OF SURPLUS REALTY.**

The City Manager is authorized to entertain or solicit one or more proposals and to negotiate, with one or more parties, on the terms and conditions for the sale of surplus real property. Council shall determine that the parcel of real property is not needed for any municipal purpose and is surplus property, and shall approve terms and conditions of any sale in a resolution of Council. The City Manager may then enter into an agreement for the sale of the surplus property on such approved terms and conditions.  
(Res. 97-R-2060. Passed 8-25-97.)