

PROPOSED FINDINGS SUPPORTING AN EXEMPTION FROM COMPETITIVE BIDDING REQUIREMENTS AND USE OF THE CONSTRUCTION MANAGER/GENERAL CONTRACTOR METHOD OF PROCUREMENT FOR THE NMHS Gym Seismic Retrofit

Before the Local Contract Review Board,

In the Matter of Exemption)	FINDINGS OF FACT
Request of)	
Medford School District 549C)	
NMHS Gym Seismic Retrofit)	

ORS 279C.335 (1) requires, with certain exceptions, that all Public Improvement contracts be based on competitive bids and, under ORS 279C.375, awarded to the lowest responsive and responsible bidder. ORS 279C.335 (2) permits the Local Contract Review Board, which in this case is the Medford School District 549C School Board, to grant, under certain conditions, specific exemptions from the requirement for competitive bidding upon the approval of specified findings. Board Policy DJC-AR also exempts certain contracts from the requirement for competitive bidding upon the approval of certain findings.

OAR 137-049-0620 (1), allows the Local Contract Review Board to exempt a Public Improvement contract from the requirements to be competitively bid, provided written findings supporting the use of non-competitive bid process show compliance with OAR 137-049-0600 to 137-049-0690 and applicable statutes.

The hearing for review of these findings will be held at 6:00 PM on January 25, 2024 at Oakdale Middle School in the Multi-Purpose Room (230), 815 S. Oakdale Ave., Medford, OR 97501, as published in the public notice section of the Daily Courier and The Daily Journal of Commerce on January 10, 2024.

I
BACKGROUND

The Medford School District 549C will perform a seismic retrofit to the existing North Medford High School Gymnasium. This project would begin in June 2024, and continue through August 2024. The project would bring the Gymnasium building up to Immediate Occupancy seismic standards. The project includes new roofing, new LED lighting throughout the building, and sanding, repainting and refinishing the main gym floor.

This project will seismically rehabilitate the gym to life safety standards. Due to the aggressive timeline, a limited budget and the complexities involved in seismically upgrading an existing building, we believe it is in the best interest of the District to use the CM/GC method. With a project of this size and scope and its inherent

complexities, contractor input throughout the design process will be critical to the success of the project.

It is the recommendation of the School District to procure the project using the CM/GC contracting methodology. ORS 279C.332 (3) identifies the CM/GC methodology as an alternative contracting method under ORS 279C.335, which allows a contracting agency to procure construction-related, services that, include, among other things listed in ORS 279C.332 (3), a construction manager/general contractor:

- (a) Functioning as a member of a project team that includes the School District, the project architect or engineer and other consultants.
- (b) Reviewing and analyzing the project design in order to suggest changes to minimize potential errors, delays, unexpected costs and other problems during construction.
- (c) Estimating construction, materials, labor and other costs for the project.
- (d) Establishing a fixed price, a guaranteed price or other maximum price for the project.
- (e) Constructing portions of the project and subcontracting portions to other contractors.
- (e) Coordinating and overseeing the construction process.

The Medford School District 549C proposes utilizing the Construction Manager/General Contractor contract delivery methodology to obtain a proposal for the NMHS Gym Seismic Project. The use of a CM/GC contract on the project will allow the District to bring the General Contractor on board during the initial design phase providing value engineering services and a Guaranteed Maximum Price during the design phase in lieu of during the bid phase after full design documents have been established.

The exempted procurement process for this project includes the following:

A Request for Proposals (RFP) process pursuant to OAR 137-049-0640 to procure a CM/GC contract with a general contractor.

II

FINDINGS REGARDING PROCUREMENT OF CM/GC SERVICES

ORS 279C.335 (2) requires that an agency make certain finding as part of exempting public improvement contracts or classes of public improvement contracts from competitive bidding, as is the case with the procurement of CM/GC services. Pursuant to ORS 279C.330 (2), the term “findings” as used in ORS 279C.335 (2) means “the justification for a conclusion that a contracting agency, in seeking an exemption from the competitive bidding requirements of ORS 279C.335 (1), reaches based on the considerations set forth in ORS 279C.335 (2).

Those required findings, generally defined as “findings regarding competition” and “findings regarding significant cost savings”, are addressed below.

A. Findings Regarding Competition

ORS 279C.335 (2) (a) requires an agency to find that: *“It is unlikely that the exemption will encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts.”*

The Medford School District 549C finds that selecting the contractor through an exempted competitive proposal selection process in accordance with OAR 137-249-0600 and 137-249-0690 will not inhibit competition or encourage favoritism. This finding is supported by the following facts:

- 1) The proposed CM/GC alternative contract delivery methodology is a competitive proposal process that allows the Medford School District 549C to select a firm renovate the NMHS Gym Seismic Retrofit Project at the best possible value. Simple price competition is not feasible due to technical complexity associated with retrofitting projects of this nature and which are best addressed by a “full team” approach, with the CM/GC working with the District and the architect to solve specific challenges identified during the pre-construction phase. The technical complexity associated with installation of certain structural systems within the rehabilitation plan lends it to specialized contractors with knowledge of these systems.
- 2) The CM/GC contractor will be selected through an open and competitive proposal process as prescribed by ORS 279C.400 to 410 and related administrative rules, including but not limited to formal public advertising of the solicitation, an award made based upon identified selection criteria described in the RFP, and an opportunity to protest any such award.
- 3) The RFP will comply with the requirements set forth in ORS 279C.337, which specifies the information required to be included in solicitation documents for CM/GC services.
- 4) The District anticipates that competition for this contract will be similar to that experienced in other projects of this type. All qualifying proposers will be eligible to submit proposals for the project.
- 5) The evaluation and solicitation process will be open and impartial. Selection will be made on the basis of final proposal scores derived from price and other components, which expand the ground of competition beyond price alone to include experience, quality, innovation factors, etc.
- 6) The District will enter into contract negotiations with the highest-ranking proposer and, in the event that contract negotiations fail, the District will have the right to negotiate with the next-highest ranked proposer until a contract is entered into.

B. Findings Regarding Significant Cost Savings

ORS 279C.335(2)(b) requires an agency to find that “Awarding a public improvement contract under the exemption will result in substantial cost savings to the public contracting agency.” This finding is supported by the following facts:

- 1) The CM/GC will participate in the design phase of the project and thereby be able to obtain a complete understanding of the District’s needs, the architect’s design intent, the scope of the project, and the operations needs of the students and staff of North Medford High School.
- 2) During the design phase, the CM/GC will provide value engineering, update cost estimate information, and offer suggestions for improvement to the design, allowing the District to be provided the best value, at a Guaranteed Maximum Price, and potentially eliminate costly change orders resulting from unknowns in the field.
- 3) CM/GC contracts also produce cost savings in that, unlike with traditional low-bid contracting method, any savings accrue to the District instead of the selected contractor.
- 4) Using a CM/GC will allow the District more flexibility to develop, evaluate and implement design changes with less impact on construction cost and time.
- 5) As a public entity, the District needs budget predictability and the CM/GC process, with its negotiated GMP, will provide the necessary predictability.
- 6) The CM/GC method of contracting provides the greatest controls for limited budgets and therefore benefits the District.

ORS 279C.335(2)(b) sets forth various criteria that the local contract review board is to consider in approving a finding that the award of a public improvement contract under the CM/GC exemption will likely result in substantial costs savings and other substantial benefits to the District. Those criteria, and the findings relevant to such criteria, are as follows:

- a. How many persons are available to bid;
There are limited qualified specialized contractors to perform the scope of work associated with this project.
- b. The construction budget and the projected operating costs for the completed public improvement;
Limited or no additional funding is available for the NMHS Gym Seismic Project. The completion date also cannot be exceeded due to the need for the school to be opened and ready for students. Early reliable pricing provided by the CM/GC during the design phases will

reduce the potential for time delays due to later discovery of higher-than-anticipated costs and the consequent changes of direction.

- c. Public benefits that may result from granting the exemption;
Utilization of the CM/GC contract delivery process will allow the Medford School District 549C to deliver the most comprehensive project for the allotted funding. The use of a CM/GC contract will allow construction work to commence relatively rapidly on some portions of the project work while design continues on the remaining portions, thus shortening the overall duration of the Project to allow for completion by the due date. The CM/GC's participation and input during the design phase, and the resulting value-engineering and other cost savings, including but not limited to the establishment of a GMP, also benefit the public.

- d. Whether value engineering techniques may decrease the cost of the public improvement;
This work integrates specialized equipment and personnel to properly install certain items of the rehabilitation. A requirement to competitively bid this type of work would create additional expenses and lead to uncertainty regarding the installation of said items. For the reasons set forth above regarding the CM/GC's participation in the design phase, the CM/GC process offers a unique opportunity for value engineering that is not possible through the standard design-bid-build process.

- e. The cost and availability of specialized expertise that is necessary for the public improvement;
An exemption from competitive bidding will allow the Medford School District 549C to take advantage of specialized general contractors knowledgeable in the rehabilitation of existing structures and value engineer the project during the design phase. This will allow the Medford School District 549C to be provided the best value and potentially eliminate costly change orders resulting from unknowns in the field. Early selection of a CM/GC creates more informed, better-quality decision making by the project team, and a more efficient project team saves the District money. The project is highly complex because it involves significant construction over a relatively short period of time. Use of a CM/GC in conjunction with the team approach will result in a better coordinated project, speedy completion, and minimize disruption to the District's operations. The CM/GC clarifies several critical variables valuable to the project design. The CM/GC: (a) guarantees the maximum price (GMP) to complete the project; (b) determines the construction schedule; (c) establishes the sequence of work; (d) is contractually bound to implement the final project design within the GMP; and (e) participates as an essential member of the project design and construction team.

- f. Whether granting the exemption may reduce risks to the contracting agency, the state agency or the public that are related to the public improvement;
Risks associated with contract overruns, schedule increases and unqualified contractors are greatly reduced with the granting of the exemption to competitive bidding. The CM/GC process will mitigate risks as described above and as follows: (a) site coordination with city and county agencies; (b) site staging and laydown coordination; (c) site safety and work hours; (d) the establishment of the GMP will provide a complete project within the District's budget; and (e) a CM/GC contract allows for the District to engage in early work agreements that give more insight and site verification of unforeseen conditions to the architects, contractors and the District, as well as expediting the construction schedule by starting work early during the design phase.
- g. Whether granting the exemption will affect the sources of funding for the public improvement;
Granting the exemption will not affect funding sources for NMHS Gym Seismic Project.
- h. Whether granting the exemption will better enable the contracting agency to control the impact that market conditions may have on the cost and time necessary to complete the public improvement;
The specialty products, services and supplies needed under this contract are not particularly impacted by market conditions.
- i. Whether granting the exemption will better enable the contracting agency to address the size and technical complexity of the public improvement;
Implementation of this project involves a number of issues of technical complexity. Special skills and expertise are needed for optimizing the related foundation strengthening, seismic strengthening, and element installation. Specialized skills will also be required of the CM/GC to negotiate and price multiple options and schedule complex tasks. A high level of coordination among the District and the all the design and construction entities is required and facilitated by the CM/GC approach.
- j. Whether the public improvement involves new construction or renovates or remodels an existing structure;
The public improvements of NMHS Gym Seismic Retrofit project will renovate and rehabilitate the existing gymnasium.
- k. Whether the public improvement will be occupied or unoccupied during construction;

The major project improvements will occur while students and administration staff are absent from the building. Parts of the project may occur during normal school hours while students are in classes as long as they do not impact learning.

- I. Whether the public improvement will require a single phase of construction work or multiple phases of construction work to address specific project conditions; It is the intent of Medford School District 549C to construct the project in one phase.

And

- m. Whether the contracting agency or state agency has, or has retained under contract, and will use contracting agency or state agency personnel, consultants and legal counsel that have the necessary expertise and substantial experience in alternative contracting methods to assist in developing the alternative contracting method that the contracting agency or state agency will use to award the public improvement contract and to help negotiate, administer and enforce the terms of the public improvement contract.

Medford School District 549C has enlisted the assistance of an Architect/Engineering team as well as a Project Manager to assist with the enforcement of the terms of the scope of work associated with this public improvement contract. Medford School District 549C will enlist Thaddeus Pauck to assist the District with legal counsel and legal enforcement of the public improvement contract.

**III
SUMMARY**

Use of the CM/GC method of contracting for the NMHS Gym Seismic Retrofit Project is an appropriate use of the alternative contracting method under OAR 137-049-0620. Additionally, an exemption from competitive bidding requirements is justified under the criteria outlined in ORS 279C.330, findings have been developed in compliance with ORS 279C.335 (2), and the Medford School District 549C will perform the post-project evaluation required by ORS 279C.355. Based upon previously listed findings, the Medford School District 549C specifically concludes that:

- 1) It is unlikely the exemption will encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts;
- 2) The exemption will result in substantial cost savings to the affected Medford School District 549C for the services provided.

The Medford School District 549C submits that this request meets all of the criteria above and requests approval of this exemption. If you have any questions, please call Andy Chasteen at 541-842-3646.