MINUTES
of the
FIRST MEETING
of the
PUBLIC SCHOOL CAPITAL OUTLAY OVERSIGHT TASK FORCE
SUBCOMMITTEE ON REQUEST FOR PROPOSALS PROCUREMENT

October 17, 2011
Room 322, State Capitol

The first meeting of the Public School Capital Outlay Oversight Task Force (PSCOOTF) Subcommittee on Request for Proposals Procurement was called to order by Representative Rick Miera, chair, on October 17 at 9:15 a.m. in Room 322, State Capitol.

Present
Rep. Rick Miera, Co-Chair, PSCOOTF
Andy Benson, Director of Business Development, Van H. Gilbert Architect, PC
Lemoyne F. Blackshear, Staff Architect, Property Control Division, General Services Department (GSD)
Rep. Donald E. Bratton, PSCOOTF Member
Sean Calvert, Esq., Calvert Menicucci, PC
Steve Crespin
Dr. Carl Foster, PSCOOTF Public Member
Jeep Gilliland, Registered Lobbyist, KL House
Jason Harrington, President and CEO, HB Construction
Shad S. James, Executive Vice President, Jaynes Corporation Albuquerque Operations
Rep. Larry A. Larrañaga, PSCOOTF Member
Dave McCoy, Executive Director, Sheet Metal and Air Conditioning Contractors' National Association
Aaron McKinney, Superintendent, Tucumcari Public School District
Patricia Miller, Superintendent, Fort Sumner Municipal School District
Joel Shirley, Superintendent, Clovis Municipal School District
Mark Shumate, President, Shumate Constructors

Staff
Sharon Ball, Senior Researcher, Legislative Council Service (LCS)
Leslie Porter, Research Assistant, LCS
Robert Gorrell, Director, Public School Facilities Authority (PSFA)
Tim Berry, Deputy Director, PSFA
Dotty McKinney, Contracts Administrator, PSFA
Martica Casias, Planning and Design Manager, PSFA
Ovidiu Viorica, Construction Manager, PSFA

Guests
The guest list is in the meeting file.

Handouts
Handouts and other written testimony are in the meeting file.

<u>Monday, October 17</u>

Welcome and Introductions

Representative Miera welcomed the subcommittee members and invited LCS staff members, PSFA staff members and subcommittee members to introduce themselves.

Background and Goals of Subcommittee

Ms. Ball provided background information on the establishment of the subcommittee. She said members of the subcommittee were appointed by the PSCOOTF to examine the specific issue of requests for proposals (RFP) procurement. She clarified that the law applies only to public education buildings and briefly discussed other pieces of legislation in effect, including RFP qualifications-based contractors. Before enactment of the RFP for construction statutes, contractors were awarded projects based strictly on the lowest bid, a practice that did not always provide the most cost-effective method of completing projects, Ms. Ball explained. She said the RFP has been in effect for a number of years, and concerns have been brought forth by both legislators and people involved in the construction industries. She explained that the subcommittee's task is to analyze the process and determine its effectiveness and develop solutions to the process if the subcommittee decides the process is faulty. She explained that the PSCOOTF endorsed legislation and can do so for this situation, but rule changes and establishment of guidelines are also an option.

Issues and Concerns

Mr. Gorrell explained that, prior to today's meeting, the PSFA met with general contractors to identify several areas of concern with the current value-based procurement. Mr. Gorrell emphasized the fact that the PSFA is not asserting that the GSD rules surrounding value-based procurement are flawed, but consideration of their application would be helpful. The concerns regarding the value-based procurement, as identified by general contractors, include the following: the weighting of price in the formula; the inconsistent methods used in the scoring formula; the qualification of selection committee members; the access that one has to the entire process; subcontractor qualification and local preference logistics; the lack of consistency in requiring interviews; and "best and final offer" procedures.

PSFA staff and the subcommittee discussed the weighting of price points. Mr. Gorrell explained that the price component of the formula is held aside until the technical score is completed. He said the price points can range from zero to 70 percent of the total points allocated for evaluation of the solicitation. He offered comparisons of the ways in which various ranges for technical, price and interview points affect the ranking of the contractors, and subcommittee members discussed various price weights. The subcommittee members who are owners of a project discussed whether or not they conduct interviews. Contractor members of the subcommittee discussed the interview process from their perspective and the desire to understand the consistency of the way in which price points are awarded.

Within the scope of weighting price points, Mr. Gorrell led the discussion regarding the concept of "local preference" points. Mr. Gorrell stated that local jurisdictions within the state prefer to see local craft labor and subcontractors on their projects. He said that current law requires that five percent of the available points be applied to an in-state offeror when competing with an out-of-state offeror. He explained that the intent of the statute is to provide opportunities for all New Mexico businesses, not simply those within a local jurisdiction within the state. He said that the PSFA recommends that if a preference for local jurisdiction subcontractors is

included, the points in the technical component should be at least five percent of the total points available. Members of the subcommittee discussed this issue and the definition of a "local-local" subcontractor as one that is within a to-be-determined area surrounding a given project.

The scoring and the formula were the next topics of discussion. Mr. Gorrell stated that a perception exists that the evaluation tools — the technical proposal, the price proposal or the interview — can be overemphasized, resulting in too few points allocated to price that, in turn, may dramatically affect the outcome of the procurement. He said the methodology for scoring evaluation criteria and price is set in rule and allows the owner to determine the importance of the weights assigned to the evaluation criteria. He stated that if a project is extremely complicated, the technical proposal may carry more weight than the price proposal.

Mr. Gorrell added that the concern of member scoring bias has been brought to his attention, and he offered potential solutions. First, he suggested easy, online training for selection committee members. The training would review the ethics and government conduct codes, the RFP document, the terms and conditions, the scope of the project, etc., with a test conducted at the end of the training to determine whether or not a person has gained the appropriate knowledge. He also suggested developing a pool of qualified evaluators in the local community or region. Mr. Gorrell added that if a statewide electronic RFP system were put into place, a selection committee member could be drawn from anywhere in the state, a practice that could broaden the pool of qualified evaluators. In response to subcommittee members' discussion and comments, Mr. Gorrell stated that the PSFA's preference is that a member of the design team should always be an advisory member on the selection committee, rather than a voting member, due to a conflict of interest.

The qualifications of selection committee members was discussed. Mr. Berry offered a brief background stating that with the inclusion of potential members such as a teacher, a parent or a school board member, a school district may assign people to the selection committee who lack sound knowledge of the construction industry with the intent to be inclusive of key people involved in the project. He said the well-intentioned inclusion of unqualified selection committee members can sometimes inadvertently affect the fairness of the evaluation, and the best value offeror may not be selected. Mr. Berry expanded on the issue, stating that state rules require a minimum of three members to be on the selection committee who are appointed by the procuring agency's management. Offering solutions to this dilemma, he said that the teacher or parent could be assigned as a nonvoting member to observe the process, and a school board member should be recused from discussions with fellow board members regarding the selection committee's recommendation for award. The second solution offered is that a team of experienced evaluators with a construction background could be tapped to advise or sit on a committee similar to the professional technical advisory board for the selection of engineers, architects, landscape architects and surveyors. The third solution offered is that a knowledgeable person from the local community who is not submitting a proposal could be invited to advise the selection committee.

Subcommittee members inquired about selection committee member orientation on a specific project. The resistance of including the design manager as a voting member on the selection committee to provide the needed technical knowledge was also discussed. Mr. Gorrell responded that school districts are their own governments and they are free to make these decisions as they see fit. Ms. Blackshear informed the subcommittee that the GSD typically has

the architect serve as an advisory member to the selection committee and said the architects do a very good job in reviewing some of the technical proposals and bringing knowledge to the selection committee. She emphasized that this is not in rule, but a best practice. Subcommittee members discussed the possibility of including this idea about putting this concept into rule.

The topic of training selection committee members arose. Mr. Gorrell stated that the PSFA policy supports continuing to require the sound training that the state is required to provide. Ms. McKinney noted that she is currently teaching the basics of the RFP process and added that it requires constant travel. She said that the e-learning training system the PSFA is developing will be significantly helpful in delivering this service.

Mr. Gorrell expanded on the technical point scoring as related to the qualification of the selection committee members. He said there is a concern that the selection committee may overgeneralize the detailed information provided in a proposal, and he explained that best practices require the four basic criteria for evaluation to be broken down into subfactors and have points assigned to those categories so the selection committee has a means to score the individual parts of the proposal. He said the subfactor points would be added together to determine a score for a core criterion. Subcommittee discussion continued about the issue of the training of selection committee members.

The access one has to the entire RFP process was brought forth. Mr. Gorrell discussed form versus content, stating that although proposals have a set number of tabs and pages published in the solicitation, they are submitted in a wide variety of packages. He said the selection committee might be impressed by the outward appearance of a proposal and not weigh the content of it. To remedy this, Mr. Gorrell explained that the PSFA has researched web-based invitation for bid and RFP procurement software, developed by BidSync, that would allay this concern. He said each offeror's proposal would be evaluated based on the content, not the presentation. The selection committee would score the proposals online, and, once the evaluations are complete, the committee would convene to review the scores, rank the offers, determine if interviews will be held and then award the contract.

Elaborating on the system, Mr. Gorrell said the system allows contractors to submit their information, which will be date-stamped upon receipt, but the marketing package would be submitted electronically at a later date. He informed the subcommittee that the idea to utilize this system arose from complaints that members of selection committees are unqualified. He said this practice allows for a more diverse selection committee because the members would not be required to be in the same physical location while reviewing the materials. In addition, he presented the challenge of who qualifies the selection committee members. He added that the use of this system will ensure transparency throughout the entire RFP process.

In response to several questions posed by subcommittee members, Ms. McKinney discussed the security of the web-based system. She said that BidSync has 3,000 customers using this methodology, and it is as secure as any bank account. She said the procurement manager controls the input and the output of the information within the system. She said that the contractor, the subcontractors and each member of the selection committee would receive a personal login. The documents uploaded by the subcontractors are date-stamped upon receipt and put onto a CD that can be sent every month to the party who uploaded the data, she explained. She said the files are also stored electronically for seven years. Once the deadline

has been reached, Ms. McKinney explained, the general contractor has the ability make the final decisions on subcontractors within minutes and then send the decisions to the procurement manager. Also upon the deadline, the procurement officer can access the RFPs to check for mandatory requirements, she said. Upon the contractor's decision and upon the procurement officer's audit, she stated, the selection committee views the data and the files are then closed.

Mr. Berry stated that all of the scores would be published; however, all of the proposals would not be. Ms. McKinney clarified this, stating that the PSFA recommends that the selection committee members be assigned a number, as opposed to the given score being published with their names. She said there will be a list of the selection committee names, but one would not be able to discern which evaluator gave which score. A few subcommittee members requested access to the proposals.

Discussion arose referring to the selection committee members' notes. The subcommittee suggested that if the members of the selection committee are volunteers, the documents are not public whereas if they are paid, then the documents are public documents.

In response to inquiries regarding the cost of the program, Ms. McKinney responded with $54,000, which she noted is inexpensive, and she said the program will not require an additional employee. In the event that the system should fail, the receipt date of the RFPs would be pushed back by 24 hours, Ms. McKinney stated. She assured the subcommittee that BidSync has stated that this occurrence has happened only twice in the past five years.

Members of the subcommittee requested information regarding the use of the system in other states. Mr. Gorrell agreed to provide this information to the subcommittee.

Mr. Gorrell mentioned that some offerors may purchase gifts and meals for the PSFA or to RFP requesters to gain a potential advantage over other competitors. He said that PSFA staff members do not accept gifts or meals in any form, and he opined that since the selection of a contractor is a determination based upon material, the PSFA encourages that this standard be applied to all parties involved in the process.

Concerning transparency in the RFP process, Mr. Gorrell emphasized that the PSFA suggests the development of a clear and concise set of guidelines of expectation for owners to follow and said the web-based system would aid this.

Ms. McKinney talked about subcontractor qualifications and local preference logistics. She said local jurisdictions often see the local subcontractors excluded from a project. Local jurisdictions could be encouraged through the award of points or a percent of the overall points awarded when the subcontractor listing form includes local companies. She pointed out a section of the scoring criteria termed "value add", used to add points for the contractors who are using local subcontractors. She explained that a value could be added to each local subcontractor craft labor used. In response to comments from subcommittee members, Mr. Gorrell stated that the PSFA believes that this "value add" should not be more than five percent of the total points and that the terms "local" and "local-local preference" would need to be defined.

PSFA staff and subcommittee members discussed the possibilities and concerns related to requiring interviews. Subcommittee members discussed the following concerns: the technical proposal scores being fixed prior to or adjusted after the price scoring; the publication of standardized interview questions; the need for flexibility in the questions; and a rule change to consider the interview points as a fixed aspect versus extra, optional points as they are now. Mr. Gorrell said that all contractors would like the opportunity to be interviewed, but if there is a large gap between the first-rated offer and the lowest offer, why drag the contractors into an interview when there is not a chance of them receiving the contract? PSFA staff and subcommittee members continued with a thorough discussion about these issues. Contractors and subcontractors sitting on the subcommittee said that if they were allowed to view their score up to the point of a potential interview, they would be able to make the decision whether or not they should accept an offered interview, meaning that they would not waste their time if they knew the interview points allocated would not affect the outcome.

Mr. Gorrell talked about the "best and final offer", explaining that the appropriate use of this term is often misunderstood in the RFP for construction process. He explained that the short-list offerors may be asked to better their price without a reason to do so, creating a perception that the owner is bid shopping. He said asking for a best and final offer is allowed, but it is not intended to put short-listed offerors in a bidding war for the contract. He explained that the process is designed to allow the owner to ask potential winners to clarify their proposals if needed, and changes in the proposed price can be negotiated prior to the award. He noted that this is typically used when a significant difference is present between the first and second bids, and while it is allowed by the Procurement Code, he is not sure this process works very well for construction.

Ms. McKinney explained that administrative rule allows for discussions with responsive, responsible offerors if clarifications are needed, but the discussions are not required. She added that negotiations may be held among short-listed offerors to promote understanding of proposals; to facilitate arriving at a contract that will be most advantageous to the owner; and in negotiations of the relevant terms and conditions as well as any other important factors in an RFP prior to award of a contract. She asked the subcommittee to think about what the best and final offer is in relation to an RFP for construction and when it should be used. Ms. McKinney pointed out in statute (Section 13-1-105 NMSA 1978) the section that discusses a ceiling and states that if a bid comes in within 10 percent of the budget, it may be negotiated without the scope of the work being altered. She opined that if a conflict is present, there is no clear direction that answers those questions. Subcommittee members discussed concerns about the sensitivity of this issue, for often owners place contractors in a compromised position of being told to lower the price without modifying anything in the plan. Other members stated that the only way contractors can lower the bid by five to 10 percent is by affecting the subcontractors, which is not fair.

Ms. McKinney drew the subcommittee's attention to examples of how to score RFPs. Detailed discussion ensued among subcommittee members and PSFA staff regarding the weight of the point categories. Mr. Gorrell explained that in order to alter the point requirements or allocation, a rule change is needed.

Consideration of Possible Recommendations and Further Work

A suggestion was made by a subcommittee member to change the process of point allocation to technical proposal, price proposal, then the interview instead of technical proposal, interview, then price proposal. Mr. Gorrell responded that this change may create a bias based on the lowest bid, which is what is trying to be avoided. It was mentioned that some owners prefer to go into the interview without knowledge of an offered price. Discussion took place about the impact of the interview on the overall point system as well as what is allowed in certain interviews, such as elaborate presentations, which may confuse the selection committee, as previously discussed. A suggestion was made to hide the price offer until the interview has been conducted. Consensus was not reached on the matter. Ms. Blackshear stated that the GSD will continue to work with the PSCOOTF on a potential rule change, and she asked the subcommittee to please not tie the hands of agencies that have the expertise and the experience in this arena.

Other Business — Next Meeting to Make Recommendations: November 10, 2011

Representative Miera encouraged subcommittee members to contact Ms. Ball regarding the issues discussed throughout the meeting and consider any procedural, rule or statute changes.

Adjournment

There being no further business before the subcommittee, the meeting was adjourned at 3:20 p.m.