RULE NO.: R161-13.37

NOTICE OF PROPOSED RULE **POSTING DATE: November 4, 2013**

The City of Austin, Texas proposes to adopt the following rule for purchasing goods, services and supplies conducted by the Purchasing Office, Contract Management Department, and other business units to which acquisition authority is delegated as of Monday, November 4, 2013.

Comments on the proposed rule are requested from the public. Comments should be submitted to the Purchasing Office, 124 W. 8th Street, 3rd Floor, Austin, Texas 78701; 512-974-2500 or to the Contract Management Department, 105 W. Riverside Drive, Suite 210, Austin, Texas 78704; 512-974-7141. To be considered, comments must be submitted before Friday, December 6, 2013, the 32nd day after the date this notice is posted. A summary of the written comments received will be included in the notice of rule adoption that must be posted for the rule to become effective.

EFFECTIVE DATE OF PROPOSED RULE

A rule proposed in this notice may not become effective before the effective date established by a separate notice of rule adoption. A notice of rule adoption may not be posted before Friday, December 6, 2013 (the 32nd day after the date of this notice) or not after Monday, February 3, 2014 (the 91st day after the date of this notice).

If a proposed rule is not adopted on or before Monday, February 3, 2014, it is automatically withdrawn and cannot be adopted without first posting a new notice of a proposed rule.

TEXT OF PROPOSED RULE

A copy of the complete text of the proposed rule is available for public inspection and copying at the following locations. Copies may be purchased at the following locations at a cost of ten cents per page:

City of Austin Purchasing Office, located at 124 W. 8th Street, 3rd Floor, Austin, Texas 78701

Contract Management Department, located at 105 W. Riverside Drive, Suite 210, Austin, Texas 78704

Office of the City Clerk, City Hall, located at 301 W. 2nd Street, Room 1120, Austin, Texas 78701.

FILED IN THE OFFICE OF CITY CLERK
ON 04 DAY OF NOV 20 13
AT 8:36 AM
CITY CLERK

BRIEF EXPLANATION OF PROPOSED RULE

Rule R161-13.37: The proposed rule will adopt procedures to administer a city-wide vendor performance evaluation program. The proposed rule sets forth the City's procedures to conduct evaluations of construction contractors, consultants, and vendors providing the City construction, goods, and professional and non-professional services. Once adopted, this rule will be published in Austin Finance Online, the City's financial portal on the Internet at:

https://www.ci.austin.tx.us/financeonline/contract_catalog/OCCRPT.cfm

AUTHORITY FOR ADOPTION OF PROPOSED RULE

The authority and procedure for adoption of a rule to assist in the implementation, administration, or enforcement of the City Code is provided in Chapter 1-2 of the City Code.

CERTIFICATION BY CITY ATTORNEY

By signing this Notice of Proposed Rule R161-13.37, the City Attorney certifies the City Attorney has reviewed the rule and finds that adoption of the rule is a valid exercise of administrative authority.

REVIEW AND APPROVED

Byron Johnson, Purchasing Officer
Purchasing Office

Rosie Truelove, Director
Contract Management Department

Karen M. Kennard
City Attorney
Law Department

City of Austin Purchasing Office and Contract Management Department Performance Evaluation and Appeal Process and Referral for Probation, Suspension and Debarment (P/S/D) – Rule R161-13.37.

Except as otherwise defined in Rule R161-13.37, the following capitalized terms apply to the Rule:

1. Definitions.

    a. "Commodity" or "Commodities" means goods, services, and supplies the City purchases from a Vendor.

    b. "Construction" is the industry, process, trade, or work of building and constructing.

    c. "Contact Person" means the individual that serves as the primary contact for the Contractor (as defined below). The Contact Person is also the recipient of the completed Performance Evaluation under this rule.

    d. "Contractor" is an individual or business firm contracted to provide goods, services and/or supplies to the City.

        i. "Consultant – Construction Related Professional Services" is the individual or business firm indicated on the Performance Evaluation summary page as performing the work on a City project. The Consultant is a person or business firm engaged to provide construction-related professional services as defined in Texas Government Code Section 2254.021 et seq. and exempt from the competitive bid requirements of the Purchasing Act, Chapter 252 of the Local Government Code. Examples of these professional service providers include architects, engineers, surveyors, and geologists.

        ii. "Consultant – Other than Construction" is the individual or business firm performing non-construction services for the City on a project. The Consultant is a person or business firm engaged to provide services other than construction-related professional services as defined in Texas Government Code Section 2254.021 et seq. and exempt from the competitive requirements of the Purchasing Act, Chapter 252 of the Texas Local Government Code. Examples include accountants, physicians, and professional nurses.

iii. "Consultant – Non-Professional Services" is the person or entity that is contracted to provide non-professional service to the City for a project and these services are not subject to the Texas Government Code Chapter 2254, and/or which are not subject to the professional, personal or planning services exemptions state in Texas Local Government Code Chapter 252, Section 252.022.

iv. "Construction Contractor" is the individual or business firm contracted to perform a construction project for the City.

v. "Supplier" is the individual or business firm contracted to provide the City with goods, services, or supplies.

vi. "Vendor" is the individual or business firm contracted to provide the City with goods or services.

e. "Days" means any period of time expressed as days will be understood to be City business days unless otherwise stated.

f. "Goods" means physical items sold to the City by the Contractor.

g. "Non-Professional Services" means consulting and other services that are not subject to the Texas Government Code Chapter 2254, and/or which are not subject to the professional, personal or planning services exemptions stated in Texas Local Government Code Chapter 252, Section 252.022.

h. "Owner", "City" or "City of Austin" means the City of Austin, Texas, a municipal corporation, home rule city and political subdivision, organized and existing under the laws of the State of Texas, acting through the City Manager or his/her designee, officers, agents, or employees.

i. "Performance Evaluation" means a detailed City performance evaluation process that evaluates and scores a Contractor's performance on a City contract that is ongoing, terminated, or expired.

j. "Professional Services – Construction Related" are services directly related to professional practices as defined by the Professional Services Procurement Act, Texas Government Code, Section 2254.002, such as architecture, engineering, and surveying.

k. "Professional Services – Other than Construction" are services directly related to professional practices as defined by the

Professional Services Procurement Act, Texas Government Code, Section 2254.002, such as accounting, medicine, and professional nursing.

l. "Project" means the scope of work identified in a particular agreement and its amendments between the Owner and Consultant / Contractor / Supplier / Vendor.

m. "Rebuttal" means the Contractor's written answer in response to the City's performance evaluation that includes the Contractor's request for the City's consideration of an adjustment of an evaluation score. (This process includes the City's determination of the evaluation score and what evaluation materials are retained or discarded, subject to City's document retention requirements and determination of final evaluation score).

2. Performance Evaluation.

a. Construction-Related Professional Services Consultants. The City will complete a Performance Evaluation for each Construction-Related Professional Services Consultant at the end of each project phase, or at project completion for Capital Improvement Projects (CIPs) or other projects that do not have construction phases. At the City's discretion, multiple project assignments with similar scopes of work completed by the same Construction-Related Professional Services Consultant will require the completion of (1) one performance evaluation for all assignments at project completion. Please refer to the individual solicitation and contract for further specific information about evaluation criteria and measures.

b. Construction Contractors. The City will complete a performance evaluation for each Construction Contractor at the end of each construction phase or project completion. Please refer to the individual solicitation and contract for further specific information about evaluation criteria and measures.

c. Performance Evaluation of Contractors contracted with as a result of a sole-source justification will be conducted. (However, in the event of an adverse Performance Evaluation, the City may continue the sole-source contract with this Consultant, Contractor, or Vendor subject to the needs of the municipality.)

d. Sections in this Rule for Contractors providing goods, services and/or supplies (other than construction-related services) will be added at a subsequent date using the City's formal rules process.

3. Rebuttal Meeting.

   a. An authorized City official, typically the City's Project or Contract Manager, will forward the completed Performance Evaluation to the Contact Person. The Contact Person may request a Rebuttal Meeting (in-person review) with the City concerning the score provided, by taking the following steps:

      i. The Contact Person must contact the City official providing the performance evaluation within (10) ten days of the date the evaluation was provided. The Contact Person must request an in-person review. Request must be in writing, and should state if an attorney has been retained and will be present at the meeting.

      ii. City will schedule a Rebuttal Meeting within (10) ten days of receipt of the Contact Person's written request. The following individuals may attend the Rebuttal Meeting:

         1. The Contact Person and other representatives of the Contractor. If an attorney representing the Contractor is included, the Contact Person must advise the City in advance; and

         2. City staff appropriate to the project, such as:

            a. Contract or Project Manager;

            b. Contract or Project Manager's Supervisor;

            c. Financial Services Department staff;

            d. Contract Management Department staff;

            e. Representatives of the City department receiving goods, services, and/or supplies from the Contractor; and

            f. Law Department staff.

         The City has the final authority to determine who may attend the Rebuttal Meeting.

   b. The Rebuttal Meeting will be informal and may not include parties other than City staff and representatives of the Contractor. Staff

may, but is not required, to decide on the Contractor's evaluation during the Rebuttal Meeting. Staff may request additional information from the Contractor or City staff. City staff may maintain the Contractor's original Performance Evaluation score or revise the score based on information received at or subsequent to the Rebuttal Meeting. The modification of a score by the City, whether for a phase or final evaluation review, will depend on the factual supporting documentation provided by the Contractor, and will be determined on a case-by-case basis. All materials provided by the Contractor will be considered during the Rebuttal Meeting.

i. If the City modifies the original scoring decision as a result of this meeting, the City will issue a written notification to the Contact Person and all meeting attendees within (5) five days after the Rebuttal Meeting. The notification will include the revised Performance Evaluation score. The City will update the Contractor's Performance Evaluation records accordingly.

ii. If there is no change to the Contractor's Performance Evaluation score, the City will issue a letter to the Contact Person and all meeting attendees that confirms the score. The City will send this letter within (5) five days from the date of the Rebuttal Meeting.

c. If issues remain unresolved after the Rebuttal Meeting, the firm may request a formal appeal in accordance with paragraph 4, Evaluation Score Appeal Process. The City will document the status of the Contractor Performance Evaluation when the decision is formalized.

4. Evaluation Score Appeal Process.

a. If issues remain unresolved after the Rebuttal Meeting and the Contact Person for the Contractor desires to appeal the final Performance Evaluation score decision (as stated in paragraph 3c above), the following steps are required:

i. The Contact Person must provide a written Notice of Intent to Appeal to the City official providing the Performance Evaluation score decision within (4) four days of the City's rendered Rebuttal Meeting decision. A complete, written Appeal must be submitted to the City within (10) days of the rendered Rebuttal Meeting decision. The Appeal must request a hearing.

ii. The Appeal Hearing is informal. The City will establish the Appeal Hearing Team. Members may include, but are not limited to:

1. Director of the Contract Management Department or Purchasing Officer and other staff;

2. Contract or Project Manager;

3. Director or staff from the supported department;

4. Small and Minority Business Resources Department (SMBR) representative if applicable;

5. Law Department representative; and

6. Other appropriate City staff.

The City has the final authority to determine who may attend the Appeal Hearing.

b. The City must be notified in advance if an attorney has been retained and will be present at the meeting.

c. The Appeal Hearing will be an opportunity for the Contact Person and other representatives of the Contractor to present the factual grounds of their Appeal.

d. After consideration of all materials presented, as well as input from meeting attendees, the director or purchasing officer shall render the final decision on the Appeal. City will notify Contact Person of the final decision and evaluation performance score in writing no later than (10) ten days after the Appeal Hearing. The decision is final and no further appeal is allowed.

e. When an Appeal is filed, the City will not finalize the Contractor's Performance Evaluation until a decision on the Appeal is made. However, the City will not delay an award of an unrelated solicitation for which the Contractor has submitted a bid, proposal or response pending an Appeal, if it is determined that:

i. The City urgently requires the supplies or services to be purchased, or

ii. The City's failure to promptly make a contract award will unduly delay a Contractor's delivery or performance under a City contract.

f. In those instances, the Director of the Contract Management Department or Purchasing Officer will notify the Contact Person and make every effort to resolve the Appeal before the award.

g. The individual award document will identify the contact and address information of the person who will receive notices for the City. In all cases, an email will serve as written notice.

h. When an Appeal is filed, the City will not unnecessarily delay performance by the Contractor.

5. Use of Evaluation Reports; Records Retention.

   a. A Performance Evaluation report will be used for the purpose of subsequent contract award decisions for a period of (5) five years from the date that the award of contract was made.

   b. Many Contractors provide goods and services in specialized as well as general scopes. When a Contractor provides multiple scopes of goods and services to the City, only "like" scoped evaluations will be considered for subsequent award recommendations.

   c. Evaluation reports will not be considered for contract award decisions after (5) five years and 1 day from the due date for the solicitation; however, evaluation reports will be retained subject to the City's document retention schedules.

   d. For contracts with multi-year performance periods, evaluations will be conducted annually or at the applicable contract phase.

6. Request for Contractor Performance References; Open Records.

   a. From time to time, the City is contacted for contractor performance references.

   b. Information that is generally available to the public via City of Austin documents such as the adopted budget, reports, web pages, or by means of the City's transparency resources (Austin Finance Online; data.austintexas.gov), such as description of purchase order, amount awarded, amount spent, and dates of payment is not considered to be a "contractor performance reference", and may be

furnished to anyone asking for this information in conformance with the Public Information Act.

c. Performance Evaluation reports are presumed to be public information under the Texas Public Information Act.

7. Reporting of Adverse Performance to Other Entities.

Federally-funded or "conditionally-funded" projects with adverse Contractor Performance Evaluations or records will be reported to grantors or other interested parties to the extent required by the funding instrument.

8. Probation, Suspension and Debarment (P/S/D).

Before a Contractor is placed on probation, suspended, or debarred, the City's P/S/D process will be followed.