



City Council Staff Report

DATE: January 21, 2015 LEGISLATIVE

SUBJECT: AN ORDINANCE OF THE CITY OF PALM SPRINGS, CALIFORNIA,
AMENDING SECTION 7.08.030 OF THE PALM SPRINGS MUNICIPAL
CODE, RELATING TO BID PROTESTS

FROM: David H. Ready, City Manager

BY: Public Works & Engineering Department

SUMMARY:

The City's existing Procurement and Contracting regulations enacted under Title 7 of the Palm Springs Municipal Code allows for submittal of bid protests through a direct appeal to the City Council in accordance with Chapter 2.05 of the Palm Springs Municipal Code. The proposed Ordinance amends Section 7.08.030 "Bid Protests" of the Palm Springs Municipal Code to delegate the filing, review and determination of bid protests through and by the City Manager. However, the City Council will retain final authority on all bid protests, at its discretion.

RECOMMENDATION:

1. Waive the reading of the ordinance text in its entirety and read by title only; and
2. Introduce on first reading Ordinance No. _____, "AN ORDINANCE OF THE CITY OF PALM SPRINGS, CALIFORNIA, AMENDING SECTION 7.08.030 OF THE PALM SPRINGS MUNICIPAL CODE, RELATING TO BID PROTESTS."

BACKGROUND:

The public bidding process, a hallmark of government transparency, generally, has become ever more competitive in nature, with competition between bidders now common. More often, bid protests are being submitted by one bidder challenging the City's award of a contract to another bidder. In most cases, the context of the bid protest do not materially affect the bid to be awarded, as determined by the City Attorney.

In 2002, the City Council adopted Ordinance No. 1605 enacting Section 7.08.030 "Bid Protests," outlining the process for filing, review and a determination of bid protests to an award of contract in the City, as follows:

7.08.030 Bid protests.

(1) Right to Protest.

Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may submit a formal protest to the city manager or his designee requesting an appeal to the city council in accordance with Chapter 2.05 of the municipal code. A protest with respect to an invitation for bids or request for proposals shall be submitted in writing within five business days following the day of opening of bids or closing date of proposals.

(2) Stay of Procurement During Protests.

In the event of a timely protest under subsection (1) of this section, the director of procurement and contracting shall not proceed further with the award of the contract until the appeal is decided.

As a "charter city," the City is empowered by the Constitution to govern its own "municipal affairs" to the extent the field is not preempted by state law.

The City's charter delegates authority to the City Council to establish by ordinance any procedures for bid protests affecting the procurement of supplies, services, and construction of public works.

ANALYSIS:

Bid protests are usually limited to protests against award of contract for public works projects that were solicited through a "Notice Inviting Bids," issued by the City, rather than award of a professional services contract that was solicited through a "Request for Proposals" released by the City. Historically, the City may receive a bid protest from a bidder several times per year, and often the allegations of non-responsiveness presented to the City in a bid protest are inconsequential to the validity of the bid. Bid protests have in all prior instances been coordinated by staff, with responses to protestants furnished by City staff following review by the City Attorney's office. Staff is unaware of an occasion where a protestant availed itself of the opportunity to have a direct appeal before the City Council for a decision on a bid protest, as otherwise allowed pursuant to Section 7.08.030 of the Palm Springs Municipal Code.

The primary grounds for a protest of the City's intent to award a contract to another bidder are that the bid is not "responsive" to the requirements identified in the bidding documents. Generally, a claim of "non-responsive," may be made if a bid form is not completely filled out and signed, as required by the bid documents, or where there are other errors or omissions on the Bid Forms. Common cases of non-responsiveness are:

- Failure to execute the bid;
- Failure to acknowledge addenda;
- Failure to include notary acknowledgments on required Bid Forms;
- Failure to appropriately list subcontractors as otherwise required by law;
- Failure to meet certain stated goals (i.e. DBE), or make good faith efforts;
- Failure to return all required Bid Forms, (including Bid Bond/Security)

After opening of bids, staff thoroughly reviews all of the bids received, and confirms that the bid totals of each bid are correct to ensure the bid abstract is accurate in listing the lowest to highest bids received. Upon confirmation of the lowest bidder, the entire bid is reviewed to ensure compliance with all bidding requirements, including the six generally critical items that determine the responsiveness of a bid as outlined above.

California law, including relevant case law over several decades, has granted the City discretion with determining the responsiveness of a bid, and in generally awarding contracts that best serve the interests of the City. The City traditionally reserves its rights to waive bidding irregularities in low bids when those irregularities are inconsequential, i.e., they do not affect the amount of the bid or afford the low bidder an unfair advantage over the other bidders. In fact, case law dating back to 1956 is often cited as the basis for public bidding laws protecting the public's best interests (and not the private interests of a losing bidder). In the case *Judson Pacific-Murphy Corp. v. Durkee* [(1956) 144 Cal.App.2d 377, 383], the Court found that:

It certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal or license application of the low bidder after the fact [and] cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid. Such construction would be adverse to the best interests of the public and contrary to public policy.

The courts have also confirmed the City's rights to automatically waive minor technical errors in bid documents, such as misspellings, errors in the exact address or name or trade of a subcontractor, or any other similar minor errors or omissions in the bid. Legal opinions are often cited in various court cases granting discretion to cities to waive minor technical errors, [47 Ops.Cal.Atty.Gen.129, 130 (1966)]:

[A] bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential.

Another important legal support of the discretion afforded to the City in review of bid protests is the theory that the City, as a local public agency, will use its discretion upon an examination of the facts, and weigh those facts in determining whether to sustain or deny a protest that is submitted. In the case *Ghilotti Construction Co. v. City of*

Richmond (1996) 45 Cal. App. 4th 897, 903-904 [53 Cal.Rptr.2d 389], the Court found that:

Our review is limited to an examination of the proceedings to determine whether the City's actions were arbitrary, capricious, entirely lacking in evidentiary support or inconsistent with proper procedure. There is a presumption that the City's actions were supported by substantial evidence, and [petitioner/plaintiff] has the burden of proving otherwise. We may not reweigh the evidence and must view it in the light most favorable to the City's actions, indulging all reasonable inferences in support of those actions.

Staff refers here to these often cited legal cases, which, over time, have continued to support the City's ability to review and consider bid protests in its discretionary award of public contracts. Staff's use of this legal discretion is with the understanding that in reviewing any bid protest, a finding to sustain or deny a bid protest must be based in fact, and cannot be arbitrary or capricious, or in any way support a bid that is afforded an unfair advantage over the other bidders.

On this basis, and with the understanding that all bid protests are carefully reviewed in the context of the requirements imposed on all of the bidders, including review and approval of bid protest determinations through the City Attorney's office, staff recommends that the existing local regulation associated with bid protests codified in Section 7.08.030 be amended to allow for an administrative process including decision authority authorization of the City Manager. **The City Council retains full reconsideration of any filed bid protest at the time the award is made at a regular City Council meeting.**

ENVIRONMENTAL IMPACT:

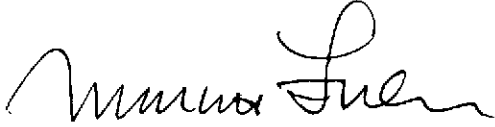
Adoption of the requested Ordinance to amend Section 7.08.030 of the Palm Springs Municipal Code is not a "project" as defined by Section 15378 of the California Environmental Quality Act (CEQA). A "project" means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. Pursuant to Section 15378(b)(5) a "project" does not include organizational or administrative activities of governments that will not result in direct or indirect physical changes in the environment.

FISCAL IMPACT:

No direct fiscal impacts are anticipated.

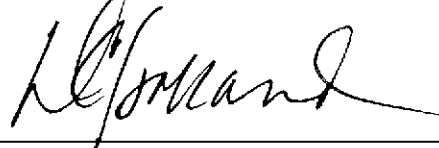
SUBMITTED

Prepared by:



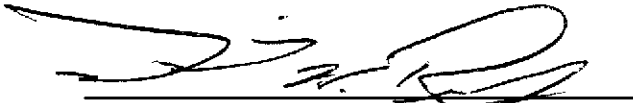
Marcus L. Fuller, MPA, P.E., P.L.S.
Assistant City Manager/City Engineer

Ordinance Approved as to Form:



Douglas C. Holland, City Attorney

Approved by:



David H. Ready, Esq., Ph.D.
City Manager

Attachments:

1. Ordinance

ATTACHMENT 1

ORDINANCE NO. ____

AN ORDINANCE OF THE CITY OF PALM SPRINGS, CALIFORNIA, AMENDING SECTION 7.08.030 OF THE PALM SPRINGS MUNICIPAL CODE, RELATING TO BID PROTESTS.

City Attorney Summary

This Ordinance amends the City's existing Code related to bid protests to further clarify the process and to provide for a final administrative determination of all bid protests by the City Manager.

The City Council of the City of Palm Springs finds:

A. The City Council of the City of Palm Springs previously adopted Ordinance No. 1605 in 2002 establishing Section 7.08.030 "Bid Protests" of the Palm Springs Municipal Code.

B. The City Council finds and declares that its current regulation for processing of bid protests lacks a sufficiently described process allowing for administrative review by and through the City Manager, and requires a direct appeal to the City Council in accordance with Chapter 2.05 of the Palm Springs Municipal Code.

C. The City Council finds and declares that the processing of bid protests is an administrative process best coordinated by and through the City Manager and the various City Departments more directly involved with the bid or proposal solicitation that may generate bid protests, and that a direct appeal to the City Council is not warranted nor required by the California Public Contract Code.

D. The City Council desires to adopt this ordinance to enact an updated process for the filing and administrative review of bid protests, allowing for a final decision of bid protests by the City Manager, or assigned designee.

THE CITY COUNCIL OF THE CITY OF PALM SPRINGS, CALIFORNIA, ORDAINS:

SECTION 1. Section 7.08.030 of the Palm Springs Municipal Code is amended to read:

7.08.030 Bid Protests.

(1) The purpose of the bid protest procedures in this Section is to protect the public interest. The bid protest procedures are not intended to give losing bidders an opportunity to evaluate the bid or proposal of the winning bidder to have the award of contract overturned to secure the award of contract for itself.

(2) Any bidder or proposer submitting a bid or proposal under Section 7.03.020, 7.03.030, or 7.03.040, may file a written bid protest with the Procurement and Contracting Manager no more than five business days following the posting of award recommendation or the posting of bid results on the City's website, or such other distribution generally used by the City in advising bidders or proposers of the competitive bid or consultant selection results, as the case may be. The written bid protest must include the name, address, telephone number and email address of the protestor and/or the person representing the protesting party. The written bid protest must set forth, in detail, all grounds for the bid protest, including, without limitation, all facts, supporting documentation, legal authorities and arguments in support of the grounds for the protest. All factual contentions must be supported by evidence. Any matters not set forth in the written bid protest shall be deemed waived. Any bid protest not conforming to the requirements of this Section shall be rejected as invalid.

(3) For all bid or proposal solicitations other than for maintenance work or public projects, as defined by Section 7.01.040, the Procurement and Contracting Manager, or assigned designee, shall review the merits and timeliness of the written bid protest and issue a written decision to the protestant within ten business days of receipt of the written bid protest. The City Attorney shall review and approve all written decisions prior to issuance to the protestant.

(4) For all bid solicitations for maintenance work or public projects, as defined by Section 7.01.040, the City Engineer, or assigned designee, shall review the merits and timeliness of the written bid protest and issue a written decision to the protestant within ten business days of receipt of the written bid protest. The City Attorney shall review and approve all written decisions prior to issuance to the protestant.

(5) Any protestant may appeal the decision of the Procurement and Contracting Manager or the City Engineer, as the case may be, to the City Manager by filing a letter of appeal within five business days of the date of the Procurement and Contracting Manager's or City Engineer's decision. The appeal must include the name, address, telephone number and email address of the appellant and/or the person representing the appealing party. The letter of appeal shall include the original protest and any additional supporting information, including, without limitation, all facts, supporting documentation, legal authorities and arguments in support of the grounds for the appeal. All factual contentions must be supported by evidence. Any matters not set forth in the letter of appeal shall be deemed waived. Any letter of appeal not conforming to the requirements of this Section shall be rejected as invalid.

(6) The City Manager shall review the merits and timeliness of the letter of appeal and issue a written decision to the appellant within ten business days of receipt of the letter of appeal. The City Attorney shall review and approve all written decisions prior to issuance to the protestant.

(7) The City Manager shall have final authority to sustain or deny a bid protest. The City Manager's decision shall constitute the City's final determination on the bid protest, unless otherwise reconsidered by the City Council as provided in Subsection (9) of this Section.

(8) Once a protest has been filed with the Procurement and Contracting Manager or City Engineer, no contract shall be awarded until the Procurement and

Contracting Manager or City Engineer, as the case may be, has issued a written decision on the bid protest, or if the Procurement and Contracting Manager's or City Engineer's decision is appealed, the City Manager has issued a final determination.

(9) For bids or proposals awarded by the City Council, the City Manager shall, at the time the bid or proposal is presented to the City Council for award, submit to the City Council a written report on the bid protest, including the Procurement and Contracting Manager's or City Engineer's decision, or, if the Procurement and Contracting Manager's or City Engineer's decision is appealed, the City Manager's final decision on the bid protest. The City Council may, in its sole discretion, reconsider the bid protest at the time the bid or proposal is scheduled for award by the City Council and amend, modify, or overrule a written decision.

SECTION 2. The Mayor shall sign and the City Clerk shall certify to the passage and adoption of this Ordinance and shall cause the same, or the summary thereof, to be published and posted pursuant to the provisions of law and this Ordinance shall take effect thirty (30) days after passage.

PASSED, APPROVED, AND ADOPTED BY THE PALM SPRINGS CITY COUNCIL THIS __ DAY OF _____, 2015.

STEPHEN P. POUCKET, MAYOR

ATTEST:

JAMES THOMPSON, CITY CLERK

CERTIFICATION

STATE OF CALIFORNIA)
COUNTY OF RIVERSIDE) ss.
CITY OF PALM SPRINGS)

I, JAMES THOMPSON, City Clerk of the City of Palm Springs, hereby certify that Ordinance No. ____ is a full, true and correct copy, and was introduced at a regular meeting of the Palm Springs City Council on the ____ day of ____, 2015, and adopted at a regular meeting of the City Council held on the ____ day of ____, 2015, by the following vote:

AYES:
NOES:
ABSENT:
ABSTAIN:

JAMES THOMPSON, CITY CLERK
City of Palm Springs, California