



BOARD OF COMMISSIONERS

AGENDA REQUEST & STAFF REPORT

MEETING DATE: October 28, 2024

SUBJECT: Public Hearing regarding Energy Wise Services Protest of Document No. 2024-811 Notice of Intent to Award a Contract for the Deschutes County Fair and Expo Center Solar PV System to E2 Solar LLC.

BACKGROUND:

Oregon Revised Statute (ORS 279C.527-528) requires that public entities spend 1.5% of the total contract price of a public improvement contract for new construction projects \$5 million or greater on green energy technology or an alternative, regardless of funding source. Green energy technology includes solar technology such as photovoltaic systems. A photovoltaic (PV) solar technology system is proposed as part of the Courthouse Expansion project to comply with the 1.5% green energy technology requirement. Due to limitations of the Courthouse site and roof area the system is proposed to be constructed at the Deschutes County Fair and Expo Center.

On July 24, 2024 staff presented the Design-Build Findings of Fact and the Board approved Order No. 2024-028 exempting the Solar PV System project from competitive bidding and authorizing the use of design-build services of contracting for the Solar PV System.

On August 7, 2024 the Facilities Department issued a publicly advertised RFP for a Design-Build Contractor for the Solar PV Project in accordance with ORS 279C.400 – 279C.410. A copy of the RFP is attached hereto. The Facilities Department received seven (7) formal proposals by the 2:00pm deadline on September 11, 2024 and the proposals were reviewed by a scoring committee made up four (4) representatives from the Fair and Expo Center and the Facilities Department. Proposals were evaluated based on the following categories and ranked by their total score out of 100 points possible:

- Cover Letter (Pass/Fail)
- Proposed Responder's Project Team (20 points max.)
- Responder's Approach to Provide Solar and PV Related Services (20 points max.)
- Responder's Customer Service (20 points max.)
- Responder's Related Project Experience (20 points max.)
- Responder's References (10 points max.)
- Responder's Billing Rates/Fee Schedule (15 points max.)
- Exhibit C: Signature Sheet (Pass/Fail)

E2 Solar received the highest scoring by the committee during the evaluation process and is being recommended for award of the contract. A copy of the scoring summary for the selection process is attached.

On October 2, 2024 the Board considered the recommendation of the scoring committee at a regularly scheduled meeting. The Board voted 3-0 to approve Document No. 2024-811. Thereafter, on October 4, 2024, Deschutes County received a formal protest from Energy Wise Services of the Notice of Intent to Award, Document No. 2024-811. A copy of the protest letter is attached hereto.

In accordance with ORS 279B.405 and .410, the Energy Wise Systems protest is before the Board for consideration.

LEGAL CRITERIA:

1. ORS 279B.405

ORS 279B.405(4) states that the contracting agency (the Board) shall consider a protest if it is timely filed and contains the following:

- (a)** Sufficient information to identify the solicitation that is the subject of the protest;
- (b)** The grounds that demonstrate how the procurement process is contrary to law or how the solicitation document is unnecessarily restrictive, is legally flawed or improperly specifies a brand name;
- (c)** Evidence or supporting documentation that supports the grounds on which the protest is based; and
- (d)** The relief sought.

All four of the above criteria must be met. Energy Wise Services' protest contains sufficient information to identify the solicitation that is the subject of the protest. However, Energy Wise Solutions has not challenged the solicitation document as unnecessarily restrictive, legally flawed or as improperly specifying a brand name. Nor has Energy Wise Services presented grounds to demonstrate that the procurement process is contrary to law. The Board must decide if Energy Wise Services has met ORS 279B.405(4)(b).

Energy Wise Services' protest letter sets forth several factors which it states the County did not give sufficient weight to its proposal. These generally include that their proposal provides more value to the County in terms of simplicity, reliability, cost savings, and system size. The Board must decide if Energy Wise Services has met ORS 279B.405(4)(c) and (4)(d).

2. ORS 279B.410

ORS 279B.410 states, in relevant part:

(1) A bidder or proposer may protest the award of a public contract or a notice of intent to award a public contract, whichever occurs first, if:

(a) The bidder or proposer is adversely affected because the bidder or proposer would be eligible to be awarded the public contract in the event that the protest were successful; and

(b) The reason for the protest is that:

(A) All lower bids or higher ranked proposals are nonresponsive;

(B) The contracting agency has failed to conduct the evaluation of proposals in accordance with the criteria or processes described in the solicitation materials;

(C) The contracting agency has abused its discretion in rejecting the protestor's bid or proposal as nonresponsive; or

(D) The contracting agency's evaluation of bids or proposals or the contracting agency's subsequent determination of award is otherwise in violation of this chapter or ORS chapter 279A.

(2) The bidder or proposer shall submit the protest to the contracting agency in writing and shall specify the grounds for the protest to be considered by the contracting agency.

The Board must consider whether the stated reasons for Energy Wise Services' protest are cognizable under ORS 279B.410(1)(b) and whether Energy Wise Services has specified the grounds for the protest in accordance with the statute. Energy Wise Services' protest letter does not allege that E2 Solar's proposal is nonresponsive, nor that the County failed to evaluate the proposals in accordance with the RFP materials. The County did not reject Energy Wise Services' proposal as nonresponsive; however, during the scoring process it was noted that the required Exhibit C: Signature Sheet was not included with their proposal. Energy Wise Services was not notified that their proposal was incomplete considering that their proposal was scored 6th out of the seven (7) proposals.

Energy Wise Services has not alleged that the County's evaluation of proposals is "otherwise in violation" of ORS 279B or ORS 279A.

3. ORS 279B.060(8)

ORS 279B.060(8) provides discretion to the Board in evaluating proposals submitted in response to an RFP. It states that a contracting agency (the Board) may evaluate proposals on any of the following bases:

- (a) An award or awards based solely on the ranking of proposals;
- (b) Discussions leading to best and final offers, in which the contracting agency may not disclose private discussions leading to best and final offers;
- (c) Discussions leading to best and final offers, in which the contracting agency may not disclose information derived from proposals submitted by competing proposers;
- (d) Serial negotiations, beginning with the highest ranked proposer;
- (e) Competitive simultaneous negotiations;
- (f) Multiple-tiered competition designed to identify, at each level, a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower ranked proposers;
- (g) A multistep request for proposals requesting the submission of unpriced technical submittals, and then later issuing a request for proposals limited to the proposers whose technical submittals the contracting agency had determined to be qualified under the criteria set forth in the initial request for proposals; **or**
- (h) A combination of methods described in this subsection, as authorized or prescribed by rules adopted under [ORS 279A.065 \(Model rules generally\)](#).

The Board exercised its discretion to evaluate the proposals based solely on the ranking of proposals, consistent with ORS 279B.060(8)(a).

BUDGET IMPACTS:

Costs for the Solar PV Project are budgeted within the Courthouse Expansion project.

RECOMMENDED MOTIONS:

The Board has several options at the conclusion of the staff presentation and Energy Wise Services protest. The Board may:

- Hold the oral and written record open and continue the hearing to a date certain
- Close the oral record and hold the written record open to a date certain
- Close both the oral and written record and set a date certain for deliberations
- Close both the oral and written record and begin deliberations

If the Board decides to deny the protest, staff will prepare a proposed Order Denying Protest for Board signature. No revisions to Document No. 2024-811 will be necessary.

If the Board decides to grant the protest, staff will prepare a proposed Order for Board signature, which Order will include withdrawal of Document No. 2024-811. The Board's order granting the protest may direct dissemination of a new RFP for the Deschutes County Fair and Expo Center Solar PV System, or it may decide based on information presented in the

protest and at the public hearing to reconsider acceptance of the recommendation of the scoring committee and approve a new Notice of Intent to Award Contract.

ATTENDANCE:

Stephanie Marshall, Deschutes County Senior Assistant Legal Counsel

Lee Randall, Deschutes County Facilities Director

Eric Nielsen, Deschutes County Facilities Capital Improvement Manager

Wayne Powderly, Cumming Group