

W. G. D.

Memorandum Date: March 17, 2009
Order Date: April 1, 2009

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 A CONSTRUCTION CONTRACT ON A STEAM HEATING SYSTEM FOR THE LANE COUNTY COURTHOUSE AND PUBLIC SERVICE BUILDING, AND ADDITION OF THIS WORK TO THE EXISTING ENERGY SAVINGS PERFORMANCE CONTRACT WITH MCKINSTRY ESSENTION, INC., FOR LANE COUNTY ADULT CORRECTIONS FACILITY.**

I. MOTION

MOVE TO GRANT AN EXEMPTION FROM COMPETITIVE BIDDING FOR A CONSTRUCTION CONTRACT ON A STEAM HEATING SYSTEM FOR THE LANE COUNTY COURTHOUSE AND PUBLIC SERVICE BUILDING, AND ADDITION OF THIS WORK TO THE EXISTING ENERGY SAVINGS PERFORMANCE CONTRACT WITH MCKINSTRY ESSENTION, INC., FOR LANE COUNTY ADULT CORRECTIONS FACILITY.

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 the construction work necessary to remove and replace the steam heating system for the Lane County Courthouse and Public Service Building (CH/PSB), and to add this work to the existing energy savings performance contract (ESPC) with McKinstry Essention, Inc. (McKinstry), for the Lane County Adult Corrections facility (LCAC).

On August 20, 2008, the Board of Commissioners granted an exemption from competitive bidding for an energy savings performance contract for the Lane County Adult Corrections facility, approving the use of a request for proposals (RFP) competitive process, in part. The Department of Management Services chose McKinstry Essention, Inc. as the Energy Services Company (ESCO) as a result of an RFP process. The Board of Commissioners approved proceeding with the Phase 1, Technical Energy Audit at LCAC, and that audit was completed by McKinstry Essention, Inc. The Board of Commissioners approved proceeding to the Phase 2, Project Development Plan at their March 4, 2009 meeting.

III. BACKGROUND/IMPLICATIONS OF ACTION

A. Board Action and Other History

Within the requirements of the State of Oregon Revised Statutes and the Lane County Manual, there exist various acceptable exceptions to the competitive selection process. The Board has, in the past, granted exemption to competitive selection when the situation conforms to an acceptable exception and can be justified by findings.

B. Policy Issues

Because an ESCO is selected based on qualifications rather than low bid, the Oregon Department of Energy has developed a Guide to Energy Savings Performance Contracting, whereby a county agency is required to request an exemption from competitive selection from the county Board of Commissioners.

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

An important component of the Phase 1 Technical Energy Audit is the County's steam energy usage. A quick audit of the Courthouse/PSB steam system was also conducted. Eugene Water and Electric Board has recently notified Lane County that it plans to discontinue providing steam energy to the County. This affects both the Courthouse/PSB and the LCAC, the only two county facilities using steam. It is likely that the County may change to a self-generating steam system at both locations. After the Phase 1 Technical Energy Audit, there is Phase 2 Development Plan, Phase 3 Design and Construction, and a Phase 4 Measurement and Verification. In summary, the addition of the Courthouse/PSB steam system upgrade to the current energy savings performance contract would occur at a reasonable point - the creation of McKinstry's project development plan and guaranteed maximum price to include that work.

If the Courthouse/PSB steam system work was considered a separate project, it would probably require at least two separate solicitations and contract awards: design services, and purchase and installation of new equipment. Under this exemption the work would be added to an existing contract in which there is single-source accountability. This will lead to a reduction in time and cost to manage the project over a conventional construction project, giving 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 use of high quality professionals to evaluate and address the County's ability to save on energy costs. The requested exemption is necessary to complete Phase 2 Project Development Plan.

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 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 March 17, 2009, 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.

F. Alternatives/Options

1. Grant the exemption from competitive selection and the addition of the work for the CH/PSB steam generation system to the existing energy savings performance contract with McKinstry for the Lane County Adult Corrections facility.
2. Deny the exemption. This will result in higher costs for replacing steam generation at the CH/PSB, and lower energy savings from the ESPC project.

IV. TIMING/IMPLEMENTATION

Upon granting of the exemption by the Board, McKinstry is prepared to move forward to include the CH/PSB steam generation replacement in the Phase 2 Project Development Plan.

V. RECOMMENDATION

Grant the exemption so the Phase 2 Project Development Plan can be completed with the highest energy savings potential.

VI. FOLLOW-UP

Once the Phase 2, Project Development Plan, has been completed, it will be brought to the Board to determine if the project will move forward to Phase 3 Design and Construction.

VII. ATTACHMENTS

EXHIBIT A - Draft Findings for Exemption from Competitive Bidding
Board Order 08-4-1-

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

The Department of Management Services requests an exemption from competitive bidding for the construction work necessary to remove and replace the steam heating system for the Lane County Courthouse and Public Service Building (Courthouse/PSB) and addition of this work to the existing energy savings performance contract for the Lane County Adult Corrections facility (LCAC). These proposed findings are in accordance with ORS 279C.335 and LM 20.265 and support the exemption.

On August 20, 2008, the Board of Commissioners granted an exemption from competitive bidding for an energy savings performance contract for the Lane County Adult Corrections facility, approving the use of a request for proposals (RFP) competitive process, in part. The Department of Management Services chose McKinstry Essention, Inc. as the Energy Services Company (ESCO) as a result of an RFP process. The Board of Commissioners approved proceeding with the Phase 1, Technical Energy Audit at LCAC, and that audit was completed by McKinstry Essention, Inc. The Board of Commissioners approved proceeding to the Phase 2, Project Development Plan at their March 4, 2009 meeting.

A. Nature of the Project and Operational Data

An important component of the Phase 1 Technical Energy Audit is the County's steam energy usage. A quick audit of the Courthouse/PSB steam system was also conducted. Eugene Water and Electric Board has recently notified Lane County that it plans to discontinue providing steam energy to the County. This affects both the Courthouse/PSB and the LCAC, the only two county facilities using steam. It is likely that the County may change to a self-generating steam system at both locations. After the Phase 1 Technical Energy Audit, there is Phase 2 Development Plan, Phase 3 Design and Construction, and a Phase 4 Measurement and Verification. In summary, the addition of the Courthouse/PSB steam system upgrade to the current energy savings performance contract would occur at a reasonable point - the creation of McKinstry's project development plan and guaranteed maximum price to include that work.

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

In energy savings performance contracts, 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, and bonds. The contractor is responsible for identifying funding sources for paying all costs, fees and expenses for the work and services to be completed under the contract, and including these 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.

Given EWEB's plan to discontinue providing steam energy, it is questionable how the County would pay for the Courthouse/PSB steam system work if it were not included in the existing energy savings performance contract. The approximate cost is \$70,000.

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

The addition of the Courthouse/PSB steam system work requires specialized expertise in order to understand and address technically complex steam heat generation systems, construction and operations, and energy management and control systems. It requires specialized engineering knowledge to evaluate and advise on redesign opportunities and to manage the components of the project.

D. Value Engineering

A central purpose of the addition of the Courthouse/PSB steam system work to the existing energy savings performance contract would be value engineering in being able to use some of the same engineering for both projects, and eliminating any duplication in costs if the projects were designed separately.

E. Public Benefits

The public benefit in adding the Courthouse/PSB steam system work is that it becomes part of an energy savings project designed 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 is 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

The addition of the Courthouse/PSB work would probably not directly impact general public safety or services in Lane County.

G. Adding Courthouse/PSB Work under this Exemption Will Likely Result in Substantial Cost Savings to the County

If the Courthouse/PSB steam system work was considered a separate project, it would probably require at least two separate solicitations and contract awards: design services, and purchase and installation of new equipment. Under this exemption the work would be added to an existing contract in which there is a single-source accountability. This will lead to a reduction in time and cost to manage the project over a conventional construction project, creating a possibility for the County to implement more comprehensive projects, and giving 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 use of high

quality professionals to evaluate and address the County's ability to save on energy costs.

One of the services provided by McKinstry Essention, Inc. is to identify and assist the County in securing funds to pay for energy upgrades on terms which would allow the money saved on energy bills to pay for the costs of the work over a period of time. Upon evaluation of the available financial resources for the LCAC work, it became apparent that adding the Courthouse/PSB steam system upgrade would help the County obtain the 20 year energy savings to pay for all of the work . Without the addition of this work, it may not be as economically feasible to complete the LCAC energy savings project. Not proceeding with this project likely means higher energy costs to the County in the future.

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

After the Development Plan, system design is completed, and guaranteed maximum price set, new equipment will need to be purchased and construction services utilized to install and complete the system. Under the energy savings performance contract, McKinstry Essention, Inc. is to conduct competitive selection for the purchase of equipment and the construction services. The reason this exemption is necessary is that the competitive selection is not expected to be a formal bid process for all of these purchases, and the current rules probably require formal bids otherwise. Because McKinstry is guaranteeing energy savings, it may be necessary to select a contractor who is not the low bidder, but one who is better able to meet the performance standard. It is anticipated that the bid process will be used for portions of the work which are not directly related to energy performance, but a request for proposal process used for energy performance based purchases. This proposed exemption recognizes the Request for Proposal (RFP) process as an appropriate alternative process, because specialized expertise, market conditions, technical complexity, and ability to save energy costs are integral elements of the energy savings performance contract.

The County's Request for Proposal process is so substantially similar to formal competitive bidding that there is no 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.

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

ORDER NO. 09-4-1-) IN THE MATTER OF GRANTING AN EXEMPTION
) FROM COMPETITIVE BIDDING FOR A
) CONSTRUCTION CONTRACT ON A STEAM
) HEATING SYSTEM FOR THE LANE COUNTY
) COURTHOUSE AND PUBLIC SERVICE BUILDING,
) AND ADDITION OF THIS WORK TO THE EXISTING
) ENERGY SAVINGS PERFORMANCE CONTRACT
) WITH MCKINSTRY ESSENTION, INC., FOR LANE
) COUNTY ADULT CORRECTIONS FACILITY.

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 2 Project Development Plan to McKinstry Essention, Inc.; and

WHEREAS, the addition of the Courthouse/PSB steam system work requires specialized expertise in order to understand and address technically complex steam heat generation systems, construction and operations, and energy management and control systems, and requires specialized engineering knowledge to evaluate and advise on redesign opportunities and to manage the components of the project; and

WHEREAS, because McKinstry is guaranteeing energy savings, it may be necessary to select a contractor who is not the low bidder, but one who is better able to meet the performance standard; and

WHEREAS, Oregon state agencies have begun using this method of purchasing, and have adopted public contracting rules to allow such purchases;

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 construction work necessary to remove and replace the steam heating system for the Lane County Courthouse and Public Service Building, and addition of this work to the existing Energy Savings Performance Contract with McKinstry Essention, Inc., for Lane County Adult Corrections facility.
2. The orders and findings in 1. above apply only to competitive selection for the above referenced work, and shall not be construed as approval of commitment to contract beyond the Phase 2 Project Development Plan.

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 2 Project Development Plan.
2. The Department of Management Services will report to the Board about the results of the Project Development Plan performed by McKinstry Essention, Inc., and the Board will determine whether to proceed after the Phase 2 Project Development Plan is completed.

Dated this 1st day of April 2009.

APPROVED AS TO FORM

Date 3/24/09 Lane county
[Signature]
OFFICE OF LEGAL COUNSEL

Peter Sorenson, Chair
Board of County Commissioners