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 bidder'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 bidder maintains, participates in, and contributes to a bona fide apprenticeship training program as required by the State of Michigan and approved by the United States Department of Labor, Bureau of Apprenticeship and Training (BAT) if apprentices are used on the job site.

√ Verification that no illegal non-US citizens will work on the project nor will the fraudulent use of the federal government's H2B visa program for immigrant construction workers be allowed.

√ A statement of determination from the contractor/sub-contractor on what percentage of their work force can be drawn significantly from area residents because it's a goal of the Municipality to utilize, in its construction activities, local residents as much as is economically feasible while retaining the high quality of construction required for its construction activities. The Municipality will consider, in evaluating which bids best serve the interest of the Municipality, the extent to which bidders are able to achieve this goal.

√ A statement regarding the bidder's staffing capabilities and labor sources including sub-contractors and a verification from the bidder that construction workers will not be misclassified, nor will independent contractors be used on site in violation of state and federal law.

√ Documentation of an on-going 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 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 bidder asserted on projects of the same or similar size within the last five (5) years. Any claim against the bidder shall be deemed to have been satisfactorily resolved if final judgment is rendered in favor of the bidder or any final judgment rendered against the bidder is satisfied within ninety (90) days of the date the judgment became final.

√ Disclosure of any violations of any state, federal or local laws, including OSHA violations, violation of any state or federal prevailing wage laws, worker's compensation or unemployment compensation laws, rules or regulations, issued to or against the bidder within the past five years.

√ Disclosure of any debarment by any federal, state or local governmental unit and/or findings of non-responsibility or non-compliance with respect to any public or private construction project performed by the bidder.

- √ 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 bidder has worked for within the last five (5) years including information regarding the records of performance and job site cooperation.

- √ Verification of an existing Fitness for Duty Program (drugs and alcohol) of each employee working on the proposed jobsite.

- √ Documentation as to whether the bidder provides health insurance and pension benefits to its employees.

- √ A criminal records check for each employee the bidder proposes to use on the construction site.

- √ A warranty statement regarding labor and materials.

- √ Evidence of any quality assurance program used by the bidder and the results of any such program on the bidder's previous projects.

- √ Have an existing Michigan School-to-Registered Apprenticeship Program partnership with a local school district, intermediate school district/secondary career technical center or community college within the boundaries of the municipality or regional workforce area.

- √ Evidence of Equal Employment Opportunity Programs for minorities, women and small businesses.

- √ 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	1st Low Bid Construction Company (25 points)	
	2nd Low Bid Construction Company (10 points)	
	3rd Low Bid Construction Company (10 points)	
	4th 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 Sample Responsible Contractor Policy Rating Chart

Examples of Bid Categories	Contractor	1. Company History	2. Applicant Trade Categories/Licenses	3. Sub-contractors/ Licenses	4. Journeyperson/Apprentice Ratio	5. Apprenticeship Training Program	6. No Illegals on Site	7. Use of Local Workers/Contractors	8. No Mis-classifed Workers/ Independent Contractors	9. MIOSHA Approved Safety Program	10. Experience Modification Rate (EMR)	11. A List of Similar Projects	12. Experience/Cost Control/Scheduling	13. Audited Financial Information	14. Litigation History	15. Safety/Prevailing Wage Violations	16. Debarment History	17. Proof of Insurance	18. References	19. Fitness for Duty Program (Drugs/Alcohol Testing)	20. Health Insurance	21. Criminal Records Check	22. Warranty Statement	23. Quality Assurance Program	24. School-to-Registered Apprenticeship	25. Equal Employment Opportunities	26. On Time/On Budget	TOTALS
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																												
Lockers																												
Casework																												
Bleachers																												
Seating/Bleachers																												
Hydraulic Elevator																												
Food Service Equipment																												
Athletic Equipment																												
Theatre & Stage Equipment																												

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
• Minimum qualifications and screening • Project awarded solely on basis of low bid	• Extensive qualifications and screening • Projects awarded on the basis of price, past performance and the firms resources and qualifications
Results	**Results**
• Poor quality • Delayed schedules, claims, disputes & litigation	• Best quality • On-time, on-budget delivery, cooperation & partnership
• 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	• 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
• Marginal performance throughout contract; same for every job	• Maximum performance throughout life of contract; critical for every job
• 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	• 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
• Irrelevant that bidder “A” has a qualification/performance package 10 times better then bidder “B “-- if bidder “B” is 2 cents lower on the bid	• 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**
• 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	• 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/Best Value Contracting or Prequalification Ordinances

Army Corp of Engineers
(Used in 50% or more of new federal construction projects)
California
City of Santa Cruz
California Public Works Design
California Education Code
Public Works Summary of Requirements CA
Public Works Contract Award Information
Required Apprentices On Public Works Contract
Los Angeles Unified School District Prequalification Questionnaire
Los Angeles Unified School District Prequalification
Los Angeles Unified School District Summary of Prequalification
California Prequalification of Contractors
California Public Works Prequalification Model
"Public Contract Code" regarding pre-qualification of bidders and contractor responsibility, 2000
Santa Cruz County Code Local Hiring of Apprentices
Delaware
"Quality Construction Improvement Act," 1999
Illinois
Township of Bloom
Springfield, IL Responsibility of Bidders
Springfield, IL Public Works Contracts
Illinois Responsible Bidder Ordinance
List of Illinois Ordinances
Maryville, IL Responsible Bidder
Indiana
Indiana Act 244
Massachusetts
Amherst
Boston Code Ordinance Chapter 9-8.1, 1998
Brockton
Cambridge
Cranston
Everett
Fall River
Lawrence
Malden
Manchester
New Bedford
Pittsfield
Plymouth County
Quincy
Salem
Springfield
Warwick
Waltham
Weymouth

Massachusetts (continued)
Woburn
Worcester
Michigan
City of Battle Creek
City of Grand Rapids
Kalamazoo County Government
Muskegon County Government
Detroit Public Library
Nevada
New Mexico
New Mexico Public Works Contracts
New Hampshire
City of Manchester, New Hampshire
NewJersey
Mercer County Executive Order 99.1, 1999
New Jersey Education Facilities Construction & Financing Act", 2000
New Jersey Public Works Contractor Registration
New York
City of Rochester, New York
NY State - Apprentice Participation on Public Works
Cornell Contractor Responsibility Language
New York Vendor Questionnaire
New York Dept. of Education Prequalification
New York Principal Questionnaire
New York procurement council guidelines, 1999
Best Practice: Determining Vendor Responsibility, New York
Prequalification Questionnaire NYC
New York City Contractor Responsibility Site (NYC)
Ohio
City of Oregon, Ohio Best Bid Criteria
City of Oregon, Ohio Best Bid Form
City of Oregon Ohio Best Bid Criteria - Subcontractors
Ohio Municipal Code
Cincinnati Public Schools Determination of Lowest Bidder
Ohio Responsible Bidder Information Form
Oregon
Contractor responsibility and pre-qualification requirements, – 1999
Pennsylvania
Pennsylvania Governor's Management Directive 215.9, 1999
Pennsylvania Subcontractor Supply Form
Pennsylvania Qualification Statement
Rhode Island
Washington State
Washington State Apprenticeship Law (Purpose)
Washington State Apprenticeship Law
West Virginia
West Virginia Design-build/Best value regulations
West Virginia Drug & Safety Program Requirements
School Building Authority of West Virginia

Some Michigan Schools Who Have Adopted a Policy on Responsible Contracting

PUBLIC SCHOOLS
Allendale Public Schools
Atlanta Community Schools
Bangor Township Schools
Battle Creek Public Schools
Brandywine Public Schools
Buena Vista School District
Chelsea School District
Climax-Scotts Community Schools
Comstock Park Public Schools
Coopersville Area Public Schools
Decatur Public Schools
Elkton-Pigeon Bayport Schools
Fitzgerald Public Schools
Flat Rock Schools
Fremont Public Schools
Free Soil Community School
Galesburg-Augusta Community Schools
Galien Township Schools
Grand Rapids Public Schools
Gull Lake Community Schools ***
Hale Area Schools
Holton Public Schools
Jackson Public Schools
Kent City Community Schools
Lakeview School District
L'Anse Creuse Public Schools
Lansing School District
Lincoln Consolidated School District
Mason County Central School District
Mecosta-Osceola ISD
Mendon Community Schools
Meridian Public Schools
Mesick Consolidated 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
Oakland Schools
Otsego Public Schools
Parchment School District
Pennfield Schools
River Rouge School District
Romulus Community Schools
Roseville Community Schools
Saginaw Public Schools
Saline Area Schools
Sanilac ISD
South Haven Public Schools
Swan Valley School District
Trenton Public Schools
Tri County Area Schools
West Branch-Rose City Area Schools
White Cloud Public Schools
Yale Public Schools

COLLEGES / UNIVERSITIES
Michigan State University
Western Michigan University

*The Michigan Association of School Boards has adopted responsible contractor policies (4760, 3660 & 4770). The original contribution of language in the formulation of policies 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 the policies.

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

*** Gull Lake Community Schools developed a Responsible Contractor Policy for their 2004 bond issue only.

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

Ed Haynor has over 25 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 completed construction projects.