

W. S. C. I.

AGENDA COVER MEMO

AGENDA DATE: February 2, 2005

TO: Board of County Commissioners

DEPARTMENT: Office of Legal Counsel

PRESENTED BY: Trina Laidlaw, Assistant County Counsel *Trina Laidlaw*

AGENDA TITLE: In the Matter of Amending Lane Manual Chapter 20 to Adopt Rules for Protesting Special Procurements in Public Contracting (LM 20.265)

I. MOTION

Move to adopt a procedural rule to allow a person or entity who is adversely affected to protest both a County department's request for approval, as well as the Local Contract Review Board decision to approve, a special procurement as set forth in ORS 279B.085.

II. ISSUE OR PROBLEM

On February 16, 2005 the Board will be asked to adopt certain "special procurements" under Lane County public contracting rules, LM Chapter 20. One new statutory change effective March 1, 2005 establishes a requirement to allow certain persons or entities to protest special procurements for non-public improvement, goods and services contracts. Lane County currently has no procedural rule to allow any such protests, and it would be advisable to have the rule in place before the Board considers LM Chapter 20 on February 16.

III. DISCUSSION

A. Background/Analysis

An Oregon statute requires a local contract review board and contracting agency to re-adopt any public contract rules in place before March 1, 2005, adopt any new rules, or adopt some or all of the Attorney General's model contract rules. The Lane County Board of Commissioners is both the local contract review board (LCRB) and the contracting agency for Lane County - it "wears two hats". The Board previously adopted public contracting rules for Lane County located in Lane Manual Chapters 20 and 21, and a section in LM Chapter 60 concerning sale of personal and surplus property. On February 16, 2005, we will be asking the Board to re-adopt those rules with modifications to reflect certain statutory changes.

The one statutory change which is the basis for this agenda item is a new procedural requirement that whenever the county, through a department, wishes to purchase goods or services (non-public improvement contracts), either by a specific contract or a class of contracts, and the applicable competitive process may not work, the department can request that the LCRB approve a "special procurement", or an "exemption" in essence, from being required to comply with a particular competitive process.

The new statute states that if the county requests a special procurement, it must provide a person with a right to protest the request and to protest any LCRB decision to approve the special procurement. It also specifically provides for a judicial review opportunity after the "exhaustion" of the protest of decision. On February 16, 2005 the Board will be asked to re-adopt LM Chapter 20. In a sense, many of the "exemptions" currently set forth in Chapter 20 are examples of LCRB adopted special procurements, to the extent they may apply to goods and services contracts. To the extent the "exemptions" in Chapter 20 are "special procurements" for goods or services contracts (non-public improvement contracts), it is advisable to have the procedural rules in place for protesting before February 16, so that persons or entities who may be affected can have advance notice of their rights to protest and the procedure for doing so, and the Board can hear any protest to the request for special procurements (LM Chapter 20) along with the request for the special procurements, all on February 16. Again, this new procedural rule applies only to goods and services contracts and certain construction services which are excluded from the definition of "public works."

As background, for public works contracts, there was and will continue to be after March 1, a requirement that the County provide 14 days public notice and a right to a public hearing on requested "exemptions" from formal competitive bidding. There was no such requirement for non-public improvement contracts although the County practice was to provide the same. Under the new statute, there are two opportunities to protest administratively and specific judicial review for non-public improvement contracts, and only one opportunity (for public hearing) for public improvement contracts. On the other hand, the protest deadline for non-public improvement contracts would be 10 days (if the Board approved the Board Order for this agenda item), as opposed to 14 days for public improvement contracts. The rule proposed in this Board agenda item attempts to balance the statutory differences with fairness.

B. Alternatives/Options

1. To approve amendments to LM 20.265 establishing rights to protest special procurements for non-public improvement goods and services contracts.

2. Not approve amendments to LM 20.265 establishing rights to protest special procurements. If this is not done potentially adversely affected persons or entities would not have the formally adopted rights which the law requires as of March 1, 2005. There is an argument that the protest rights do not need to be provided until after March 1, 2005. However, the safest approach legally is to officially provide the protest rights in advance so that the action taken by the Board on February 16 would meet the statutory requirements.

C. Recommendation

Approve the amendments to LM 20.265 establishing rights to protest special procurements for non-public improvement goods and services contracts.

D. Timing

Upon Board approval, the amendments will be adopted and the protest rights established.

IV. ATTACHMENT

Board Order

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

ORDER NO.

IN THE MATTER OF AMENDING CHAPTER 20 OF
THE LANE MANUAL TO ADOPT RULES FOR PRO-
TESTING SPECIAL PROCUREMENTS IN PUBLIC
CONTRACTING(LM 20.265)

The Board of County Commissioners of Lane County orders as follows:

Lane Manual Chapter 20 is hereby amended by removing, substituting, and adding the following section:

REMOVE THIS SECTION

20.265

as located on pages 20-12 through 20-13
(a total of 2 pages)

INSERT THIS SECTION

20.265

as located on pages 20-12 through 20-13
(a total of 2 pages)

Said section is attached hereto and incorporated herein by reference. The purpose of this substitution and addition is to adopt rules for protesting special procurements in public contracting (LM 20.265).

Adopted this _____ day of _____ 2005.

Chair, Lane County Board of Commissioners

APPROVED AS TO FORM

Date 1/20/05 Lane County

J. Laidlaw

OFFICE OF LEGAL COUNSEL

20.265 LCRB Exemption for Other Public Improvement Contracts and Special Procurements.

(1) The LCRB may exempt a particular public improvement contract, or a category of contracts, from the bidding requirements of ORS 279C.335, which are not otherwise exempt under these rules. The request for exemption shall contain the following information where appropriate:

- (a) The nature of the project;
- (b) The financial impact including estimated cost of the project, operational, budget and financial data and funding sources;
- (c) A narrative description of the cost savings anticipated by the exemption from competitive bidding, and the reasons competitive bidding would be inappropriate;
- (d) Public benefits;
- (e) Value engineering;
- (f) Specialized expertise required;
- (g) Public safety;
- (h) Market conditions;
- (i) Technical complexity;
- (j) Funding sources;
- (k) Proposed alternative contracting and purchasing practices to be employed; and
- (l) The estimated date by which it would be necessary to let the contract.

(2) The LCRB may require such additional information as it deems necessary to determine whether a specific contract, or a category of contracts, is to be exempt from competitive bidding.

(3) Application of the information in LM 20.265(1) and (2) must demonstrate that the exemption would meet the following standard:

- (a) It is unlikely that such exemption will encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts; and
- (b) The awarding of public contracts pursuant to the exemption will result in substantial cost savings to the public contracting agency considering the type, cost, amount of the contract, number of persons available to bid and such other factors as may be deemed appropriate.

(4) The LCRB may approve a special procurement for a particular non-public improvement contract, or a category of contracts, to allow procurement other than through an otherwise applicable process including competitive bidding (ORS 279B.055), request for proposals (ORS 279B.060), small procurement (ORS 279B.065), and intermediate procurement (ORS 279B.070). The written request for approval of a special procurement shall include:

- (a) A description of the goods or services or the class of goods or services to be acquired; and,
- (b) A description of the proposed contracting procedure; and,
- (c) A description of the circumstances that justify the use of a special procurement.

(5) The LCRB may require such additional information as it deems necessary to determine whether a specific contract, or category of contracts under (4), should be procured by a process other than one that would be applicable.

(6) Application of the information in LM 20.265(4) and (5) must demonstrate that the special procurement would meet the following standard:

(a) It is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts; and

(b) Either result in substantial cost savings to the contracting agency or to the public, or otherwise substantially promote the public interest in a manner that could not practically be realized by complying with requirements under ORS 279B.055, 279B.060, 279B.065, 279B.070, including any rules adopted thereunder.

(7) Public Notice. Public notice of a request for special procurement shall be provided through the standard public notice for Lane County Board of Commissioners/LCRB meetings. Public notice of the approval of a special procurement shall be the date of the oral decision to approve at the LCRB meeting, unless otherwise provided by the LCRB.

(8) A person or entity who is adversely affected may protest the County's request for approval of a special procurement. The affected person or entity shall deliver a written protest to the County department proposing the special procurement within ten days after the public notice of the request for special procurement, unless a different protest period is provided in the public notice in (7) above.

(9) An affected person or entity may protest the LCRB's decision to approve a special procurement. The affected person or entity shall deliver a written protest to the County department within ten days after the public notice of the oral decision to approve, unless the LCRB provides a different protest period in its public notice.

(10) Untimely filed protests in (8) or (9) will not be considered.

(11) A written protest shall include a statement of the legal and factual grounds for the protest, a description of the resulting harm to the affected person, and the relief requested.

(12) For protests covered by (8) or (9) above, the County department may prepare a response within three days. If the County department concurs with the protest, in whole or in part, it may revise the proposed special procurement accordingly, or withdraw the request. If it does not concur, the LCRB will consider the protest at the time set for considering the request for special procurement for a protest under (8), and for a protest under (9), on a future LCRB agenda as soon as reasonably practicable. The LCRB shall consider the written record, including but not limited to, any County department analysis and submissions by the affected person or entity, and any oral testimony. The LCRB may revise the special procurement, in whole or in part, or deny or sustain the protest.

(13) A contract may not be awarded until after the running of the protest period or completion of protest process in (9) above. *(Revised by Order No. 98-12-2-1; Effective 12.2.98; 04-6-30-12, 6.30.04)*

BID SECURITY AND PERFORMANCE BOND

20.270 Bid and Performance Security.

(1) Contracts, other than those for public improvements, are exempt from the bid security requirements of ORS 279.027 and performance security requirements of ORS 279.029 provided that the County may require bid, performance, or payment security, in its discretion, regardless of this exemption.

(2) Contracts for public improvements which are equal to or less than \$50,000 are exempt from bid and performance security requirements provided that the County may require such security in its discretion, regardless of this exemption. *(Revised by Order No. 98-12-2-1; Effective 12.2.98)*

20.265 LCRB Exemption for Other Public Improvement Contracts and Special Procurements.

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~~Strikethrough~~ indicates material being deleted
~~20.27020-270~~ Lane Manual

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~~20.27020-270~~ |

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