

Responsible Construction Contracting

for

Local Governments in Michigan

The purpose of this paper is to provide information about a qualifications-based approach to construction contracting for public entities. This concept is known as *responsible contracting*. In some states the concept is known as best value contracting. Definitions, principles, rationale and issues of quality are detailed. Sample criteria, rating sheets and charts are included to illustrate the need for responsible contracting for Local Governments in Michigan.

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Constructing a **BETTER** Tomorrow

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What Is a Responsible Contractor Policy?

A Responsible Contractor Policy is a set of enforceable qualifications adopted by a formal meeting of the local government's governing board and incorporated into the municipality's construction bid specifications by the municipality's construction manager and design professionals. Once adopted and generated into the bid documents, these important qualifications let the entire community know that your governing board wants competent and qualified construction firms and personnel to build and renovate public buildings and other construction projects.

- Having a Responsible Contractor Policy in place and included in the bid specifications enables local government to put all bidders on notice that quality criteria in addition to the lowest price will be considered when bids are reviewed to ensure the selection of qualified construction professionals in the building and renovating of your public construction projects.
- Governing boards that adopt a Responsible Contractor Policy are protecting the interests of the citizens who are depending on the municipality to assure quality construction at the lowest possible cost.
- Responsible contracting assures the safety of staff and community in regards to their security and well-being.

Why Should Local Government Enact a Responsible Contractor Policy?

- Contracting out for construction has potential risks for local government.
- Excessive change orders, back-charges, delays, inefficiencies, unfinished work and embarrassment are just some of the problems that plague public sector construction projects when a construction bid is awarded to an unqualified bidder.
- Public sector construction projects are measured on quality for the cost and not vice versa.

Some Taxpayer Assurance Issues to Consider

How does the municipality assure taxpayers that:

- A qualifications-based process will be used in selecting construction contractors?
- Prevailing wage laws or other wage standards or rates will be used by contractors and enforced by local government?
- Contractors will comply with social security, unemployment compensation and workers compensation laws?
- Unqualified persons will not be working on the job site?

The Foundation of Safe Public Buildings Begins with a Responsible Contractor Policy

- A Responsible Contractor Policy is founded on generating enforceable qualitative criteria that is rationally related directly to a quality built construction project.
- Michigan law mandates quality in bids, not just consideration of price.
- Contractors and their employees that do not meet the governing board's definition of quality should not be awarded a construction project just because they submit the lowest bid.
- A Responsible Contractor Policy will actually promote greater competition among quality bidders enabling the municipality to award construction contracts to bidders who are both the lowest and responsible.

The Community Can Accept Nothing Less

A Responsible Contractor Policy promotes the essential qualifications contractors and their employees must have before they are awarded a contract to build public buildings and facilities. If they don't have the qualifications, they simply should not be hired.

High standards for public sector construction should not be an option! We must have stringent construction policies in place before we build public structures, to ensure each building is a sanctuary of safety for everyone who walks through the door. There is nothing more important than being absolutely positive that there is a Responsible Contractor Policy in place when your public buildings are renovated or built. In fact, nearly 50 years ago Michigan's Attorney General observed, " . . . **it is incumbent upon the Board to determine the abilities of any prospective contractor and make the award, if it makes any at all, to the lowest responsible bidder.**" (O.A.G. 1959-1960, Vol. 1, No. 3303, p.169, 171.)

Responsible Contractor Policy is Good Public Policy!

Local Government's Sample Checklist of Critical Factors to Consider in the Development of a Responsible Contractor Policy

The following factors are typical of the kinds of criteria that are contained in a Responsible Contractor Policy. These factors should be considered discussion points as each public entity determines what factors are in the best interest of their community to be contained in their own policy. This list is not intended to be all inclusive or exhaustive. A Rating System is shown on page 7 and an Evaluation Chart is shown on page 10 on how the criteria could be used.

- √ General information about the contractor's company, its principals, and its history, including state and date of incorporation.
- √ Trade categories and information regarding the state and local licenses and license numbers held by the applicant.
- √ A confirmation that all sub-contractors, employees and other individuals working on the construction project will maintain current applicable licenses with the Michigan Bureau of Construction Codes and Fire Safety and as may otherwise be required by law for all licensed occupations and professions.
- √ The ratio of masters or journeypersons to apprentices proposed to be used on the construction project job site.
- √ Documentation that the contractor maintains, participates in, and contributes to a bona fide apprenticeship-training program.
- √ Verification that unqualified persons will not be used on the job site.
- √ Documentation of a completed MIOSHA-approved safety-training program for employees used on the proposed job site.
- √ Evidence of a worker's compensation Experience Modification Rating ("EMR"). Preference will be given to contractors and subcontractors who exhibit an EMR of 1.1 or less.
- √ A list of similar projects completed within the past five (5) years, including dates, clients, approximate dollar value, and size. Documentation from these previous projects of comparable size/complexity, including but not limited to all costs relating to the bidder's timeliness, performance, quality of work, extension requests, contractual fines and penalties imposed (including proof of such fines and penalties), liens filed, history of claims for extra work and any contract defaults with an explanation of the reason for the default and how the default was resolved.

- √ Evidence of experience with construction techniques, trade standards, quality workmanship, project scheduling, cost control, management of projects of comparable size/complexity, and building codes by documenting the bidder's ability and capacity to perform the project. The bidder must identify those portions of the project it reasonably believes will be sub-contracted in the names of the sub-contractors.
- √ Audited financial information current within the past twelve months, such as a balance sheet, statement of operations, and bonding capacity. Evidence that the applicant has financial resources to start up and follow through on the project(s) and to respond to damages in case of default as shown by written verification of bonding capacity equal to or exceeding the amount of the project. The written verification must be submitted by a licensed surety company rated ("B+" or better) in the current A.M. Best Guide and qualified to do business within the State of Michigan.
- √ A warranty statement regarding labor and materials.
- √ A list of all litigation and arbitrations currently, pending and within the past five (5) years, including an explanation of each. Evidence of satisfactory resolution of claims filed by or against the contractor asserted on projects of the same or similar size within the last five (5) years. Any claim against the contractor shall be deemed to have been satisfactorily resolved if final judgment is rendered in favor of the contractor or any final judgment rendered against the contractor is satisfied within ninety (90) days of the date the judgment became final.
- √ Proof of insurance, including certificates of insurance, confirming existence and amount of coverage for liability, property damage, workers compensation, and any other insurances required by the proposed contract documents.
- √ Provide references from individuals or entities the contractor has worked for within the last five (5) years including information regarding the records of performance and job site cooperation.
- √ Evidence of compliance with the federal Fair Labor Standards Act; Social Security Administration, with regulatory agencies such as EPA and OSHA; Michigan Department of Labor and Economic Development including Worker's Compensation and Unemployment Compensation laws; and other applicable State and Federal laws.
- √ Evidence of any quality assurance program used by the contractor and the results of any such program on the contractor's previous projects.
- √ Identification of whether the contractor's work force is drawn significantly from area residents.

- √ Documentation that the contractor provides health insurance and pension benefits to its employees.
- √ Verification of an existing Fitness for Duty Program (drugs and alcohol) of each employee working on the proposed jobsite.
- √ Evidence of Equal Employment Opportunity Programs for minorities, women and small businesses.
- √ Have an existing Michigan School-to-Registered Apprenticeship Program partnership with a school district or intermediate school district/secondary career technical center within the boundaries of the school district.
- √ Assurance that all construction work for this project shall proceed economically, efficiently, continuously and without interruption.

Local Municipality Sample Responsible Contractor Evaluation Rating System

This sample Responsible Contracting Policy Rating System is provided for illustrative purposes only and is designed to show how a Responsible Contracting evaluation process might be implemented. The example does not represent an actual project or case study by the West Michigan Construction Alliance. The factors and ratings are only offered for the purposes of illustrating one possible framework for an evaluation of bidders where quality factors in addition to price are considered in the awarding of public sector construction projects. The municipality should seek assistance from their construction professionals in compiling evaluation data from bidders. It's the bidder's responsibility to attach documentation in support of each criterion.

This rating system would only apply to the low bidder and any other bidder on the project who was within 5% of the low bid. The low bidder would receive 25 points. Other bidders who are within 5% of the low bid would receive 10 points. Any one of the bidders who is being rated by this process who receives a "fail" in Table 1 or fails to submit any required forms, documents, or permits, in regards to the municipality's Responsible Contractor Policy and Rating System, the contractor's bid will no longer be considered. The bidder who receives the most points in this rating process will be recommended to the municipality's governing board for the bid award. A Rating Chart on page 10 would be used in conjunction with this rating system.

Table 1

| Criteria | Description | Rating |
|-----------|--|-----------|
| Legal | A list of all pending litigation and all litigation within the past five (5) years, including an explanation of each. Evidence of satisfactory resolution of claims filed by or against the contractor asserted on projects of the same or similar size within the last five (5) years. Any claim against the contractor shall be deemed to have been satisfactorily resolved if final judgment is rendered in favor of the contractor or any final judgment rendered against the contractor is satisfied within ninety (90) days of the date the judgment became final. | Pass/Fail |
| | Evidence of experience with construction techniques, trade standards, quality workmanship, project scheduling, cost control, management of projects of comparable size/complexity, and building codes by documenting the bidder's ability and capacity to perform the project. The bidder must identify those portions of the project it reasonably believes will be subcontracted in the names of the subcontractors. | Pass/Fail |
| | Documentation from all previous projects of comparable size/complexity within the past five years, including but not limited to all costs relating to the bidder's timeliness, performance, quality of work, extension requests, contractual fines and penalties imposed (including proof of such fines and penalties), liens filed, history of claims for extra work and any contract defaults with an explanation of the reason for the default and how the default was resolved. | Pass/Fail |
| | Evidence of compliance with the federal Fair Labor Standards Act; Social Security Administration, with regulatory agencies such as EPA and OSHA; Michigan Department of Labor and Economic Development including Worker's Compensation and Unemployment Compensation laws; and other applicable State and Federal laws. Verification that unqualified persons will not be used on the job site. | Pass/Fail |
| Financial | Audited financial information current within the past twelve months, such as a balance sheet or statement of operations. | Pass/Fail |
| | Evidence that the applicant has financial resources to start up and follow through on the project(s) and to respond to damages in case of default as shown by written verification of bonding capacity equal to or exceeding the amount of the project. The written verification must be submitted by a licensed surety company rated ("B+" or better) in the current A.M. Best Guide and qualified to do business within the State of Michigan. | Pass/Fail |
| Safety | Contractor's current Experience Modification Rate (EMR) is less than or equal to 1.1 | Pass/Fail |

Table 2 represents points awarded for being the low bidder as well as other bidders who are within 5% of the low bid.

Table 2 Bid Rating Scale: 25= Low Bid, 10=Bid Within 5% of Low Bid

| Criteria | Description | Rating |
|----------|---|--------|
| Bid | 1 st Low Bid Construction Company (25 points) | |
| | 2 nd Low Bid Construction Company (10 points) | |
| | 3 rd Low Bid Construction Company (10 points) | |
| | 4 th Low Bid Blue Construction Company (10 points) | |

Table 3 represents factors considering the management qualities of the contractor.

Table 3 Quality Rating Scale: 5= Exceptional, 3=Acceptable, 1=Marginal, 0=Unacceptable

| Criteria | Description | Rating |
|------------|---|--------|
| Management | General information about the contractor's company, its principals, and its history, including state and date of incorporation. | |
| | Trade categories and information regarding the state and local licenses and license numbers held by the applicant. | |
| | A list of projects completed within the past five (5) years, including dates, clients, approximate dollar value, and size. | |
| | Proof of certificates of insurance, confirming current worker's compensation coverage, public liability and property damage insurance according to the scope of the construction project and/or as required by law. | |
| | Provide references from individuals or entities the contractor has worked for including information regarding the records of performance and job site cooperation. | |
| | A warranty statement regarding labor, equipment, and materials. | |
| | Successful implementation of a quality assurance program such as ISO 9000. | |

Table 4 represents technical factors such as education, training and qualifications of the contractor's workforce.

Table 4 Quality Rating Scale: 5= Exceptional, 3=Acceptable, 1=Marginal, 0=Unacceptable

| Criteria | Description | Rating |
|-----------|---|--------|
| Technical | Evidence of certification or other qualifications, which shows contractor and/or employee(s) are certified/qualified and competent in performing the work for which they have bid. | |
| | The proportion of journeypersons to apprentices used on the proposed job site for each trade area if the contractor is using less-than-qualified journeypersons on the proposed job site. | |
| | Documentation in an apprenticeship-training program such as the U.S. Department of Labor's Bureau of Apprenticeship Training Program. | |

Table 5 represents safety factors in consideration of the contractor’s workforce.

Table 5 Quality Rating Scale: 5= Exceptional, 3=Acceptable, 1=Marginal, 0=Unacceptable

| Criteria | Description | Rating |
|----------|--|--------|
| Safety | Documentation of a completed safety-training program for employees used on the proposed job site. | |
| | Verification of an existing Fitness for Duty Program (drugs and alcohol) of each employee working on the proposed jobsite. | |

Table 6 represents community factors in consideration of the contractor’s workforce.

Table 6 Quality Rating Scale: 5= Exceptional, 3=Acceptable, 1=Marginal, 0=Unacceptable

| Criteria | Description | Rating |
|-----------|---|--------|
| Community | Evidence of Equal Employment Opportunity Programs for minorities, women and small businesses. | |
| | Have or will hire a significant percentage of qualified workers who reside in the general area. | |
| | Evidence that the contractor provides health insurance and pension benefits to its employees. | |
| | Have an existing Michigan School-to-Registered Apprenticeship Program partnership with the school district or intermediate school district/secondary career technical center. | |
| | Evaluation Point Total | |

Local Municipality Responsible Contractor Policy Rating Chart

| Examples of Bid Categories | Contractor | Company History | Litigation History | Citation History | Licenses | Experience/Past Jobs | Building Code Violation History | Audited Financial Information | Bonding Ability | Liability Insurance/Workers Comp. | Warranty Statement | Ratio of Apprentices to Journeypersons | Prevailing Wage, Health Insurance & Pension Benefits | Apprenticeship Training Program | Verification of Worker Qualifications | MIOSHA Approved Safety Program | Experience Modification Rate (EMR) | Fitness for Duty Program (Drugs/Alcohol Testing) | Equal Employment Programs for Minorities, Women & Small Businesses | Criminal History Check | Quality Assurance Program | References | School-to-Registered Apprenticeship |
|-------------------------------------|------------|-----------------|--------------------|------------------|----------|----------------------|---------------------------------|-------------------------------|-----------------|-----------------------------------|--------------------|--|--|---------------------------------|---------------------------------------|--------------------------------|------------------------------------|--|--|------------------------|---------------------------|------------|-------------------------------------|
| Sitework/Earthwork | | | | | | | | | | | | | | | | | | | | | | | |
| Site Concrete | | | | | | | | | | | | | | | | | | | | | | | |
| Building Concrete (Flatwork) | | | | | | | | | | | | | | | | | | | | | | | |
| Building Concrete (Foundations) | | | | | | | | | | | | | | | | | | | | | | | |
| Precast Concrete | | | | | | | | | | | | | | | | | | | | | | | |
| Masonry | | | | | | | | | | | | | | | | | | | | | | | |
| Structural Steel | | | | | | | | | | | | | | | | | | | | | | | |
| Misc. Metals | | | | | | | | | | | | | | | | | | | | | | | |
| Mechanical | | | | | | | | | | | | | | | | | | | | | | | |
| Electrical | | | | | | | | | | | | | | | | | | | | | | | |
| Fire Protection | | | | | | | | | | | | | | | | | | | | | | | |
| Asphalt Paving | | | | | | | | | | | | | | | | | | | | | | | |
| Landscaping | | | | | | | | | | | | | | | | | | | | | | | |
| Irrigation | | | | | | | | | | | | | | | | | | | | | | | |
| General Trades | | | | | | | | | | | | | | | | | | | | | | | |
| Membrane Roofing | | | | | | | | | | | | | | | | | | | | | | | |
| Shingle Roofing | | | | | | | | | | | | | | | | | | | | | | | |
| Calking, Sealants & Waterproofing | | | | | | | | | | | | | | | | | | | | | | | |
| Doors, Frames & Hardware (Furnish) | | | | | | | | | | | | | | | | | | | | | | | |
| Aluminum, Glass & Glazing | | | | | | | | | | | | | | | | | | | | | | | |
| Translucent, Wall & Roof Assemblies | | | | | | | | | | | | | | | | | | | | | | | |
| Drywall | | | | | | | | | | | | | | | | | | | | | | | |
| Light Gauge Metal Trusses | | | | | | | | | | | | | | | | | | | | | | | |
| Acoustical Ceilings | | | | | | | | | | | | | | | | | | | | | | | |
| Wall Panels | | | | | | | | | | | | | | | | | | | | | | | |
| Flooring | | | | | | | | | | | | | | | | | | | | | | | |
| Wood Flooring | | | | | | | | | | | | | | | | | | | | | | | |
| Painting | | | | | | | | | | | | | | | | | | | | | | | |
| Casework | | | | | | | | | | | | | | | | | | | | | | | |
| Hydraulic Elevator | | | | | | | | | | | | | | | | | | | | | | | |
| Miscellaneous Equipment | | | | | | | | | | | | | | | | | | | | | | | |
| Other | | | | | | | | | | | | | | | | | | | | | | | |

Special Note: During the rating process, each Bid Category would have its own page of Contractors. Rating criteria could include a point system, pass/fail rating or combination of ratings where both a point system and pass/fail criteria could be considered.

In Consideration of Total Costs **COMPARISON OF LOW BID & RESPONSIBLE CONTRACTING FEATURES**

| LOW BID FEATURES | RESPONSIBLE CONTRACTING FEATURES |
|---|---|
| <ul style="list-style-type: none"> • Minimum qualifications and screening • Project awarded solely on basis of low bid | <ul style="list-style-type: none"> • Extensive qualifications and screening • Projects awarded on the basis of price, past performance and the firms resources and qualifications |
| Results | Results |
| <ul style="list-style-type: none"> • Poor quality • Delayed schedules, claims, disputes & litigation | <ul style="list-style-type: none"> • Best quality • On-time, on-budget delivery, cooperation & partnership |
| <ul style="list-style-type: none"> • Minimal incentive to perform once contract is awarded • Performance on project largely irrelevant to winning future projects • Minimal compliance with plans & specifications • Least-cost interpretation of bidding documents | <ul style="list-style-type: none"> • Maximum incentive to perform once contract is awarded, incentive to excel • Performance on one job can determine opportunity for next job • Full compliance with specifications & quality workmanship • Quality oriented interpretation of bidding documents |
| <ul style="list-style-type: none"> • Marginal performance throughout contract; same for every job | <ul style="list-style-type: none"> • Maximum performance throughout life of contract; critical for every job |
| <ul style="list-style-type: none"> • Expectation of only minimal qualifications/marginal performance • No relative weight/credit given to key performance capabilities impacting success, such as craft training & staffing, equipment, quality control • No incentive to invest in key performance capabilities | <ul style="list-style-type: none"> • Expectation of top qualifications/successful project performance • Critical/decisive weight & credit given to key performance capabilities • Every incentive to invest in performance capabilities, smart business to invest |
| <ul style="list-style-type: none"> • Irrelevant that bidder "A" has a qualification/performance package 10 times better than bidder "B" -- if bidder "B" is 2 cents lower on the bid | <ul style="list-style-type: none"> • Bidders with marginal qualifications are weeded out, bidders with good to excellent performance capabilities win, provided their bid price is reasonable in relation to project estimate and other bids |
| Bottom Line | Bottom Line |
| <ul style="list-style-type: none"> • False savings from poor quality, late delivery, cost-overruns, excessive claims, hassles and headaches • Virtual absence of accountability • Poor results for municipality officials, the community & quality contractors • Taxpayers suffer the consequences | <ul style="list-style-type: none"> • Successful project delivery in terms of quality, cost, schedule and cooperation • Maximizes accountability • Quality results for school officials, students & community • Taxpayers get what they paid for |

Governmental Agencies in Support of Responsible or “Best Value” Contracting

Army Corp of Engineers

(Used in 50% or more of new federal construction projects)

California - “Public Contract Code” regarding pre- qualification of bidders and contractor responsibility, 2000

Delaware - “Quality Construction Improvement Act,” 1999

Massachusetts - Boston Code Ordinance Chapter 9-8.1, 1998

Michigan -City of Grand Rapids

Kalamazoo County Government

Muskegon County Government

City of Battle Creek

Oregon - Contractor responsibility and pre-qualification requirements, – 1999

New Jersey - “Education Facilities Construction and Financing Act”, 2000

Mercer County Executive Order 99.1, 1999

New York - State procurement council guidelines, 1999

Pennsylvania - Governor’s Management Directive 215.9, 1999

West Virginia - Design-build/Best value regulations

Some Michigan Schools Who Have Adopted a Policy on Responsible Contracting

Allendale Public Schools

Atlanta Community Schools

Bangor Township Schools

Brandywine Public Schools

Buena Vista School District

Chelsea School District

Climax-Scotts Community Schools

Decatur Public Schools

Flat Rock Schools

Gull Lake Community Schools

Fremont Public Schools

Kent City Community Schools

Galesburg-Augusta Community Schools

Lakeview School District

L’Anse Creuse Public Schools

Lincoln Consolidated School District

Mason County Central School District

Mendon Community Schools

Meridian Public Schools

Michigan Association of School Boards *

Montabella Community Schools

Montague Area Public Schools

Mt. Morris Consolidated Schools

Muskegon Public Schools **

Newaygo County RESA

Newaygo Public Schools

Orchard View Schools

Otsego Public Schools

Pennfield Schools

Saginaw Public Schools

Sanilac ISD

Swan Valley School District

Trenton Public Schools

Tri County Area Schools

West Branch-Rose City Area Schools

Western Michigan University

White Cloud Public Schools

Yale Public Schools

*The Michigan Association of School Boards has adopted an optional sample responsible contractor policy. The original contribution of language in the formulation of the sample policy was provided by the West Michigan Construction Alliance and the Michigan Building and Construction Trades Council. The above organizations and their designated and authorized representatives have full rights to the use of this sample policy.

**Muskegon Public Schools was the first Michigan school district to adopt a responsible contracting policy.

Material content was made possible in part by the Michigan Association for Responsible Contracting.

Ed Haynor has over twenty years of experience as a Michigan school board member at Newaygo Public Schools and Newaygo County RESA. As a board member, Mr. Haynor has public policy experience through recent and relevant construction projects.