Improving Denver’s Construction Contracting Process

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Issue Brief
You hire a contractor to do some work on your house, perhaps a remodel. However the work is subpar—it is not what you bargained for and not what you contracted for. But, you pay the contractor despite the poor quality work because you feel you have no choice—you don’t want a lien or to go through litigation. Then, after the contractor is paid and gone, you realize the work was not only subpar but it was not really finished—some electrical circuits are not complete. Also, some things don’t work—windows won’t fully close. You now have to hire another contractor to redo the work that was already done and finish the unfinished work.

Would you hire the original contractor again?

No…unless you are the City and County of Denver.

Our performance audits of the City’s contracting, contractor pre-qualification, and bid award process for construction contracts have uncovered serious issues. Our findings indicate that poor performing contractors—or contractors realistically incapable of performing the work on which they bid—are able to secure City contracts despite a history of poor performance. This leads to significant cost-overruns, poor quality work, and the taxpayer stuck with the tab—to the tune of millions of dollars.

Our audits found problems in the City’s construction contracting processes including the:

* Prequalification of Contractors
* Contract Awarding
* Change Orders
* Contract Compliance
* Lack of Effective Governance

For Instance: A 2011 performance audit of Public Works illustrated the substantial weaknesses and failures in the contracting processes. In the audit, we noted that a contractor was granted a contract despite a known pattern of poor past performance, including, at the time of the bid and contract award, being assessed liquidated damages by the City for poor performance on a previous contract. Then, the contractor performed so poorly on the new project that it was unable to successfully complete the work. The consequence of that poor performance was a 20% increase in the cost of the project with a new contractor having to be engaged to successfully complete it. Costly failures like this are the result of not being able to use an evaluation of contractor past performance and other assessments in awarding City contracts. It is worse than flying blind—in many cases the contractor’s past performance is known, but that knowledge or evaluation cannot be used during the prequalification or contract award steps in the process. That’s not flying blind, that’s flying in the face of common sense.
THE PROCESS

The City has a multi-step construction contracting process whereby a project is bid and a contract is awarded. Those steps are outlined below, but it is important to note that our audits have found problems in the way the steps are designed and administered. Significant changes and enhanced oversight are needed at every step in Denver’s bidding, contract awarding, and contract oversight process.

- **PREQUALIFICATION:** This is the initial stage and critical control point for ensuring that only contractors who meet necessary requirements are allowed to bid on City projects. The City’s Prequalification Board assesses a contractor’s self-reported information, primarily involving the financial capability of the contractor, but does not require detailed contractor performance information. The City process does not prevent poor performing contractors from securing City contracts. Our audits have recommended that proof of past work performance be used in evaluating the capability of the contractor to successfully complete the contract.

- **CONTRACT AWARD:** Adherence to a low-bid acquisition methodology for certain contracts does not ensure that timelines are met or that the City receives the best value or lower contract costs. According to the federal Office of Management and Budget (OMB) exclusive reliance on low bids actually increases the likelihood of awarding a contract to an inferior bidder.¹ Our audits have demonstrated that the City is prevented from effectively assessing contractors’ proposed means and methods and individual line items prior to or after awarding contracts.² We have recommended that the City conduct a formal assessment of contractor means and methods as part of the contract award methodology.

- **CHANGE ORDERS:** Our audits have found that change orders for construction projects lack transparency particularly when used for legal settlements. The City’s reliance on low-bid as the sole criteria creates the perception of an environment where unscrupulous contractors can intentionally manipulate and submit low bids to secure a City contract with the intent of increasing the amount of the contract through subsequent change orders. We have recommended that the City implement a policy to update City Council when change orders reach a certain threshold to maintain transparency and proper oversight of project finances. We also stressed the need for strengthening the overall change order process to address substantive control risks and increase compliance with change order policies and procedures.

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² Means and Methods – How the contractor will develop and construct the project in accordance with performance requirements dictated within the contract documents.
We are proposing that the City adopt what we are calling Quality Assured Contracting (QAC). QAC assures that those who bid on and are awarded City contracts meet certain minimum standards. It means that the City is confident that the bidder can successfully complete the project and that the bid price and project completion timeline is realistic. Understandably, unforeseeable circumstances can result in change orders that may raise the price of a project and perhaps delay the completion date. But all too often change orders that inflate the price of a project or delay its completion are not the result of unforeseeable circumstances. They are often the result of poor performance by the contractor or in some cases a manipulation of the system by a contractor to inflate a low-bid price that may have been unrealistically low in the first place. This not only costs the City, but it unfairly punishes high-performing contractors that submit realistic bids. QAC is designed to mitigate cost overruns, project delays, poor performance, and unfair manipulation of the process.

QAC addresses some of the problems we have identified in the City’s contracting process by eliminating current restrictions on what criteria can be used to evaluate a contractor’s qualifications for bidding on a project as well as allowing for a more in-depth analysis of the means, methods, and ability of the contractor to successfully complete a project once a bid is received and before the contract is actually let. QAC would still allow the contract to be awarded to the lowest responsible bidder, but it ensures that only those truly qualified would be allowed to bid and that the low-bidder has the means, methods, and plan to successfully complete the project as proposed. The elements of QAC are included at the end of this report.

We have made other recommendations in our audits (some are noted above) to address related contacting problems. We continue to follow-up on all our audit recommendations and advocate that they be implemented.
In today’s financial climate, performance audits have never been more important. Information and recommendations gleaned from our performance audits are the basis for our proposals to improve the City’s contracting process and to save taxpayer dollars. Performance audits provide objective analysis to assist management and those charged with governance and oversight in using the information to improve program performance and operations, reduce costs, facilitate decision making by parties with responsibility to oversee or initiate corrective action, and contribute to public accountability. Performance audits enhance the accountability of government and help governments ensure that their operations are effective and efficient.

The Audit Services Division of the Denver Auditor’s Office conducts independent performance audits of City agencies, programs, and contracts. Our audits focus on strengthening governance, enhancing efficiency, increasing revenues, reducing costs, and improving the quality of services provided to citizens by the City and County of Denver. The Division, under the leadership of the elected Auditor, strives to keep residents informed about the activities of their City and County government by adhering to a citizen-centric focus. Our reports are structured to communicate the work performed by the Division in an easily understood manner and we formally present audits during the City’s audit committee meetings, which are open to the public and televised in order to further government transparency and accountability. All of our audits include recommendations to fix or strengthen the programs and systems that we’ve audited. After an audit is performed, the City Administration is responsible for implementing our recommendations to make the necessary changes. Our auditors will return to perform follow-up audits to determine how well the City has implemented these recommendations. All of our audits and other reports are available on our website, www.denvergov.org/auditor.
Prequalification Minimum Standards and Contract Award
Requirements for City Contracts

1. Contractor Responsibility
2. Experience and Past Contract Performance
3. Management Capabilities

1. Contractor Responsibility:
   a. Has not been nor is currently debarred by any federal, state, or local government agency or authority in the past three years.
   b. Has not defaulted on any project in the past three years.
   c. Has not had any type of business, contracting, or trade license revoked or suspended in the past three years.
   d. Has not committed a serious or willful violation of federal or state safety laws as determined by a final decision of a court or government agency authority in the past three years.
   e. Participates in a Class A Apprenticeship Program for each separate trade or classification in which it employs craft employees. A Class A Apprenticeship Program is an apprenticeship program that is registered with the U.S. Department of Labor Office of Apprenticeship and has graduated apprentices to journeyperson status for each of the past five years.

2. Experience and Past Contract Performance:
   a. Has not been nor is currently debarred by any federal, state, or local government agency or authority in the past three years.
   b. Has not defaulted on any project in the past three years.
   c. Has not had any type of business, contracting, or trade license revoked or suspended in the past three years.
   d. Contractor shall document work performance for projects from the previous five years, showing the bid/proposal price and final contract price; the original date for schedule completion and the actual completion date; indicate any level of LEED certification achieved.

Contractor shall not be prequalified if past performance demonstrates a level of risk that would call into question successful performance on the anticipated project.

3. Management Capabilities:
   Prior to awarding a contract to the lowest responsive bidder, contractor shall document:
   a. The Proposed Project Schedule which shall include the proposed project schedule, including key milestones, and a narrative description of the Proposer’s technical approach to the project.
   b. The Proposer’s project management team which shall include, at a minimum, the construction management, field supervision, and technical personnel of the Proposer. With the project management team list, the Proposer shall provide resumes of the persons listed.
   c. Quality Control Plan – shall include a copy and/or description of the Quality Control Program it will use on the project and any implementing documents applicable to its program.
   d. Cost Control Plan – shall include a description of the Cost Control Program it will use for the project.

Contractor may be deemed a non-responsive bidder and disqualified from contract award if a review of the above documentation demonstrates a lack of capability to successfully perform under the terms of the contract.