

**DESCHUTES COUNTY, Bend Oregon**

**FINDINGS OF FACT**

**Doc #2022-162**

**For Exemption from Competitive Bidding and the Use of the Construction  
Manager/General Contractor (CM/GC) Services of Contracting for**

*for*

**Deschutes County – Courthouse Expansion Project**

**1. General**

ORS 279C.335(2) permits a local contracting agency to exempt public improvement projects from traditional competitive bidding upon approval of Findings of Fact (“Findings”) showing that an alternative contracting process is a) unlikely to encourage favoritism or diminish competition and that b) the process will result in substantial benefit to the local contracting agency.

ORS 279C.400 – ORS 279C.410 describe the Request for Proposals method of solicitation as an alternative to traditional competitive bidding. Pursuant to ORS 279C.410(8), a public Agency using the Request for Proposals method may award a contract to the responsible proposer “whose proposal is determined in writing to be the most advantageous to the contracting agency based on the evaluation factors set forth in the request for proposals and, when applicable, the outcome of any negotiations authorized by the request for proposals.”

ORS 279C.330 defines “Findings” and identifies specific information to be provided as a part of Deschutes County’s justification. Under ORS 279C.335(5) a public hearing must be held before the findings are adopted, allowing an opportunity for interested parties to comment on the draft findings.

**2. General**

The current regional and local construction market is navigating unprecedented challenges, including labor shortages, global – local supply chain issues, as well as multiple public projects slated for construction over the coming year.

In consideration of these circumstances, Deschutes County Facilities seeks to utilize CM/GC Services, an alternative method of contracting, based on the Findings of Fact presented herein.

## FINDINGS OF FACT

### SUMMARY FINDINGS

- 1. Competition will not be diminished.** This exception will likely encourage more competition in this tight market, rather than diminish competition. The Request for Proposals selection process will be competitive based on relevant selection criteria, will be publicly advertised, and will be open to all interested proposers as described in the findings below.
- 2. This process will attract more contractors in this currently tight market.** This exemption will result in attracting more contractors in this tight market and result in better construction costs. Also, value will be added to the project and outcomes that would not otherwise be obtained under the standard design-bid-build process, especially in these current market conditions.

### SPECIFIC FINDINGS, WHICH SUPPORT THE SUMMARY FINDINGS, ARE AS FOLLOWS:

- 1. The CM/GC will be selected through a competitive process in accordance with the qualifications-based selection process authorized by Deschutes County Board of Commissioners. Therefore, it is unlikely that the awarding of the construction contract for the Project will encourage favoritism or substantially diminish competition. This finding is supported by the following:**
  - A. SOLICITATION PROCESS:** Pursuant to ORS 279C.360, the CM/GC solicitation will be advertised at least once in the Daily Journal of Commerce, as well as The Bulletin to maximize exposure.

The CM/GC proposals and interviews will be rated based on a predetermined list of criteria as required by ORS 279C.337 and the Attorney General's Model Contract Rules. The County will enter into contract negotiations with the highest-ranking firm. Should negotiations fail, the County will have the right to negotiate with the second highest-ranking firm.
  - B. FULL DISCLOSURE:** To ensure full disclosure of all information, the Request for Proposals solicitation package will include:
    - a. Detailed Description of the Project
    - b. Contractual Terms and Conditions
    - c. Selection Process
    - d. Evaluation Criteria
    - e. Role of Selection Committee
    - f. Provisions for Comments
    - g. Complaint Process and Remedies Available
  - C. COMPETITION:** As outlined below, the County will follow processes which maintain competition in the procurement of a CM/GC.

- a. The County anticipates that competition for this contract will be similar to that experienced in other Projects of this type. The competition will remain open to all qualifying proposers.
- b. The selection and solicitation process employed will be open and impartial. Selection will be made on the basis of final proposal scores derived from qualifications, price and other components, which expand the ground of competition beyond price alone to include experience, quality, and approach to market conditions.
- c. The competitive process used to award subcontracts for all competitively bid construction work will be specified in the CM/GC contract and will be monitored by the County. The County will designate in the contract the proposed percentage of construction work that must be subcontracted and may not be self-performed by the CM/GC. The CM/GC contract will comply with the subcontractor competition requirements in ORS 279C.337.

**D. SELECTION PROCESS:** Other highlights of the selection process will include:

- a. A mandatory Pre-Proposal Conference and Site Tour will be announced and held. This conference will be open to all interested parties. During this Pre-Proposal Conference, as well as any time prior to five (5) business days before the close of the solicitation, interested parties will be able to ask questions, request clarifications and suggest changes in the solicitation documents if such parties believe that the terms and conditions of the solicitation are unclear, inconsistent with industry standards, or unfair and unnecessarily restrictive of competition.
- b. The evaluation process will determine whether a proposal meets the screening requirements of the RFP, and to what extent. The following process will be used:
  - i. Proposals will be evaluated for completeness and compliance with the screening requirements of the RFP. Those proposals that are materially incomplete or non-responsive will not be accepted.
  - ii. Proposals considered complete and responsive will be evaluated to determine if they meet and comply with the qualifying criteria of the RFP. If a proposal is unclear, the proposer may be asked to provide written clarification. Those proposals that do not meet all requirements will be rejected.
  - iii. Proposals will independently be scored by the voting members of the Selection Committee. Scores will then be combined and assigned to each proposal.
  - iv. The Selection Committee will convene to select from the highest-scoring proposers, a finalist(s) for formal interviews.
  - v. The Selection Committee will conduct the interview/s with the short-listed proposer/s.
  - vi. The Selection Committee will use the interview to confirm the scoring of the proposal and to clarify any questions. Based upon the revised scoring, the Selection Committee will rank the proposers, and provide an award recommendation.
  - vii. Deschutes County will negotiate a contract with the top-ranked firm. If an agreement cannot be reached, the County will have the option to enter into an agreement with the second-ranked firm, and so forth.

- c. Competing proposers will be notified in writing of the selection of the apparent successful proposer and will be given seven (7) calendar days after receipt of the notice to file any questions, concerns, or protests about the selection process. Protests will be subject to the requirements of the OAR 137-049-0450, must be in writing, and must be delivered to the County within seven (7) calendar days after receipt of the selection notice. No protest of the award selection shall be considered after this time period.
- d. The contract achieved through this process will require the CM/GC to use an open competitive selection process to bid all components of the job. The CM/GC's general conditions and fee make-up of the total cost will be evaluated as one of the scoring criteria. General Conditions must include supervision, bonding, insurance, and mobilization, and must be within the current industry standard range. The CM/GC's fee must be within the industry's standard range for a project of this size. The entire value of the project will be awarded through open, competitive processes, at either the general contractor and/or the subcontractor level.

**2. The awarding of a construction contract for the Project using CM/GC method would offer the County critical construction expertise and value to the Project. This finding is supported by the following information required by ORS 279C.335(2)(b) and ORS 279C.330.**

- A. SPECIALIZED EXPERTISE:** Early selection of the CM/GC creates more informed, better quality decision making by the project team. A more efficient design and construction team saves the County money and helps the team anticipate and mitigate challenges in the current construction market.

This exemption will allow Deschutes County to proactively seek construction and constructability expertise during the design process, well in advance of the standard competitive bid timeline, to address the complexities of existing conditions and the current construction market, to help inform the best decisions on behalf of the County. Value will be added to the Project, via early and time-critical construction expertise, that could not otherwise be obtained to the same depth, duration, or quality.

- a. **COORDINATION:** Use of a CM/GC in conjunction with the team approach will result in a better coordinated Project. By having the CM/GC part of the project team early, the CM/GC will have time to fully evaluate and understand the existing facilities and systems, along with the intended design direction prior to start of construction. This information will inform design direction and approach to site logistics and safety and security measures during construction.
- b. The CM/GC clarifies several critical variables valuable to the Project design. The CM/GC will guarantee the maximum price (GMP) to complete the Project; determines the construction schedule; establishes the sequence of work; is contractually bound to implement the final Project design within the GMP; and participates as an essential member of the Project design and construction team. By utilizing the Request for Proposal selection process, which allows the County to consider factors such as experience and expertise in addition to price, the County will ensure that the selected CM/GC will be competent addition to the team.

The CM/GC would help assess material selections relative to lead time issues, best opportunities to secure subcontractors and labor for trade coverage, better pricing, and will

help discuss and/or adjust the work plan to address project and construction market needs. This component cannot be addressed by the usual design/bid/build method of construction because selection is typically based on the lowest bidder and occurs at the completion of the design process.

- c. **CONSTRUCTION COORDINATION:** A CM/GC participating on this Project would provide timely assistance and support to the development of the design and the most suitable approach to accommodate existing infrastructure and safety for the adjacent tenant.
- d. **MARKET CONDITIONS:** As well as the multitude of construction market factors that currently exist today in Oregon and Washington (e.g., supply chain and lead time issues, construction labor shortages, significant competition of and with other projects), the difficulty in establishing the best work sequence complicates our ability to accurately estimate the cost of this Project. The current construction market challenges the interest and capacity for contractors to bid for jobs. CM/GC Services, an alternative contracting method, will be more likely to result in a more experienced and better suited contractor for this Project than the usual competitive/low bid procurement.

## **B. OPERATIONAL, BUDGET, FINANCIAL DATA**

- a. **BUDGET:** The County has a fixed budget available for the Project, as well as a desired “as soon as possible” project delivery date. Early reliable pricing provided by the CM/GC, as well as scheduling and procuring help with long lead items during the design phase will allow for the potential to mitigate later related challenges.
- b. **LONG TERM COSTS:** The Project will require expertise regarding the constructability and long-term cost/benefit analysis of innovative design. This knowledge is best obtained directly from the construction industry. Many decisions will be required during the design process that will encompass immediate feedback on constructability and pricing. Under the traditional design-bid-build process, there is a high risk of increased change orders and schedule impacts for Project of this size and complexity. Since there are significant costs associated with delay, time is of the essence. Because the contractor participates during the design phase, the CM/GC process will assist in providing a scope of work, constructible design and phasing solutions that best meet the requirements of the Project with significantly lower risk to the Project’ costs. Involving the CM/GC during design will also allow Project risks to be addressed early and teamwork between the County, the design consultants, and the construction contractor (CM/GC) to minimize those risks.
- c. **FEWER CHANGE ORDERS:** When the CM/GC participates in the design process, fewer change orders occur during project construction. This is due to the CM/GC’s better understanding of the owner’s needs, the existing building and the architectural and engineering team’s intent. As a result, the Project is more likely to be completed on time and within budget. In addition, fewer change orders reduce the administrative time and costs of project management for both the County and the contractor.
- d. **GMP CHANGE ORDERS COST LESS:** CM/GC change orders will be processed at a lower cost under the GMP. The design-bid-build method typically results in the contractor charging 15%+ markup on construction change orders. The GMP method applies lower predetermined markups.

- e. **POTENTIAL SAVINGS:** Under the GMP method the County will enjoy the full savings, if actual costs are below the GMP. When the CM/GC completes the Project, any savings between the GMP and the actual cost accrue to the County.
- f. **CONTRACTOR'S FEE IS LESS:** Contracts with CM/GC's are designed to create a better working relationship with the contractor. Consequentially, the overhead and profit fee is typically slightly lower than the fee anticipated on similar design-bid-build contracts.

### C. ADDITIONAL PUBLIC BENEFITS

- a. **TIME SAVINGS:** The use of CM/GC as an alternative contracting method allows for more streamlined construction documents, in lieu of a fully bid set where everything needs to be documented for pricing. This will help streamline the project and the completion date.
- b. **COST SAVINGS:** The Project will benefit from the active involvement of a CM/GC contractor during the design process in the following ways:
  - i. The contractor's input regarding material availability and lead times, as well as the cost-effectiveness of various alternatives will guide the design toward the most economic choices.
  - ii. Consideration of the specific equipment available to the contractor will allow the designer to implement solutions that utilize the capacity and availability of that equipment.
  - iii. The contractor will be able to provide current and reliable information regarding the cost of materials that are experiencing price volatility and the availability of scarce materials.
  - iv. The contractor will also be able to order materials while design is being completed in order to avoid inflationary price increases and/or lead time issues, to mitigate the lead-times that may be required for scarce materials.
- c. **GUARANTEED MAXIMUM PRICE (GMP) ESTABLISHES A MAXIMUM PRICE PRIOR TO COMPLETION OF DOCUMENTS:** The CM/GC will be able to obtain a complete understanding of the County's needs, the architect's design intent, the scope of the Project, and the operational needs of the Project by participating in the construction document phase. With the CM/GC participating in this phase they will be able to offer suggestions for improvement and make suggestions that will reduce costs. With the benefit of this knowledge, the CM/GC will also be able to guarantee a maximum price to be paid by the County for constructing the Project.

### D. VALUE ENGINEERING

- a. **WITH THE DESIGN-BID-BUILD PROCESS:** If the County were to utilize the design-bid-build method, the contractor would not participate in this evaluation. In conducting value engineering under the design-bid-build approach, a value engineering consultant is hired to participate in the design and cost evaluation process. This process adds extra costs and administrative complications, without providing the same benefits of early and committed through construction contractor participation.
- b. **WITH CM/GC:** The CM/GC process offers a unique opportunity for value engineering that is not possible through the design-bid-build process. Value engineering is the means used to determine the best project design that meets the needs and priorities of the owner, within the

owner's budget. Value engineering is done most effectively by a team consisting of the owner, architect, consultants, and the contractor. When the contractor participates, the team can render the most comprehensive evaluation of all factors that affect the cost, quality, and schedule of the project.

- i. The CM/GC method has the benefit of:
  - the ability to best set/anticipate the schedule within these current market conditions;
  - the ability to anticipate long lead items and how to best gain subcontractor commitment to this project,

Through integrated participation, a project's scope and design evolve that has greater value for the owner, and is not likely to be the same project or product created by the design-bid-build method.

## **CONCLUSIONS OF LAW**

The above "Findings" show that the CM/GC process for the Construction of the Deschutes County Courthouse Expansion project complies with the requirements of ORS 279C.335(2) for exemption of the project from competitive bidding.

**PROPOSED ORDER**

**ORDER GRANTING EXEMPTION FROM COMPETITIVE BIDDING, AUTHORIZING THE CONSTRUCTION OF THE Deschutes County Courthouse Expansion PROJECT BY MEANS OF A CONSTRUCTION MANAGER/GENERAL CONTRACTOR AND AUTHORIZING SELECTION BY REQUEST FOR PROPOSAL**

WHEREAS, the Board of County Commissioners of Deschutes County is the Local Contract Review Board for the County and in that capacity has authority to exempt certain contracts from competitive bidding requirements of 279C and associated county code provision, and

WHEREAS, the Board has determined that the Construction of the Deschutes County Courthouse Expansion Project should be constructed by a CM/GC.

The Board finds as follows:

1. The Board adopts the specific "Findings of Fact" set forth above.
2. The "Findings" show that an exemption from competitive bidding for the project complies with the requirements of ORS 279C.335 (2) and the Attorney General's Model Contract Rules, OAR 137-049-0630 (2) for exemption of the project from competitive bidding.

NOW, THEREFORE, the Board of Commissioners orders as follows:

The contract for the construction of the Deschutes County Courthouse Expansion Project in Bend, Oregon by a Construction Manager/General Contractor is exempted from competitive bidding and the CM/GC shall be selected by the Request-for-Proposals method in accordance with the Attorney General's Model Contract Rules and the process described in the above findings.

Dated this \_\_\_\_ of \_\_\_\_\_, 2022

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PATTI ADAIR, Chair, County Commissioner

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ANTHONY DeBONE, Vice Chair, County Commissioner

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PHIL CHANG, County Commissioner