ORDINANCE G-6153

AN ORDINANCE AMENDING PHOENIX CITY CODE, CHAPTER 2, ARTICLE XII RELATING TO PUBLIC WORKS CONTRACTS TO PROVIDE PROTEST AND WITHDRAWAL PROCEDURES FOR PROCUREMENT OF PUBLIC WORKS CONTRACTS.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF PHOENIX as follows:

SECTION 1. Phoenix City Code, Chapter 2, Article XII, Section 2-187 is amended to read as follows:

Sec. 2-187. Computation of time under this article.

In computing any period of time prescribed or allowed by this Article XII (Public Works Contracts), the day of the act or event from which the designated period of time begins to run shall WILL not be included. Unless noted otherwise, intermediate Saturdays, Sundays and City of Phoenix holidays shall WILL not be included in the computation. The last day of the period so computed shall WILL be included unless it is a Saturday, Sunday or a City of Phoenix holiday, in which event, the period runs until 5:00 p.m. of the next day which is not a Saturday, Sunday or City of Phoenix holiday.

SECTION 2. Phoenix City Code, Chapter 2, Article XII is amended to add a new Section 2-187.1 as follows:

SEC. 2-187.01. DEFINITIONS.

A. "CITY ENGINEER" MEANS CITY ENGINEER OR AUTHORIZED DESIGNEE.
B. “CITY MANAGER” MEANS CITY MANAGER OR AUTHORIZED DESIGNEE.

C. “INTERESTED PARTY (PARTIES)” MEANS THOSE PERSONS SUBMITTING PROPOSALS TO THE CITY IN RESPONSE TO THE SOLICITATION; FOR A PROTEST, LIMITED TO THE PROTESTING OFFEROR AND RECOMMENDED OFFEROR.

A. D. “Proposer” means any person, party or firm who intends to submit or who submits a solicitation response to the City of Phoenix for a public works contract.

E. “PROTEST”

1. MEANS WITH REGARD TO A SOLICITATION PROTEST:
   A. A FORMAL COMPLAINT MADE BY A PARTY CONCERNING THE CONTENTS OF THE SOLICITATION.

2. MEANS WITH REGARDS TO AN AWARD RECOMMENDATION:
   A. A FORMAL COMPLAINT MADE BY AN INTERESTED PARTY WHO HAS A SUBSTANTIAL CHANCE OF BEING AWARDED THE CONTRACT AND WILL BE HARMED BY THE RECOMMENDED AWARD RECOMMENDATION;
   B. MAY ALSO MEAN A FORMAL COMPLAINT ABOUT THE SOLICITATION BY AN AGGRIEVED PARTY CONCERNING THE PROPOSED SOLICITATION AWARD;
   C. BUT DOES NOT MEAN FORMAL COMPLAINTS RELATED TO DETERMINATIONS OF NON-RESPONSIVENESS FOR SMALL BUSINESS OR DISADVANTAGED BUSINESS ENTERPRISES.

F. “Solicitation” means a request for qualifications, invitation to bidders, a request for proposals, a request for quotation or any other invitation or request issued by the City of Phoenix to invite a person, party or firm to submit an offer, statement, response, bid or other proposal for a public works contract.

G. “Solicitation response” means a bid, proposal, statement of qualifications or other offer to contract submitted to the City of Phoenix in response to a solicitation for a public works contract.

SECTION 3. Phoenix City Code, Chapter 2, Article XII, Section 2-188 is amended to read as follows:

Sec. 2-188. ProtestS GENERALLY of solicitation, determination and contract award and request to withdraw solicitation response—How made.
A. A proposer shall follow the procedures set forth in this article to protest a solicitation, the short list of qualified firms, the final list of qualified firms, a determination of non-responsiveness, or the award of a public works contract.

B. A. The protesting proposer shall file the protest in writing with the City Clerk and submit copies of the protest to the City Manager and City Engineer. The proposer shall include the following information in each protest: THE CITY CLERK WILL NOTIFY THE CITY ENGINEER, WHO WILL DETERMINE IF THE PROTEST IS TIMELY AND VALID.

1. THE NAME, ADDRESS, AND TELEPHONE NUMBER OF THE PROPOSER;

2. THE SIGNATURE OF THE PROPOSER OR THE PROPOSER’S REPRESENTATIVE;

3. IDENTIFICATION OF THE SPECIFIC SOLICITATION OR CONTRACT NUMBER;

4. A DETAILED STATEMENT OF ALL LEGAL AND FACTUAL GROUNDS OF THE PROTEST, INCLUDING COPIES OF RELEVANT DOCUMENTS; AND

5. THE FORM OF RELIEF REQUESTED.

B. A PROPOSER OR INTERESTED PARTY WILL FOLLOW THE PROCEDURES SET FORTH IN THIS ARTICLE TO PROTEST A SOLICITATION, THE SHORT LIST OF QUALIFIED FIRMS, THE FINAL LIST OF QUALIFIED FIRMS, A DETERMINATION OF NON-RESPONSIVENESS, OR THE PROPOSED AWARD OF A PUBLIC WORKS CONTRACT.

C. A PROPOSER OR INTERESTED PARTY WILL INCLUDE THE FOLLOWING INFORMATION IN EACH PROTEST:

1. THE NAME, ADDRESS, AND TELEPHONE NUMBER OF THE PROPOSER;

2. Within ten calendar days after the proposer knew or should have known of the alleged mistake, impropriety or defect; or

2. Ten calendar days prior to the deadline for submission of the solicitation response.

C. A PROPOSER OR INTERESTED PARTY WILL INCLUDE THE FOLLOWING INFORMATION IN EACH PROTEST:

1. THE NAME, ADDRESS, AND TELEPHONE NUMBER OF THE PROPOSER;
2. THE SIGNATURE OF THE PROPOSER OR THE PROPOSER’S REPRESENTATIVE;
3. IDENTIFICATION OF THE SPECIFIC SOLICITATION OR CONTRACT NUMBER;
4. A DETAILED STATEMENT OF ALL LEGAL AND FACTUAL GROUNDS OF THE PROTEST, INCLUDING COPIES OF RELEVANT DOCUMENTS; AND
5. THE FORM OF RELIEF REQUESTED.

D. If the protest is based on an alleged mistake, impropriety, or defect that is apparent after the deadline for the submission of the solicitation response, the proposer shall file the protest within three days:

1. The proposer knew of or should have known to the basis of the protest;
2. Notice of award of contract;
3. Notice of a short list determination;
4. Notice of a final list determination; or
5. Notice of determination of non-responsiveness.

D. THE CITY ENGINEER WILL REJECT ALL PROTESTS NOT FILED STRICTLY IN ACCORDANCE WITH THE LIMITS IN THIS ARTICLE.

E. The City shall reject all protests not filed strictly in accordance with these time limits.

E. THE CITY ENGINEER HAS THE DISCRETION TO APPOINT A HEARING OFFICER TO REVIEW THE PROTEST IN ACCORDANCE WITH THIS ARTICLE.

F. Any proposer a public works contract who claims a mathematical or clerical error in their solicitation response shall lodge that claim, in writing, with the City Clerk within three days of the solicitation response deadline. The written claim must describe in detail the mathematical or clerical error and be accompanied by a sworn affidavit stating the facts of the alleged error. In addition, the proposer must request, in writing, to be released from their solicitation response. The City shall reject all claims of errors in a solicitation response if such claims are not filed within this time limit.

SECTION 4. Phoenix City Code, Chapter 2, Article XII, Section 2-189 is amended to read as follows:
Sec. 2-189. Protest hearing; withdrawal hearing. PROTEST OF SOLICITATION.

A. If a protest is timely filed, the City Clerk shall notify the City Engineer and within ten days the City Engineer or a person designated by the City Engineer, as hearing officer, shall conduct a hearing in which the protesting proposer and other interested parties shall be allowed to appear, with or without counsel. A notice shall be given to all parties involved in the protest at least five days prior to the date set for the hearing. The notice shall include:

1. A statement of the time, place and nature of the hearing.

2. A statement of the legal authority and jurisdiction under which the hearing is to be held.

3. A reference to the particular section(s) of the City Code, City Charter, or State law involved.


A. WITH RESPECT TO A PROTEST OF A SOLICITATION, THE CITY ENGINEER IS AUTHORIZED TO DENY A PROTEST, OR TO AMEND OR WITHDRAW ANY SOLICITATION.

B. The hearing officer shall hear testimony and receive evidence as to whether or not the protest is valid. The burden of proof shall remain with the proposer lodging the protest.

B. IF THE PROTEST IS BASED ON AN ALLEGED MISTAKE, IMPROPRIETY, OR DEFECT THAT IS APPARENT BEFORE THE DEADLINE FOR SUBMISSION OF A SOLICITATION RESPONSE, THE PROPOSER WILL FILE THE PROTEST WITHIN SEVEN DAYS AFTER THE PROPOSER KNEW OR SHOULD HAVE KNOWN OF THE ALLEGED MISTAKE, IMPROPRIETY OR DEFECT; BUT IN NO CASE LATER THAN SEVEN DAYS PRIOR TO THE DEADLINE FOR SUBMISSION OF THE SOLICITATION RESPONSE.

C. If a request to withdraw a solicitation response because of an alleged mathematical or clerical error is timely filed, the City Clerk shall notify the City Engineer and within ten days the City Engineer or a person designated by the City Engineer, as hearing officer, shall conduct a hearing at which the party requesting to withdraw their solicitation response shall be allowed to appear, with or without counsel. The notice shall be given at least five days prior to the date set for the hearing. The notice shall include:

1. A statement of the time, place and nature of the hearing.

2. A short statement of the procedure to be utilized at the hearing.
C. ALL SOLICITATION PROTESTERS MUST SUBMIT A TIMELY OFFER REGARDLESS OF A SOLICITATION PROTEST BEING SUBMITTED. ONLY UPON OFFICIAL NOTICE FROM THE CITY ENGINEER IN THE FORM OF A SOLICITATION ADDENDUM WILL A SOLICITATION DEADLINE BE POSTPONED, AT THE CITY ENGINEER’S DISCRETION.

D. The hearing officer shall hear testimony and receive evidence as to whether or not the City should allow the request to withdraw the solicitation response. The review procedures on claims of an erroneous response shall not be available to a proposer who seeks to have their solicitation response modified and reconsidered due to an alleged error in submitting the response. The burden of proof that the error was a substantial mathematical or clerical error to justify the City’s release of the party’s solicitation response and bid bond, if applicable, shall remain with the proposer.

SECTION 5. Phoenix City Code, Chapter 2, Article XII, Section 2-190 is amended to read as follows:

Sec. 2-190. Hearing procedure. PROTEST OF DETERMINATION AND CONTRACT AWARD.

A. Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

B. Informal disposition may be made of any bid protest or request to withdraw by stipulation, agreed settlement, consent order or default.

B. IF THE PROTEST IS BASED ON AN ALLEGED MISTAKE, IMPROPRIETY, OR DEFECT THAT IS APPARENT AFTER THE DEADLINE FOR SUBMISSION OF THE SOLICITATION RESPONSE, THE PROPOSER WILL FILE THE PROTEST WITHIN THREE DAYS AFTER THE EARLIEST OF THE FOLLOWING EVENTS:

1. THE PROPOSER KNEW OF SHOULD HAVE KNOWN OF THE BASIS FOR THE PROTEST; OR
2. NOTICE OF INTENT TO AWARD A CONTRACT; OR
3. NOTICE OF A SHORT LIST DETERMINATION; OR
4. NOTICE OF A FINAL LIST DETERMINATION; OR
5. NOTICE OF DETERMINATION OF NON-RESPONSIVENESS.

C. The record in a protest or request to withdraw shall include:
1. All pleadings, motions, and interlocutory rulings.

2. Evidence received or considered.

3. A statement of matters judicially noticed.

4. Objections and offers of proof and rulings thereon.

5. Proposed findings of fact and conclusions of law.

6. Any decision, opinion or report by the officer presiding at the hearing.

C. THE CITY WILL NOTICE THE SOLICITATION DETERMINATIONS AND DECISION AS PROVIDED IN SECTION 2-190(A)(1-4) ON ITS PROCUREMENT WEBPAGE. NOTICE RELATED TO SECTION 2-190(A)(5) DETERMINATIONS WILL BE MADE DIRECTLY TO THE PROPOSER.

D. Oral proceedings or any part thereof may be recorded manually, by a recording device or taken before a court reporter, and shall be transcribed on request of any party. The cost of such transcript shall be paid by the party making the request unless otherwise provided by law or unless assessment of the cost is waived by the City.

D. ANY PROPOSER REQUESTING RELIEF IN THE FORM OF AN ADMINISTRATIVE RECONSIDERATION DUE TO A DETERMINATION OF NON-RESPONSIVENESS RELATED TO A SMALL BUSINESS OR DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENT (SBE OR DBE) MUST SUBMIT THAT REQUEST TO THE CITY CLERK’S OFFICE. THE CITY EQUAL OPPORTUNITY DIRECTOR HAS DISCRETION IN DETERMINING RESPONSIVENESS REGARDING SBE OR DBE REQUIREMENTS.

E. Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

F. A hearing may be conducted in an informal manner and without adherence to the rules of evidence required in judicial proceedings. Neither the manner of conducting the hearing nor the failure to adhere to the rules of evidence required in judicial proceedings shall be grounds for reversing any administrative decision or order providing the evidence supporting such decision or order is substantial, reliable, and probative. Irrelevant, immaterial or unduly repetitious evidence shall be excluded. Every proposer who is a party to such proceedings shall have the right to be represented by counsel, to submit evidence in open hearing and shall have the right of cross examination. Unless otherwise provided by law, hearings may be held at any place determined by the City.
G. Copies of documentary evidence may be received in the discretion of the hearing officer. Upon request, parties shall be given an opportunity to compare the offered copy with the original.

H. Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts or established customs and practices within that portion of the construction industry normally performing the type of public work forming the subject of the protest, to the extent that such facts, custom and practices are within the City’s specialized knowledge. To the extent reasonably feasible, parties shall be notified, either before or during the hearing, or by reference in reports or otherwise, of any material officially noticed by the hearing officer and the party affected thereby shall be afforded an opportunity to contest the material so noticed. The City’s experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence.

SECTION 6. Phoenix City Code, Chapter 2, Article XII, Section 2-190.1 is amended to read as follows:

Sec. 2-190.1. Protest or withdrawal recommendation. HEARING PROCEDURES

Within seven days of completion of the hearing, the hearing officer shall submit findings and recommendations to the City Manager. The City Manager shall forward those findings and recommendations, together with such other and further findings and recommendations as developed by the City Engineer and City staff bearing on any issue relating to the award of the contract. Such findings or recommendations presented to the City Council may be based on information obtained from any source whatsoever, including but not limited to, the protest or withdrawal hearing, for action by the City Council pursuant to the City Charter and under such other terms and conditions as the Council shall deem proper. No evidence, not previously offered to the hearing officer, shall be offered or presented by any proposer, to the Council. The foregoing shall not be construed to prevent the presentation of any matter bearing on the award to the City Council or any member thereof by the City Manager at any time prior to the execution of the public works contract.

A. IF A HEARING IS HELD, AN OPPORTUNITY WILL BE AFFORDED ALL INTERESTED PARTIES TO RESPOND AND PRESENT EVIDENCE AND ARGUMENT ON ALL ISSUES PRESENTED IN THE PROTEST.

B. THE BURDEN OF PROOF WILL REMAIN WITH THE PROPOSER LODGING THE PROTEST.
C. A HEARING MAY BE CONDUCTED IN AN INFORMAL MANNER AND WITHOUT ADHERENCE TO THE RULES OF EVIDENCE REQUIRED IN JUDICIAL PROCEEDINGS. NEITHER THE MANNER OF CONDUCTING THE HEARING NOR THE FAILURE TO ADHERE TO THE RULES OF EVIDENCE REQUIRED IN JUDICIAL PROCEEDINGS WILL BE GROUNDS FOR REVERSING ANY ADMINISTRATIVE DECISION OR ORDER PROVIDING THE EVIDENCE SUPPORTING SUCH DECISION OR ORDER IS SUBSTANTIAL, RELIABLE, AND PROBATIVE. IRRELEVANT, IMMATERIAL OR UNDULY REPETITIOUS EVIDENCE SHALL BE EXCLUDED. EVERY INTERESTED PARTY TO SUCH PROCEEDINGS WILL HAVE THE RIGHT TO BE REPRESENTED BY COUNCIL, TO SUBMIT EVIDENCE IN OPEN HEARING AND WILL HAVE THE RIGHT OF CROSS EXAMINATION. UNLESS OTHERWISE PROVIDED BY LAW, HEARINGS MAY BE HELD AT ANY PLACE DETERMINED BY THE CITY.

SECTION 7. Phoenix City Code, Chapter 2, Article XII, Section 2-190.2 is enacted as follows:

SEC. 2-190.2 WITHDRAWALS.

A. ANY PROPOSER WHO HAS SUBMITTED A RESPONSE ON A PUBLIC WORKS CONTRACT WHO CLAIMS A MATHEMATICAL OR CLERICAL ERROR IN THEIR SOLICITATION RESPONSE MUST LODGE THAT CLAIM, IN WRITING, WITH THE CITY CLERK WITHIN THREE DAYS OF THE SOLICITATION RESPONSE DEADLINE. THE WRITTEN CLAIM MUST DESCRIBE IN DETAIL THE MATHEMATICAL OR CLERICAL ERROR AND BE ACCOMPANIED BY A SWORN AFFIDAVIT STATING THE FACTS OF THE ALLEGED ERROR. IN ADDITION, THE PROPOSER MUST REQUEST, IN WRITING, TO BE RELEASED FROM ITS SOLICITATION RESPONSE. THE CITY WILL REJECT ALL CLAIMS OF ERROR NOT FILED IN ACCORDANCE WITH THESE TIME LIMITS.

B. IF A REQUEST TO WITHDRAW A SOLICITATION RESPONSE BECAUSE OF AN ALLEGED MATHEMATICAL OR CLERICAL ERROR IS TIMELY FILED, THE CITY ENGINEER WILL ISSUE A WRITTEN RESPONSE TO THE REQUEST.

C. THE CITY ENGINEER WILL DETERMINE WHETHER OR NOT THE CITY SHOULD ALLOW THE REQUEST TO WITHDRAW THE SOLICITATION RESPONSE. THE CITY ENGINEER MAY APPOINT A HEARING OFFICER IN ACCORDANCE WITH THIS ARTICLE.

D. THESE PROCEDURES DO NOT APPLY TO A PROPOSER WHO SEEKS TO HAVE ITS SOLICITATION RESPONSE MODIFIED AND RECONSIDERED DUE TO AN ALLEGED ERROR IN ITS SOLICITATION RESPONSE. THE
BURDEN OF PROOF THAT THE ERROR WAS A SUBSTANTIAL MATHEMATICAL OR CLERICAL ERROR TO JUSTIFY THE CITY’S RELEASE OF THE PARTY’S SOLICITATION RESPONSE AND ANY BID OR SUBMITTAL BOND, IF APPLICABLE, WILL REMAIN WITH THE PROPOSER.

SECTION 8. Phoenix City Code, Chapter 2, Article XII, Section 2-190.3 is enacted as follows:

SEC. 2-190.3 PROTEST OR WITHDRAWAL RECOMMENDATION.

A. WITHIN SEVEN DAYS, OR IF EXTENDED BY THE CITY MANAGER FOR GOOD CAUSE, WITHIN A REASONABLE TIME OF COMPLETION OF THE HEARING, IF A HEARING IS HELD, THE HEARING OFFICER WILL SUBMIT FINDINGS AND RECOMMENDATIONS TO THE CITY ENGINEER.

B. THE CITY ENGINEER WILL MAKE THE FINAL RECOMMENDATION REGARDING THE SOLICITATION DECISION TO THE CITY MANAGER IN A TIMELY MANNER.

C. THE AWARD OF A CONTRACT IS TO BE BROUGHT FORWARD BY THE CITY MANAGER, FOR ACTION BY THE CITY COUNCIL PURSUANT TO THE CITY CHARTER, AND UNDER SUCH OTHER TERMS AND CONDITIONS AS THE COUNCIL DEEMS PROPER.

D. NO EVIDENCE, NOT PREVIOUSLY OFFERED TO THE CITY ENGINEER OR HEARING OFFICER, WILL BE OFFERED OR PRESENTED BY ANY PROPOSER, TO THE CITY MANAGER OR COUNCIL.

SECTION 9. Phoenix City Code, Chapter 2, Article XII, Section 2-190.4 is enacted as follows:

SEC. 2-190.4 SOLICITATION TRANSPARENCY POLICY.

COMMENCING ON THE DATE AND TIME A SOLICITATION IS PUBLISHED, POTENTIAL OR ACTUAL PROPOSERS (INCLUDING THEIR REPRESENTATIVES) WILL ONLY DISCUSS MATTERS ASSOCIATED WITH THE SOLICITATION WITH THE MAYOR, ANY MEMBERS OF CITY COUNCIL, THE CITY MANAGER, ANY DEPUTY CITY MANAGER, OR ANY DEPARTMENT DIRECTOR DIRECTLY ASSOCIATED WITH THE SOLICITATION (INCLUDING IN EACH CASE THEIR ASSIGNED STAFF, EXCEPT FOR THE DESIGNATED PROCUREMENT OFFICER) AT A PUBLIC MEETING, POSTED UNDER THE ARIZONA REVISED STATUTES, UNTIL THE RESULTING CONTRACT(S) ARE AWARDED OR ALL OFFERS OR RESPONSES ARE REJECTED AND THE SOLICITATION IS CANCELLED WITHOUT
ANY ANNOUNCEMENT BY THE PROCUREMENT OFFICER OF THE CITY’S INTENT TO REISSUE THE SAME OR A SIMILAR SOLICITATION.

SECTION 10. All rights or remedies of the City of Phoenix in enforcing the provisions of the Phoenix City Code, Chapter 2, Article XII, prior to the amendments set forth in this ordinance, are expressly saved and, all duties, obligations and requirements thereby imposed are expressly saved as to all parties to whom they are applicable.

PASSED by the Council of the City of Phoenix this 4th day of May, 2016.

Greg Stanton
M A Y O R

ATTEST:

_____ Cris Meyer ________ City Clerk

APPROVED AS TO FORM:

_____ Daniel L. Brown ________ Acting City Attorney

REVIEWED BY:

_____ Ed Zuercher ________ City Manager

JMK:ab/1231694; CM34; Item 52; 5/4/16