Payson
Legal Department

303 North Beeline Highway
Payson, Arizona 85541
Phone 928-474-5242
Fax 928-474-8472

MEMORANDUM

Date: January 9, 2014

To: Mayor and Council Members

From: Tim Wright, Town Attorney

Re: Systematic Town Code Review – Title III, CHAPTER 34: MAGISTRATE COURT; CHAPTER 35: PURCHASING; CHAPTER 36: PERSONNEL; AND CHAPTER 37: TAX CODE (Ordinance 843 and Resolution 2752)

This is part 7 of the Systematic Town Code Review. Chapters 34 through 37 were reviewed. No changes were recommended for Chapter 34 (Magistrate Court, recently reviewed); Chapter 36 (Personnel as it only adopts the Personnel Policy Manual by reference); and Chapter 37 (Tax Code as it adopts the Arizona Model Tax Code).

The changes recommended below are for Chapter 35: Purchasing, Financial Policy 102 Procurement, and Admin Policy A202 (Bid Process). Ordinance 843 implements the changes related to Chapter 35 and Resolution 2752 implements the changes related to Finance Policy 102 (originally adopted by Council 5/19/2009) and repeals Admin Policy A202.

Input for the changes was obtained from the Town Manager and the Assistant Town Manager. (insertions are noted with a double underline and deletions are noted by ~~strikeout~~)

Currently, the Town's purchasing is governed by Chapter 35 of the Town Code, Admin Policy A202 (October 2008), and Financial Policy 102 Procurement (approved by Council May 19, 2009). One of the primary purposes of the amendments to Chapter 35 and these Policies is to reconcile these three sources of authority.

CHAPTER 35: PURCHASING

Section 35.01 PURCHASING OF GOODS AND SERVICES – This section is amended to require the Council to approve a policy governing the procedures for the procurement of goods and services. In May of 2009, the Council adopted such a policy. The amendment eliminates duplication and/or conflicts between the Code and the Policy. This approach also allows the Council greater flexibility in purchasing. A Council Policy may be amended with only one meeting and take immediate effect; where as an ordinance change takes two readings and has a 30 day delayed effective date.

35.01 PROCUREMENT ~~PURCHASING~~ OF GOODS AND SERVICES.
The Council shall adopt a policy governing the procurement of goods and services.

~~Purchases of supplies, materials, equipment, insurance and contractual services, except for contractual services consisting of the rendering of professional services, including, but not limited to, that of an attorney, an accountant, an auditor, an appraiser, an architect, and an engineer, having an estimated cost in excess of $25,000 per transaction shall be made as follows:~~
~~(A) Based upon Sealed, competitive bids;~~

~~(B) Through A joint purchase agreement or in conjunction with another public entity or agency provided one of the parties undertakes competitive bidding for the purchase;~~

~~(C) From another public entity or agency;~~

~~(D) Through the United States General Services Administration; or~~

~~(E) Utilizing a duly called for and received competitive bid received by another political subdivision of the state, including, but not limited to a county, a city, town or school district, for an identical item.~~

Section 35.02 BIDS – The substance of this section is now covered in the Procurement Policy and is therefore not needed.

35.02 ~~BIDS~~ RESERVED.
~~Bids shall be opened publicly at the time and place stated in the invitation. Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the town with respect to price, conformity to the specifications and other factors. However, all bids may be rejected if the Council determines that rejection is in the public interest.~~

Section 35.03 DISBURSEMENT OF FUNDS – Several minor grammatical changes have been made to this section.

35.03 DISBURSEMENT OF FUNDS.

(A) Disbursement of funds shall be for public purposes only. Disbursements of such funds shall be to obtain goals sought by the Council, and not be for purposes primarily to benefit non-profit corporations. No donations, gifts or grants, whether by subsidy or otherwise, are permitted.

(B) No funds may be disbursed to non-profit corporations except by compliance with the following:

(1) The Council shall make a finding of fact, at a public meeting, of the following:

(a) The goal sought to be achieved by the disbursement of the funds is one which the Council would seek to attain whether or not the non-profit organization requested the right to perform the services in return for funds.

(b) The exact nature of the purpose to which the funds are to be used.

(c) That the consideration to be received by the town will be to the town residents and taxpayers alone. Funds will not be disbursed in return for consideration beneficial to anyone other than town taxpayers and residents.

(d) That the consideration to be received by the town is approximately equal in value to the amount of funds given.

(e) Each non-profit corporation requesting town funding shall provide the town with all state and federal tax numbers issued by the state and federal taxing authorities with each application for funds and prior to receipt of any funds from the town. Any changes in the non-profit corporation tax status as a non-profit corporation or any change of the tax numbers assigned to each non-profit corporation shall be reported to the town within five days of each change.

(2) The requesting organization shall provide the factual basis for the finding required in subsection (1) above. ~~non-profit corporation requesting funds from the town must provide the foundation from which the Council may determine the above findings of fact. The burden shall be placed upon the requesting organization. All discussion concerning funds shall be at a public meeting.~~

(3) No funds may be disbursed to a non-profit corporation except by written contract ~~executed by both the town and the corporation~~. The contract must include a requirement that the corporation provide auditable records to the town, monthly or on another regular basis, as determined by the town. The contract shall also include the stipulation that a failure of the recipient corporation to provide the proper documents upon request would be a breach of contract. Likewise, any unauthorized or unexplained expenditures of the money given by the town would be considered a breach of contract. The town is to retain control over the monies expended and, in the event of a breach of the contract, the contract shall require that the remaining funds be returned to the town. Additionally, at the town's request, the full amount of the funds given by the town shall be returned to the town, minus any amount equal to the consideration already received by the town.

(4) All contracts shall be in compliance with the Gift Clause of the Constitution of the State of Arizona, Article 9, Section 7, and relevant Arizona case law.

FINANCIAL POLICY 102 PROCUREMENT

1.2.9 – The amendment conforms the Policy to the current practice of having the late bids retained by the Clerk's Office.

1.2.9 LATE BID
A bid is late if it is received at the location designated in the Request for Bids after the time and date set for the bid opening.

A late bid shall be rejected and not considered, regardless of the reason for lateness, including circumstances beyond the control of the bidder.

A late bid shall not be opened, except (if necessary), for identification purposes.

Delivery and return of late bids shall be handled in the following manner:
1) If delivered in person, a late bid shall be immediately rejected and returned to the bidder.
2) If not delivered in person, such bid shall be filed unopened by the Town Clerk. ~~within the Financial Services Department.~~

1.2.15 – Amendments (1) clarify that bids should be awarded to the most responsive, responsible bidder; and (2) conform portions of the award and subsequent signing of contract procedures to current practice.

1.2.15 CONTRACT AWARD
The department shall review the bids regarding meeting the required specifications and mathematical calculations and determine the apparent most responsive, responsible ~~low~~ bidder. If mathematical errors are found that materially change the bid amounts, the department head may reassess who the apparent most responsive, responsible ~~low~~ bidder is.

After determining the apparent most responsive, responsible ~~low~~ bidder, the department will return the bid bond for all but the two lowest bidders with a letter notifying them of who the apparent low bidder is and a copy of the bid tabulation. After all contracts or agreements are signed, the department will return the two remaining bid bonds. The department shall retain a copy of all returned bonds.

~~In the event that two or more bidders submit a low bid with an identical dollar amount, the department shall determine which bidder to recommend to the Town Council for award of the project. The decision of the Town Council on who to award the contract to shall be final, with no appeal. The Town of Payson may also reject all bids if there is a tie in the low bid amount submitted.~~

The department will prepare a Council Decision Request and present the results of the bid, including a complete bid tabulation, and the bidder determined to be the most ~~lowest~~ responsive, responsible bidder whose bid conforms in all material aspects to requirements and criteria set forth in the Request for Bids.

If two bids appear to be equally responsive and responsible, the Council may award the bid by lot.

The Town Council makes the final decision on bidder selection and contract award. The decision of the Town Council on who to award the contract to shall be final, with no appeal.

The Town Council, however, reserves the right to accept or reject any or all bids if deemed to be best for the public good and to waive any informality in the bids received.

The Town, at its option, may refuse to award a contract or purchase to any vendor who is in violation of any Business License requirements or in default on the payment of Town taxes, licenses or other monies due the Town at the time of bid opening.

The Town, at its option, may refuse to award a contract or purchase to any vendor who has defaulted on a similar contract with the Town, or has defaulted on a similar contract with another jurisdiction or public entity within the last three (3) years.

After Council approval and award, the department will notify the selected bidder in writing, and shall deliver all original bid documentation, excluding the most responsive, responsible bid, to the Town Clerk for filing. The original bid documentation of the most responsive, responsible bidder shall be used to create the final contract documents for signature. The department shall coordinate the signing of any contracts or agreements. The Town may not execute the contract until any required Payment Bonds, Performance Bonds and Certificates of Insurance have been received. After signing, the original documents shall be delivered to the Town Clerk. Additional copies shall be provided for at least the following: the department issuing the call for bids, Financial Services, and the successful bidder.

~~After Council approval and award, the department will notify the selected bidder in writing and coordinate the signing of any contracts or agreements. The Town may not execute the contract until the required Payment Bond, Performance Bond, and Certificate of Insurance have been received.~~

1.3 - Amendment allows greater flexibility in purchasing (when allowed by state law) if approved by 5 members of the Council.

1.3 ALTERNATE PURCHASE PROCEDURES
In addition to the purchase procedures defined above, the following may also be used when permitted by State law:

1) Purchases through a joint purchase agreement or in conjunction with another public entity or agency provided one of the parties undertakes competitive bidding for the purchase;

2) Purchases from another public entity or agency;

3) Purchases through the United States General Services Administration; or

4) Purchases utilizing a duly called for and received competitive bid received by another political subdivision of the state, including, but not limited to a county, a city, town or school district, for an identical item.

5) Any other method approved by the Council if all of the following occur:
(a) the method complies with all applicable state and federal laws;
(b) the Town receives greater value than could otherwise be obtained; and
(c) at least 5 Council Members vote for such alternative method.

1.4.1 – Amendment clarifies that prequalification of bidders is not limited to 'projects.' It may include goods, services, etc.

1.4.1 GENERAL INFORMATION
The Town may also pre-qualify bidders ~~for a particular project~~. The purpose is to identify a pool of technically qualified teams. This process uses a Request for Qualifications (RFQ) process. A RFQ is issued to any interested parties. Based on the responses submitted to the RFQ, a pool of highly qualified bidders is created. This pool will then be asked to bid ~~on the particular project~~.

1.11.6 – Amendment clarifies the certain projects will require performance and/or payment bonds.

1.11.6 BID AND CONTRACT SECURITY, MATERIAL OR SERVICE CONTRACTS
The soliciting department may require the submission of security to guarantee faithful bid and contract performance.

Security shall be in the form specified within the Town's bid specification, and may include, but not be limited to a bid bond, performance bond, and payment bond. A performance bond and payment bond shall be required for all construction projects of $25,000 or more.

Bid bonds shall be at least 10% of the bid. Performance and payment bonds shall be for at least 100% of the bid ~~cost~~ amount.

The requirement for security must be included in the Request for Bids, Request for Proposals, or Bid Package.

Failure to submit security in the amount and type of security required may result in the rejection of the bid or proposal.

1.16.4 – Correction of the word 'approves' to 'approved'

ADMIN POLICY A202 (BID PROCESS) – This admin policy is repealed and superseded by Financial Policy 102 (Procurement) and the amendment to Section 35.01.