

Submitted by: Assembly Chair Constant
Assembly Vice Chair Zaletel
Prepared by: Assembly Counsel's Office
For reading: October 10, 2023

**ANCHORAGE, ALASKA
AO No. 2023-108**

1 **AN ORDINANCE OF THE ANCHORAGE MUNICIPAL ASSEMBLY AMENDING**
2 **ANCHORAGE MUNICIPAL CODE TITLE 7 TO INCLUDE PROCEDURES**
3 **SPECIFIC TO CERTAIN CONSTRUCTION CONTRACTS, GENERALLY KNOWN**
4 **AS CONSTRUCTION MANAGER/GENERAL CONTRACTOR PROCUREMENT,**
5 **AND TO CONTRACTS WHERE COMPENSATION IS DERIVED FROM REVENUE**
6 **GENERATED FROM USE OR OPERATIONS OF MUNICIPAL PROPERTY OR**
7 **FACILITIES.**

8
9 **WHEREAS**, recently, the Assembly leadership has identified certain types of
10 contracts and certain types of compensation arrangements under contemporary
11 procurement methods not particularly addressed under Anchorage Municipal Code
12 subsection 7.15.040A. and which were not submitted to the Anchorage Assembly
13 for approval prior to execution, nor reported by an informational memorandum; and
14

15 **WHEREAS**, the contracting method known as Construction Manager/General
16 Contractor (CM/GC) or Construction Manager at Risk (CMAR), involves an initial
17 phase where the winning bidder first works with a contracted designer of a municipal
18 construction project to assist with design plans, development schedules, and cost
19 estimates. The amount of the Construction Manager's professional services
20 contract often falls below the Title 7 professional services threshold for Assembly
21 approval, currently at \$150,000; and
22

23 **WHEREAS**, this contracting method is structured so that the *Construction Manager*
24 selected in the first phase for professional services will also be the *General*
25 *Contractor* in the second phase, for the actual construction, if the parties can agree
26 on pricing. Although the second phase is often a multimillion dollar project not
27 previously approved by the Assembly, this is done by amendment to the initial
28 professional services contract and approved pursuant to AMC section 7.15.080, and
29 at that point the contractor has already been selected; and
30

31 **WHEREAS**, another method of contracting involves a use agreement or operating
32 agreement whereby the municipality is not obligated to pay anything up front to the
33 contractor, but instead through its use of municipal property or managing the
34 operations of municipal facilities or property, the contractor generates revenues and
35 its compensation is derived from that revenue; and
36

37 **WHEREAS**, contracts with compensation from revenue generated from use or
38 operations of municipal property or facilities do not appear to be consistently
39 processed or submitted by the Administration for Assembly approval because the
40 revenue is speculative and the lack of a contractual requirement to pay from
41 municipal funds that typically triggers the thresholds to require Assembly approval;
42 and
43

1 **WHEREAS**, the nature of the above described contracts have a significant impact
 2 on municipal assets, resources, and/or finances, and this ordinance is intended to
 3 bring them within the purview of Assembly approval and reporting requirements;
 4 now, therefore,

5
 6 **THE ANCHORAGE ASSEMBLY ORDAINS:**

7
 8 **Section 1.** Anchorage Municipal Code section 7.15.040 is hereby amended to
 9 read as follows (*the remainder of the section is not affected and therefore not set*
 10 *out*):

11
 12 **7.15.040 Assembly approval of contracts.**

- 13
 14 A. In addition to a contract described in subsection F., n[N]o contract for
 15 supplies, services, professional services or construction whereby the
 16 municipality is obligated to pay more than \$150,000.00 pursuant to a
 17 contract awarded through competitive procedures, which are
 18 described in sections 7.20.020 through 7.20.040 (bids) and 7.20.060
 19 (proposals), or more than \$30,000.00 including any amendment
 20 pursuant to contracts awarded under section 7.20.080A.5, or more
 21 than \$50,000.00 pursuant to contracts awarded through other
 22 authorized procedures, may be executed unless the assembly has
 23 approved a memorandum setting forth the essential terms of the
 24 contract. To the extent applicable for particular contracts, the following
 25 essential terms shall be set forth:
- 26 1. The identity of the contractor;
 - 27 2. The contract price;
 - 28 3. The nature and quantity of the performance that the
 - 29 municipality shall receive under the contract;
 - 30 4. The using agency; and
 - 31 5. The time for performance under the contract.

32
 33 All contracts awarded through competitive procedures under this
 34 subsection A. that are more than \$50,000.00 and less than \$150,000.00 shall
 35 be reported to the assembly in an informational memorandum once each
 36 month and no later than a month after award. The report shall contain the
 37 information described in subsections 1. through 5. of this subsection.

- 38
 39 B. If contracts are awarded to more than one bidder pursuant to an
 40 invitation for bids, contracts with different bidders shall be considered
 41 separately for purposes of determining the application of subsection
 42 A. of this section. If any contract to be awarded under a given bid is
 43 subject to assembly approval, the award of other contracts pursuant
 44 to the same invitation for bids may, at the discretion of the purchasing
 45 officer, be delayed pending assembly approval.

46
 47 *** *** ***

48 **F.** Notwithstanding the dollar amount thresholds for procurement
 49 methods or contract types stated in subsection A., the following types
 50 of contracts are subject to the requirements of assembly approval prior
 51 to execution, in addition to reporting requirements, as stated herein:

- 1 1. Construction Manager/General Contractor (CM/GC) contracts.
2 a. Definition. A CM/GC contract means an agreement for
3 construction projects that is generally phased to first
4 require a construction manager to deliver design and
5 construction schedules, and estimated costs for the
6 construction of the project. Upon acceptance by the
7 municipality of the contracted construction manager's
8 proposed costs developed in the first phase, the contract
9 is amended to add the costs and construction work by
10 that contractor.
11 b. Award procedure and public process. Awards for the
12 first phase and all subsequent phases shall be approved
13 by the assembly before execution of the contract or
14 amendment for each phase. The memorandum for the
15 assembly's approval of the first phase shall include an
16 estimated range of the construction costs by municipal
17 officials.
18 i. The purchasing director shall publish notice of the
19 construction manager's proposed costs for the
20 construction work at least seven days before a
21 decision to accept or reject it. The date of
22 publication and copy of the notice shall be
23 included with the memorandum for the
24 assembly's approval of the amendment
25 accepting the construction manager's proposed
26 cost or of a contract if those are rejected and the
27 construction work is procured with a new
28 solicitation.
29 ii. The assembly shall hold a public hearing before
30 consideration and vote whether to approve an
31 amendment to award performance of the
32 construction work to the construction manager.
33 2. Compensation from revenue generated by use or operations
34 contracts.
35 a. Definition. This means a contract whereby the
36 consideration includes compensation derived from
37 revenue generated from the use or operations of
38 municipal property or facilities on behalf of the
39 municipality:
40 b. Award procedure and public process.
41 i. If the agreement is in the nature of an operating
42 agreement subject to competitive procurement,
43 the maximum projected revenue shall be used for
44 assembly approval thresholds under Subsection
45 7.15.040A.;
46 ii. If the agreement is in the nature of a use
47 agreement not subject to competitive
48 procurement, such an agreement shall treated be
49 as a disposal under Section 25.30.020 requiring
50 an ordinance.
51

(AO No. 79-203; AO No. 82-168; AO No. 93-217, § 1, 2-26-94; AO No. 94-123(S), § 1, 8-25-94; AO No. 2001-122(S-1), § 2, 7-24-01; AO No. 2007-22, § 1, 2-27-07; AO No. 2018-74 , § 1, 9-25-18; AO No. 2015-39 , § 1, 5-14-15; AO No. 2019-24 , § 3, 4-1-19; AO No. 2023-23(S) , § 1, 3-21-23)

Section 2. The requirements amended to the Code by this ordinance shall apply to procurements publicly noticed pursuant to AMC section 7.20.020B. after the effective date of this ordinance.

Section 3. This ordinance shall be effective immediately upon passage and approval by the Assembly.

PASSED AND APPROVED by the Anchorage Assembly this _____ day of _____, 2023.

Chair

ATTEST:

Municipal Clerk

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MUNICIPALITY OF ANCHORAGE

ASSEMBLY MEMORANDUM

No. AM 779-2023

Meeting Date: October 10, 2023

1 **From:** Assembly Chair Constant and Vice Chair Zaletel

2
3 **Subject:** AN ORDINANCE OF THE ANCHORAGE MUNICIPAL ASSEMBLY
4 AMENDING ANCHORAGE MUNICIPAL CODE TITLE 7 TO
5 INCLUDE PROCEDURES SPECIFIC TO CERTAIN
6 CONSTRUCTION CONTRACTS, GENERALLY KNOWN AS
7 CONSTRUCTION MANAGER/GENERAL CONTRACTOR
8 PROCUREMENT, AND TO CONTRACTS WHERE
9 COMPENSATION IS DERIVED FROM REVENUE GENERATED
10 FROM USE OR OPERATIONS OF MUNICIPAL PROPERTY OR
11 FACILITIES.
12

13 This ordinance is proposed in order to provide greater transparency and Assembly
14 oversight in the procurement process for two types of solicitation approaches that
15 have recently received scrutiny. The Construction Manager/General Contractor
16 (CM/GC, also known as Construction Manager At Risk (CMAR)) approach and
17 contracts for managing and/or operating Municipal property where the contractor's
18 compensation is derived from the property's revenue.
19

20 **Construction Manager/General Contractor (CM/GC)**

21 This type of contract is defined and addressed in new subsection AMC 7.15.040F.1.
22 proposed by the ordinance. (p. 3 line 1) This method of procurement was
23 spotlighted by the Mayor's proposed Navigation Center/Adult Shelter project in the
24 vicinity of Tudor and Elmore streets, when AM 496-2022 was submitted by the
25 Administration for approval of Amendment No. 2 to the contract with Roger Hickel
26 Construction which would have increased the contract amount from \$50,000 to
27 \$4,950,000. The low initial amount of the original contract was for construction
28 manager services only and was not reported to the Assembly. The Amendment No.
29 2 ballooned the entire contract by almost five million dollars and the contractor had
30 commenced construction work before the Assembly had any notice of it.
31

32 The Purchasing Department provided a description of this common method used
33 for project delivery in the construction industry. (Exhibit A, attached) The
34 Purchasing Officer provided link to a video that describes the process and the
35 benefits around using the CM/GC delivery method,
36 <https://www.youtube.com/watch?v=pf59LitGnWc> , and stated there are many
37 benefits to a successful CM/GC project, including:

- 38 • Gives the contractor and project owner the opportunity to reduce project
39 times, and many are completed at an accelerated rate.
- 40 • Project cost tends to be lower.
- 41 • The contractor and designer take time to mitigate risk during the design
42 phase, reducing or eliminating any unexpected setbacks during the
43 construction phase. The collaboration between the contractor and the

1 designer ensures that all entities are on the same page before construction
2 begins.

- 3 • More accurate cost estimates and reducing the chances of change orders
4 down the road.

5
6 The Municipality has used the CM/GC method with several projects that have been
7 approved by the Assembly, such as the Petroleum and Cement Terminal Project for
8 the Port (AM 761-2017), the new Central Transfer Station Work Package 1 for SWS
9 (AM 352-2020, and the Anchorage Regional Landfill Leachate Upgrades Project
10 (AM 169-2022).

11
12 We believe the CM/GC method of procurement should have a more refined process
13 for Assembly approval, because it invariably involves multimillion dollar construction
14 projects on the Municipality's property and this is known at the outset when the initial
15 low-dollar construction manager phase is first awarded without exceeding the
16 threshold for Assembly approval or reporting. The proposed ordinance then will
17 require Assembly approval of a memorandum when the contract is first
18 recommended for award. The objective is to make the Assembly, and the public,
19 aware of the commencement of contracted work on large Municipal construction
20 projects before they balloon exponentially by millions of dollars for the construction
21 phase to the selected contractor. Additionally, in the interests of fairness and
22 transparency, the maximum cost estimates provided by the construction manager
23 at the end of the first phase of the CM/GC process are to be publicly noticed, and a
24 public hearing is required before Assembly approval of the second phase
25 construction costs amendment to the contract. The Purchasing Department
26 provided a flowchart that depicts the step-by-step process of the CM/GC, and it is
27 attached with notations showing how the current workflow for it will change by this
28 proposed ordinance. (Exhibit B, attached)

29 30 **Compensation from Revenue Generated**

31 This type of contract is defined and addressed in new subsection AMC 7.15.040F.2.
32 proposed by the ordinance. (p. 3 line 33) These are not new, however it does not
33 appear that they are consistently presented to the Assembly for approval. This type
34 of contract was recently discussed in a worksession held August 25, 2023 on the
35 contract between the Municipality and O'Malley Ice and Sports Center LLC
36 (hereafter "O'Malley Ice"), which provides the contractor management and
37 operations authority over the Dempsey Anderson Ice Arena, Ben Boeke Ice Arena,
38 and, by recent amendment, the George M. Sullivan Arena.

39
40 Among other things, the contract divides the responsibilities for certain facility
41 maintenance and repairs between the MOA and Contractor, and provides a
42 "Cost/Revenue Schedule" for each arena that compensates with a management fee
43 and a 50% contractor incentive fee taken from collected revenues remaining after
44 subtracting the management fee, facility maintenance costs, capital reserve
45 contribution, and operating expenses. The original contract based on RFP
46 2022P014 was for September 1, 2022 through August 31, 2027 for the Dempsey
47 and Boeke arenas with estimated compensation to O'Malley Ice a minimum of
48 \$157,000 and maximum of \$753,304. The July 2023 amendment added the
49 Sullivan Arena and increased the estimated compensation range to be from

1 \$307,500 to \$1,180,502. Neither the original contract award nor the amendment
2 were submitted by memorandum to the Assembly approval or included in the report
3 of competitive awards. In contrast, prior contracts and amendments to them for
4 management and operations of the arenas were described in Assembly
5 Memorandums submitted for approval, including AM 311-2001, AM 292-2004, AM
6 865-2005, AM 693-2010, and AM 692-2010.

7
8 The terms of this type of contract allows the contractor nearly complete authority
9 and control of the operations of municipal property and assets, with compensation
10 derived from the revenue generated rather than an obligation to pay from municipal
11 funds. This may be the source of inconsistent treatment of the contracts with
12 respect to obtaining Assembly approval prior to execution, or reporting the award,
13 because AMC section 7.15.040 requirements to do so are triggered by “the
14 municipality [being] obligated to pay” more than the dollar thresholds listed in that
15 Code section. Regardless, the projected range of compensation to the contractor
16 falls well within the thresholds to require either approval or reporting to the
17 Assembly. As a matter of public policy, we believe vesting such a degree of
18 management and operations authority over Municipal property and assets for this
19 level of compensation should consistently be subject to the Assembly approval, or
20 reporting requirements, and the transparency provided by that process. Therefore,
21 we recommend the Code amendments in this proposed ordinance.

22
23 There are some minor costs that result from this ordinance, but it is not anticipated
24 to exceed \$30,000 to the Municipality therefore a summary of economic effects is
25 not included.

26
27 **We request your support for the ordinance.**

28
29 Prepared by: Assembly Counsel's Office
30 Reviewed by: Assembly Budget and Program Analyst
31 Respectfully submitted: Christopher Constant, Assembly Chair
32 District 1, North Anchorage

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34 Meg Zaletel, Assembly Vice Chair
35 District 4, Midtown

36
37 Attachments: Exhibit A, CM/GC Process description
38 Exhibit B, CM/GC Process Flowchart, with AO changes
39 annotated
40
41

Exhibit A - CM/GC Process description

CM/GC Construction Process As Integrated with Municipality of Anchorage (MOA) Title 7 Requirements

**Chris L. Hunter
MOA Deputy Purchasing Director**

There are multiple methods of project delivery commonly used in the Construction industry. All have their advantages and disadvantages depending on the size and complexity of the project.

MOA has traditionally relied on one process; the traditional method of hiring one architectural/engineering contractor to develop a design followed by a separate construction bid to be awarded to the lowest bidder. Although this works in many situations, it is not ideal for all.

Other methods are now being used for larger, more complex projects. One of these is the Design-Build, in which a contract is awarded to one contractor for both design and construction. This method could have been used with an Initiation to Bid (ITB). However, a Request for Proposal (RFP) has been used as there have been other criteria to consider besides price. Two recent examples of Design-Build are the Port of Alaska (POA) Administration Building and the POA North Extension Stabilization projects.

Another method of project delivery being used here more frequently for larger, more complex projects is called the Construction Manager/General Contractor (CM/GC) process. It is also known as the Construction Manager at Risk (CMAR) process. The typical reason stated for using this process is to improve the design, schedule and cost for these types of projects. Attached are several examples of CM/GC/CMAR contracts that have been approved by the Assembly.

CM/GC Process

The CM/GC process has two separate phases: the CM phase, and the GC phase. Ideally, if all goes well, the CM will transition to the GC phase, but this is not guaranteed. At the end of the CM phase, there is a point where it must be decided whether to continue to the GC phase or end the contract and proceed using the traditional ITB process.

There are multiple roles in the CM/GC process as applied to MOA. In no particular order they are the Owner (Department), Purchasing, the Design firm(s), the Third-Party Estimator, and the MOA Assembly.

CM - Phase I

In this phase, an RFP is solicited for CM Services. The cost of the resultant contract is typically less than \$50,000. Please note that this is **not** for design nor for construction, but to assist and advise during the design. The Scope of Work for the resultant CM contract can include the following:

Exhibit A - CM/GC Process description

- Participate in the design process as a member of a team with the Owner, Design firm(s) , and other project consultants. The CM will be included in the design process at approximately the 35% design point
- Review in-progress design documents and advise with respect to completeness, clarity, construction feasibility, alternative materials/methods, and long-lead material procurements. Provide tangible feedback of information and recommendations to the design team (i.e., reports, charts, diagrams, etc.)
- Recommend a strategy that identifies the division of the work to facilitate bidding and award of subcontracts, considering the sequence of construction, safety, minimizing disruption of existing facilities, improving or accelerating construction completion, and other related issues. This may include -purchasing and expediting long-lead materials to prevent construction delays
- Help establish procedures for expediting and processing all Shop Drawings, Submittals, Field Memos (FMs), Requests for Information (RFIs) and other documents.
- Prepare a detailed Construction Schedule for monitoring progress and managing the work
- Develop schedules (design and construction), work plans
- Recommend adjustments to the Project Design Schedule to ensure project completion within approved construction schedule and desired completion
- Prepare construction estimates
- Perform value engineering and life-cycle costing
- Analyze alternative designs
- Understand labor conditions, construction methods and techniques
- Perform constructability reviews and developing sequences of work
- Develop a Guaranteed Maximum Price (GMP) for construction at approximately the 95% design point.

GC – Phase II

The GMP is to be verified by the Third-Party Estimator and is subject to acceptance by the Owner. Should the Owner accept the Third-Party verified GMP, the next step is Assembly approval of an amendment to the CM contract to add construction (GC). While Assembly approval of the CM contract is generally not required by Title 7 due to the low amount, the GC amendment will probably need it. If the Assembly does not approve it, the construction will either be bid via the traditional ITB process or be cancelled altogether.

If the Assembly does approve the amendment, the contract is typically amended by increasing the amount, extending the term, and adding a Construction appendix. Once the amendment is approved by both parties, input into SAP and approved, construction can begin at the direction of the Department. It is important to understand that construction must not begin until the Assembly approves the amendment, the amendment is approved by both parties, and an SAP Purchase Order is issued.

Exhibit B – CM/GC Process Flowchart with AO changes annotated.

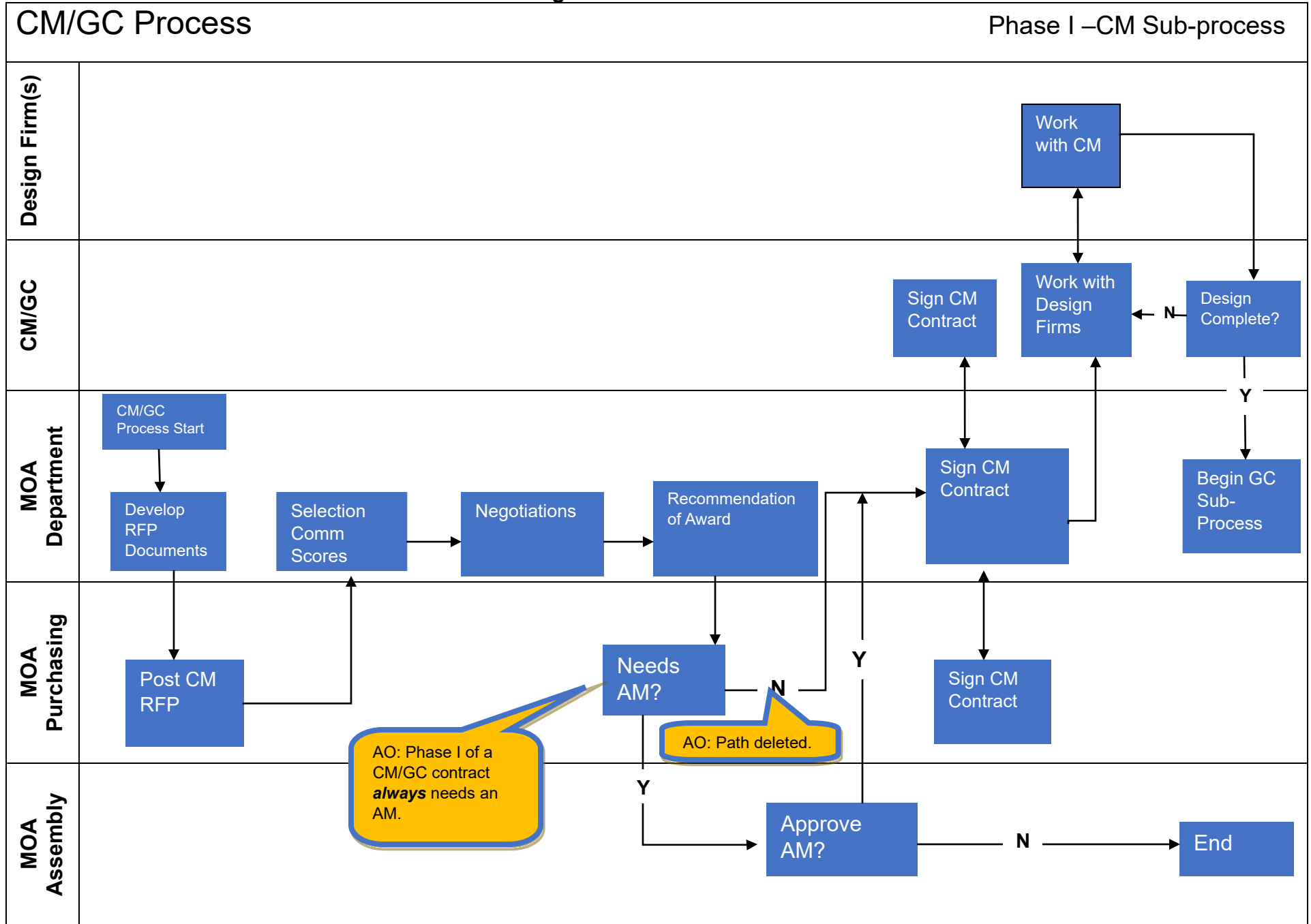


Exhibit B – CM/GC Process Flowchart with AO changes annotated.

