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Memorandum Date: July 30, 2008
Order Date: August 20, 2008

TO: Board of County Commissioners
DEPARTMENT: Management Services
PRESENTED BY: David Suchart, Director
AGENDA ITEM TITLE: **PUBLIC HEARING AND ORDER: IN THE MATTER OF GRANTING AN EXEMPTION FROM COMPETITIVE BIDDING FOR AN ENERGY SAVINGS PERFORMANCE CONTRACT FOR LANE COUNTY ADULT CORRECTIONS**

I. MOTION

TO GRANT AN EXEMPTION FROM COMPETITIVE BIDDING FOR AN ENERGY SAVINGS PERFORMANCE CONTRACT FOR LANE COUNTY ADULT CORRECTIONS

II. AGENDA ITEM SUMMARY

The Board is holding a Public Hearing as part of this agenda item. The Board is being asked to grant an exemption from competitive bidding for an Energy Savings Performance Contract (ESPC) related to construction work to existing Lane County Adult Corrections facilities. The Department of Management Services used a Request for Proposals process in accordance with guidance from the Oregon State Department of Energy.

On May 7, 2008, the Board of County Commissioners approved Board Order No. 08-5-7-13 to award a contract committing to a technical energy audit (in Phase 1) to McKinstry Essention, Inc. The purpose of this Board item is to approve the Request for Proposal competitive process for all of the energy savings work, including potential future phases, to achieve energy savings in the event the Board chooses to proceed after completion of the technical energy audit.

III. BACKGROUND/IMPLICATIONS OF ACTION

A. Board Action and Other History

In the May 7, 2008, Board agenda item, the Board was advised about the Department's intent to try energy savings performance contracting for the Lane County Adult Corrections facility as a way to replace old, inefficient equipment where there is a lack of available capital funding. Under this type of contracting, a single Request for Proposal procurement is used to purchase a complete package of services including: Phase 1, a technical energy audit and project development plan; Phase 2, design and construction; and Phase 3, measurement and verification. This has been identified as a pilot project.

B. Policy Issues

ORS 279C.335(2) and Lane Manual 20.265 authorizes the Local Contract Review Board (“LCRB”), which is the Lane County Board of County Commissioners, to exempt a public improvement contract from competitive bidding. Should the Board exempt this energy savings performance contract for Lane County Adult Corrections from competitive bidding and allow the Request for Proposal process to be used as the basis for contracting for all phases of the project, including beyond the Phase 1 audit if the Board decides to proceed?

C. Board Goals

The goal of the ESPC is to evaluate existing energy efficiencies to develop plans for improvements and provide certain services designed to reduce the consumption of water and energy. In addition to the cost savings, the improvements recommended as a result of the audit will contribute to the protection of the public’s assets by maintaining and upgrading the County’s investments in systems and capital infrastructure, as outlined in the Goals and Strategy B.1.d. of the County’s Strategic Plan.

D. Financial and/or Resource Considerations

The financial and resource considerations for the exemption are covered in the Findings attached to the Board Order.

E. Analysis

The technical energy audit (in Phase 1) will be performed at no cost to Lane County in that McKinstry will be seeking EWEB funds to reimburse for these services and if those funds are not made available, agrees not to charge Lane County for them. The County may choose not to proceed after Phase 1 audit without liability for payment for McKinstry audit services. But, if the County chooses to proceed and terminates at a later stage, it would be required to pay McKinstry for the Phase 1 technical energy audit services. In addition, if the County agreed to proceed after the audit, but decided to terminate or not to proceed through all of the remaining phases, it would be required to pay McKinstry for other fees or a portion of its services. The result of the audit of the current systems at the Adult Corrections facility should provide an analysis of improvements that will save energy costs. The technical energy audit (in Phase 1) is important in identifying the costs and savings.

As to potential future phases, the Department prepared draft findings in support of the LCRB granting the exemption from competitive bidding covering the standard and information set forth below. Due to the specialized expertise required to audit, design, manage, construct and address a broad range of building energy and water services for the Lane County Adult Corrections facility, an exemption from competitive bidding is appropriate. The County’s use of a Request for Proposals process as the alternate process is appropriate so that specialized qualifications may be fully evaluated and considered, in addition to costs.

The standard/test the LCRB needs to apply in order to approve an exemption includes:

1. It is unlikely that such exemption will encourage favoritism in the awarding of a public improvement contract or substantially diminish competition for such a contract; and,
2. The awarding of a public improvement contract under the exemption will likely result in substantial cost savings to the County considering the type, cost, amount of the contract, the number of persons available to bid and such other factors as may be deemed appropriate. Where the project is a pilot project, the County can instead make a finding identifying it as a pilot project for which it intends to determine whether the use of the alternative contracting method (RFP) actually results in substantial cost savings.

The specific information to be covered in the findings includes:

1. The nature of the project;
2. The financial impact including estimated cost of project, operational, budget and financial data;
3. Public benefits;
4. Value engineering;
5. Specialized expertise required;
6. Public safety;
7. Market conditions;
8. Technical complexity;
9. Funding sources;
10. Any other information identified by the County, in its discretion, and used to justify the conclusion to exempt the contract from competitive bidding.

In granting an exemption, the Board shall:

1. Where appropriate, direct the use of alternate contracting and purchasing practices that take account of market realities and modern practices and are consistent with the public policy of encouraging competition.
2. Require and approve or disapprove written findings by the County that support the awarding of a particular public improvement contract without competitive bidding.

In addition to these requirements, before final adoption of the findings above:

1. The County shall hold a public hearing.
2. Notification of the public hearing shall be published in at least one trade newspaper of general statewide circulation a minimum of 14 days prior to the hearing.
3. The notice shall state that the public hearing is for the purpose of taking comments on the agency's draft findings for an exemption from the competitive bidding requirement.

4. At the time of the notice, copies of the draft findings shall be made available to the public.
5. At the public hearing, the County shall offer an opportunity for any interested party to appear and present comment.

In accordance with these requirements, a public notice was published in the Daily Journal of Commerce on July 30, 2008, a trade newspaper of general statewide circulation. It contained a description of the project, the time, date, and location of the public hearing before the Board of County Commissioners, that the purpose was to receive comments on the draft findings for the exemption and that the draft findings could be obtained from Connie Robinson, Executive Assistant for the Department of Management Services. [As of July 30, 2008, the date of drafting this agenda memo, no one has requested a copy of the draft findings.]

F. Alternatives/Options

1. Grant the exemption from competitive bidding for selection of the energy savings performance contractor, and approve the use of a Request for Proposals process instead.
2. Deny the exemption. This will result in the likelihood that one or more additional competitive processes would be required, as well as changes in the anticipated contract with McKinstry concerning its services.

IV. TIMING/IMPLEMENTATION

The ESPC is ready to be executed with McKinstry upon granting of the exemption by the Board.

V. RECOMMENDATION

Grant the exemption so the ESPC can be executed and the project can move forward to identify energy-savings potential.

VI. FOLLOW-UP

Once Phase 1, the Technical Energy Audit, has been completed, the results of the audit will be brought back to the Board. The Board will determine at that time if there are savings potential sufficient to warrant proceeding to the subsequent phases.

VII. ATTACHMENTS

Board Order
Findings

IN THE BOARD OF COUNTY COMMISSIONERS OF LANE COUNTY, OREGON
SITTING AS LOCAL CONTRACT REVIEW BOARD AND
AS LOCAL CONTRACTING AGENCY

ORDER NO. 08-8-20-

IN THE MATTER OF GRANTING AN EXEMPTION
FROM COMPETITIVE BIDDING FOR AN ENERGY
SAVINGS PERFORMANCE CONTRACT FOR LANE
COUNTY ADULT CORRECTIONS

WHEREAS, public contracting law and LM 20.265 allows a local contract review board to exempt a public improvement contract from competitive bidding requirements; and

WHEREAS, energy savings performance contracts have been recognized to include both professional service and construction components; and

WHEREAS, the Board previously approved award of a contract committing to a Phase 1 technical energy audit to McKinstry Essention, Inc.; and

WHEREAS, the Department of Management Services used a Request for Proposal process covering all potential phases of an energy savings performance contract and wishes to use this as a basis for completing future Phases if the Board decides to proceed after the audit;

NOW, THEREFORE, sitting as the local contract review board for Lane County, having examined and considered findings in Exhibit A, incorporated by this reference, the record submitted and any evidence or testimony provided at the Board's public hearing, the Board of County Commissioners hereby orders and finds as follows:

1. The Board adopts the Exhibit A findings and conclusions in support of granting an exemption from competitive bidding for an energy savings performance contract covering all Phases of the energy savings work for Lane County Adult Corrections facility.

2. The Board approves the Request for Proposal process used by the Department of Management Services for all of the energy savings work at the Lane County Adult Corrections facility described in that process, including Phase 1 technical energy audit and all potential future phases. This is an appropriate basis for contracting, including beyond the Phase 1 audit if the local contract review board decides to proceed.

3. The orders and findings in 1. and 2. above apply only to competitive selection, and shall not be construed as approval of commitment to contract beyond the Phase 1 technical energy audit.

AND FURTHER, the Board, sitting as the local contracting agency, hereby orders that:

1. The above orders and findings of the local contract review do not commit the Board to a contract with McKinstry Essention, Inc. beyond the Phase 1 technical energy audit.

2. The Department of Management Services will report to the Board about the results of

the technical energy audit performed by McKinstry Essention, Inc., and the Board will determine whether to proceed after the Phase 1 audit work is completed.

DATED this _____ day of _____ 2008.

Chair, Lane County Board of Commissioners

APPROVED AS TO FORM
Date _____ Lane County

OFFICE OF LEGAL COUNSEL

EXHIBIT A

LOCAL CONTRACT REVIEW BOARD FINDINGS FOR EXEMPTION FROM COMPETITIVE BIDDING (Draft)

The Department of Management Services requests an exemption from competitive bidding for an energy savings performance contract for the Lane County Adult Corrections facility. These proposed findings are in accordance with ORS 279C.335 and LM 20.265 and support the exemption.

A. Nature of the Project and Operational Data

An "energy savings performance contract" means a public contract between a contracting agency and a qualified energy service company for the identification, evaluation, recommendation, design and construction of energy conservation measures, including a design-build contract, that guarantee energy savings or performance. ORS 279A.010(g). Energy savings performance contracting is a method to purchase energy efficiency improvements in buildings when there may be a lack of funds. A single competitive Request for Proposal process is used to purchase a complete package of services in which one contractor is accountable for: investigating existing conditions, completing all necessary designs, purchasing and installing equipment, commissioning, training staff to effectively operate the systems, providing measurement and verification of savings, and guaranteeing energy savings.

B. Funding Sources, Estimated Cost of Project, Budget and Financial Data

It is anticipated that the project financing, including payment of fees for the energy savings contractor, will be arranged so that no up-front money is needed by using incentives from utilities, the Energy Trust of Oregon, and from State of Oregon Business Energy Tax Credits. In any contract, the parties would agree that the technical energy audit (in Phase 1) will be performed at no cost to Lane County. Also, the County would agree that it reasonably believes sufficient funds are anticipated to pay all amounts due under the energy savings performance contract (inc. \$12,000 fee for audit; \$20,500 for project development plan fee; a contractor fee which is a percentage of the guaranteed maximum price; not to exceed contingency; project management/construction management costs; performance and payment bond costs; permit costs; costs for labor, materials, and equipment; environmental costs; construction documents fee; systems start-up and commissioning fee; training services fee; measurement and verification services fee; energy savings guarantee fee) and that it will use best efforts to obtain and properly request and pursue funds from which payments required under the contract will be made. The contractor is responsible for including all of these costs and fees in the guaranteed maximum pricing. The energy savings are expected to cover costs for energy improvements and contractor's fees and costs. If the guaranteed energy savings are not achieved, the contractor would be obligated to pay the County the difference between the actual savings and the guaranteed savings. These energy savings provisions would likely be in effect for 5 years, and the County would also likely be paying a percentage of the project cost annually to the contractor through the energy savings.

C. Specialized Expertise Required, Technical Complexity, and Market Conditions

This proposed exemption recognizes that the Request for Proposal (RFP) process is an appropriate alternative process. Specialized expertise is required in order to understand and address technically complex building facilities, construction and operations; to understand and address a broad range of building energy and water systems, including but not limited to HVAC equipment, energy management and control systems, lighting systems, hot water systems, the building envelope, devices that consume water, sewage services, and landscape irrigation equipment and to price improvements. It requires specialized engineering knowledge to evaluate and advise on redesign opportunities and to manage the many components of the project. An RFP process is particularly suitable when professional or personal services are involved, and when price is not necessarily the determinative factor.

D. Value Engineering

A central purpose of the contract would be value engineering as it applies to pre-existing facilities in the Lane County Adult Corrections building. Contractor selection through an RFP process is more appropriate than bidding, because it allows evaluation of factors such as qualifications and expertise, not just cost.

E. Public Benefits

The public benefits of this energy savings project and method of contracting is the potential to save costs and improve energy efficiency. The County has not previously utilized energy savings performance contracting, although it has been used throughout the United States for a number of years. In essence, the project covered by this exemption would be a pilot project for Lane County. Oregon state agencies have begun using this method of purchasing, and have adopted public contracting rules to allow such purchases. If this project were successful in saving costs for Lane County while improving energy efficiency, it is anticipated that the Board may want to adopt rules to allow this type of contracting for future projects.

F. Public Safety

While this project covers the Lane County Adult Corrections facility, it would probably not directly impact general public safety or services in Lane County.

G. Award of Contract under the Exemption Will Likely Result in Substantial Cost Savings to the County

Using a conventional process would probably require three separate solicitations and contract awards: services for an energy study, for design services and for installation of the improvements. Under this exemption there is one RFP solicitation process. The single-source accountability reduces the time and cost to manage the project than a conventional construction project, creates a possibility for the County to implement more comprehensive projects, gives on-site facility staff and users the opportunity for more

input into the project design and better control of the final product. There would likely be a substantial cost savings to the public and the County through the selection of high quality professionals to evaluate and address the County's ability to save on energy costs. The County's ability to save energy costs over the long term justifies the short term redirection of these savings to pay for energy savings improvements and fees for the contractor's services. The County intends to continue to evaluate whether the use of the RFP process results in substantial cost savings to the County.

H. It is Unlikely that Such an Exemption will Encourage Favoritism or Substantially Diminish Competition

This proposed exemption recognizes that the Request for Proposal (RFP) process is an appropriate alternative process, because specialized expertise, market conditions and technical complexity are integral elements of the energy savings performance contract, in addition to costs. One essential component is design-build or CMGC (Construction Manager/General Contractor) services. CMGC services are covered by an existing exemption under LM 20.160 which requires a request for proposal process as an alternate contracting method, just as the exemption for this project requires.

The County's Request for Proposal process is so substantially similar to formal competitive bidding that there is not be significant effect on competition. See Lane Manual 21.107. Under an RFP process, there is an additional protection for protesting the evaluation committee's recommendation, which is not required under a formal competitive bidding requirement. In other respects, the two processes are nearly identical in Lane County. Accordingly, it is unlikely that this exemption will encourage favoritism or substantially diminish competition.