PORTLAND DEVELOPMENT COMMISSION

Portland, Oregon

ACTING IN ITS CAPACITY AS THE

LOCAL CONTRACT REVIEW BOARD

RESOLUTION NO. 7002

MAKING FINDINGS IN SUPPORT OF AND EXEMPTING THE DAWSON PARK IMPROVEMENT PROJECT FROM COMPETITIVE BIDDING

WHEREAS, by adoption of Resolution No. 3550, the Portland Development Commission ("PDC") Board of Commissioners (the "Board") was established as the agency's Local Contract Review Board (the "LCRB") pursuant to state law;

WHEREAS, Oregon Revised Statutes ("ORS") Chapter 279 and PDC's LCRB Administrative Rules (the "LCRB Rules") generally require that all public contracts be competitively bid;

WHEREAS, ORS 279C.335 and LCRB Rule Part 1 (III)(C)(1) allow certain exemptions to the general requirement for competitive bidding upon specific findings by the LCRB;

WHEREAS, ORS279C.355 and LCRB Rule Part 5 allow for alternative contract methods and specifically allow the use of an alternative contract method that the agency has not previously used if it identifies the proposed project as a pilot project for which PDC intends to determine pursuant to ORS 279C.355, if after completion, such pilot project has in fact resulted in substantial cost savings;

WHEREAS, PDC staff proposes to use an alternative Best Value Guaranteed Maximum Price (BV-GMP) Contract and to identify the Dawson Park Improvements Project (the "Project") as a pilot project; and

WHEREAS, after due public notice, staff held a public hearing to receive comments on the draft findings for the exemption for the Project as required by ORS 279C.355(5) and LCRB Rule Part 4(II)(B)(2)(I)(C). No one attended the public hearing and no public comments were received on the draft findings.

NOW, THEREFORE, BE IT RESOLVED, the Board acting as the LCRB hereby makes the findings set forth in Section II (the "Findings") of the Findings in Support of Exemption from Competitive Bidding for the Dawson Park Improvements Project attached hereto and fully incorporated herein as Exhibit A (the "Findings Report");

BE IT FURTHER RESOLVED, that based on the Findings Report, the LCRB hereby exempts the Project from the competitive bidding requirements of ORS Chapter 279 and the LCRB Rules and specifically approves the Project for the alternative contracting approach set forth in the Findings Report; and

BE IT FURTHER RESOLVED, that this resolution shall become effective immediately upon its adoption.

Adopted by Portland Development Commission on May 8, 2013

Gina Wiedrick, Recording Secretary

DATE: May 8, 2013

TO: The PDC Board of Commissioners acting in its capacity as PDC Local Contract Review Board

FROM: Patrick Quinton, Executive Director

SUBJECT: Findings in Support of Exemption from Competitive Low Bid Solicitation for the Dawson Park Improvement Project (the "Project")

I. BACKGROUND AND CONTEXT

The findings ("Findings") herein support a resolution by the Portland Development Commission ("PDC") Board of Commissioners ("Board"), acting as the PDC Local Contract Review Board ("LCRB"), exempting the Dawson Park Improvement Project ("Project") from the competitive bidding process.

Dawson Park is owned by the Portland's Bureau of Parks and Recreation ("PP&R") and is one of the top 24 historically significant parks in the city. The 2.02-acre park was acquired by PP&R in 1921. Dawson Park is located in Northeast Portland and is bounded on the east and west by N. Vancouver and N. Williams Avenues, and on the north and south by N. Morris and N. Stanton Streets within the Interstate Corridor Urban Renewal Area (the "URA").

Under various intergovernmental agreements between PDC and PP&R, PP&R has completed all necessary design, engineering, and permitting activities and PDC intends to coordinate all necessary procurement activities and construction administration services for the Project. The scope of the Project includes selected demolition, playground, walkways, splash pad, children's play area, irrigation, electrical lighting and other related civil, utilities, and landscape work. These improvements will make Dawson Park a more welcoming, active space and reflect community priorities of safety, access, and honoring the important historic role Dawson Park has played as a center of Portland's African-American community. Design work for the Project has been completed. The estimated construction cost for the Project is $1.3 million. If the exemption is approved by the LCRB, solicitation will occur in spring and summer 2013 with construction work anticipated to start around September 16, 2013 to reach final completion by May 15, 2014, with final closeout and acceptance extending through August 2014.

Based on the Findings set forth below, PDC staff is requesting to use an alternative Best Value Guaranteed Maximum Price Contract approach ("BV-GMP Contract") for the Project. In making this request, staff carefully reviewed the standard competitive low bid solicitation process and determined that many factors including, but not limited to, project complexity, schedule, overall project cost, and social equity goals would be met best with a BV-GMP Contract Approach.

Staff evaluated other alternative public contracting methods including Construction Management/General Contractor ("CM/GC"), Design Build, and Multi-step selection that are typically deployed at the beginning of the design and engineering phase. Because design has already been completed for the Project, those other methods are not appropriate for the Project.

Staff has reviewed other public entities' use of the BV-GMP Contract Approach as an innovative method of selecting a general contractor using a request for proposals process on the basis of best value ("BV") according to objective criteria. Upon selection, PDC and the general contractor will negotiate and enter into a Guaranteed Maximum Price Contract ("GMP Contract"). The BV-GMP Contract approach compares the strengths, weakness, risks, performance and price of each proposal in determining the best overall value then locks in the Project cost with the GMP Contract.

After considerable review, staff requests that the Project be considered a pilot project within the meaning of ORS 279C.335(2)(c) (the "Pilot Project") using the combination of the BV Request for Proposals ("RFP") process and the subsequent negotiation of a GMP Contract. PDC has not used the BV-GMP Contract approach before. Additional information analyzing alternative contracting methods prepared by staff for the Executive Director is attached as Attachment A.

II. FINDINGS

ORS 279C.335 and PDC's LCRB Administrative Rules ("LCRB Rules") provide that the LCRB may exempt certain public contracts from the low competitive bidding process upon the LCRB making the following Findings:

1. It is unlikely that such exemption will encourage favoritism in the awarding of the of a public contract or substantially diminish competition for the contract; and

2. The awarding of public contract under the exemption will result in substantial cost savings to the agency.

In making the Findings the LCRB may consider the type, cost and amount of the contract, the number of persons available to bid and such other factors as may be deemed appropriate.

No Favoritism and No Diminished Competition

The contractor selection will be accomplished by issuing a competitive RFP with objective best value selection criteria. Any general contractor may respond to the BV RFP. Among other things, the BV RFP will require competitive subcontracting, optimal schedule completion, and inclusion of opportunities for Minority/Women/Emerging Small Business ("M/W/ESB") and Disadvantaged Business Enterprise ("DBE") firms and demonstrated ability to comply with PDC's Equity Policy, including the Workforce Training and Hiring Program. A committee will evaluate the proposals, followed by negotiations with the most qualified, responsive and responsible bidder to establish a GMP Contract. Based on the foregoing, the LCRB should find that the use of the BV-GMP Contract approach in connection with the Project does not result in favoritism or diminished competition.

Substantial Cost Savings

Because the Project is a Pilot Project using a BV-GMP Contract approach not previously used by PDC, ORS 279C.335(2)(c) provides that the contracting agency, as an alternative to a finding of substantial cost savings, may use an alternative contracting method that the contracting agency had not previously used and the contracting agency may make a finding that identifies the project as a Pilot Project for which PDC intends to determine whether the use of the alternative contact actually results in substantial cost savings to the agency. The LCRB should find that the Project is a Pilot Project for which PDC intends to determine upon completion of and final payment under the GMP Contract if the Pilot

Project has in fact resulted in substantial cost savings and shall prepare, pursuant to ORS 279C.355 an analysis and conclusion regarding the actual cost savings, if any, in its evaluation.

III. PUBLIC HEARING

In accordance with ORS 279C.335(5) and the LCRB Rules, Part 4(II)(B)(2), PDC published notice of the required public hearing which was held on March 20, 2013. No public comments or public testimony was received.

IV. RECOMMENDATION

Commission staff recommends that the LCRB adopt a resolution making the Findings and authorizing the PDC to exempt the Project from the competitive low bid solicitation process in favor of using a BV-GMP Contract approach.

ATTACHMENTS

A. BV-GMP Summary Briefing Report December 18, 2012

Additional Information

Best Value GMP Contract
Alternative Construction Contract Briefing
December 12, 2012

Summary

This project is proposed as an alternative construction contract pilot project (Pilot Project) allowed per Oregon Revised Statutes (ORS) 279C.355 upon approval of Local Contract Review Board (LCRB) exemption findings (Findings). The Best Value (BV) contractor selection process is currently being tested in several states as innovative means of selecting a general contractor using a Request for Proposals (RFP) proposal process to award a contract to the lowest responsible bidder on the basis of BV according to objective criteria and then negotiating and entering into a Guaranteed Maximum Price Contract (GMP).

The BV selection process compares the qualifications, schedule, quality, strengths, weakness, risks, other factors in addition to price of each proposal in determining the best overall value. This is considered an alternative procurement process where other key factors in addition to price can be considered in the evaluation and selection process to maximize benefits and enhance the long-term performance and value of construction. The goal is to obtain the most advantageous balance of price, quality, and performance achieved through competitive procurement methods in accordance with stated selection criteria.

Examples

In California Best Value (BV) as of January 2012 is being used as a pilot on Higher Education Projects with a construction cost over $1.0 million and require pre-qualification for each project in accordance with the project scope.

California established five bidder qualification criteria (in addition to price): Demonstrated Management Competency, Financial Condition, Labor Compliance, Relevant Experience and Safety Record. The maximum qualification points, for each proposal is 1,000 (distributed according to priority needs, none less than 150 points).

An evaluation committee ranks each proposal and the total Bid Price (for the work) is divided by the 'average' of the Qualification Points (QP) in a unit of measurement indicating dollars per quality point ($/QP). Formula is Bid$/QP = $/QP which results in Best Value Score ("BVS"). The bidder with the lowest BVS score is the apparent most responsible bidder. The BV is being used as a selection process, not a delivery method (aka form of contract).

Minnesota uses selection criteria to include: quality performance, timeliness of performance, customer satisfaction, and on-budget performance, ability to minimize change orders, ability to prepare plans, technical capacity, qualifications, and ability to assess and minimize risks. If criteria other than price are used, the solicitation document must clearly state the relative importance of price and other factors. They allow a number of ways to score evaluation criteria weighted against price including some pass/fail criteria.

Why to Use Alternative Contract Selection Process

<u>Flaws & Limitations of Low-Bid System:</u> Often awarding projects to the low bidder can result in false economy if there is subsequent default, late deliveries, defective or substandard work, or other

unsatisfactory performance. ~ Federal Acquisition Regulation ("FAR"), Section 9.103(c), 48 C.F.R. § 9.103(c). This typically happens when the low bidder lacks the proper resources and/or qualifications to do the job; underbids the work; does not adequately manage schedule, costs or subcontractors; fails to properly sequence or supervise the work; lower quality work, etc.

Delayed and/or unsatisfactory performance, greatly escalate contract costs and cause serious administrative and logistical problems for contracting agencies. These problems, plus excessive claims and change orders, also common on low-bid projects, translate into "total project" costs far in excess of the original "low bid" quoted. Simply stated, if the work is not done right the first time by a qualified reliable contractor, the agency loses.

Alternative Contract Exemption to Low Bid

Pursuant to ORS279C prior to deployment of any alternative contract selection or award; the agency must prepare findings, conduct a hearing, obtain LCRB Board approval then proceed with advertisement, selection and award. Typical alternative contracts include Construction Manager/ General Contractor (CM/GC, Design Bid or Multi-Step process. Typically alternative contracts are best deployed on projects with a construction value of $5 million or more, in part due to the effort by the agency and contractor to respond to this type of procurement. ORS279C also allows for 'pilot' alternative contracts.

The "Best Value" Alternative Contract: The BV selection approach allows contracting officials to closely examine, evaluate and rate contractors on their respective qualifications and performance capabilities and choose the 'best qualified' contractor who offers the 'best' price. The agency still retains the right to choose the low bid --it just can't be forced to accept the low bid when it doesn't offer the best value. A contractor whose price is 10 percent higher than the low bidder may be worth it if its track record and qualifications; less change orders, no claims, better quality are 10 times better than the low bidder.

Key Evaluation Criteria: BV enables contracting agencies to more effectively screen bidders, and use an evaluation process that is fair and balanced to select a contractor who present less risk and who are more likely to deliver the best overall value for the agency. These results are achieved because contracting officials can consider various factors in the selection process to include:

Technical Qualifications	Project Planning
Past Performance	Quality Control
Management Personnel	Safety Programs
Staffing Capabilities	Financial Capability
Subcontracting Plans	Local Economic Benefits (jobs and materials)

By emphasizing contractor performance as an issue as well as price, owners of projects get performance based accountability, as well as full and fair competition. This leads to reduced claims, protests and litigation, while promoting public benefits, safety and skill training, better quality longer lasting projects. Also it also allows for diversity initiatives to be included in the selection process as well initiatives to purchase local goods and services. Overall this enables agencies to support positive societal impacts that local benefits to the community.

Pros and Cons of Best Value Contracting

Assumptions

- Need qualified team who understand construction to rate/rank/select BV most responsible contractor
- Need qualified team and agency procurement staff to prepare BV RFP proposal and ranking/scoring criteria
- Need key agency staff to negotiate contract terms, risks etc. with most responsible BV contractor to establish a GMP
- Need qualified key staff to manage actual construction project and derive to the extent possible and practicable the desired goals of the project – "best value"
- Findings for exemption do not encounter any substantive public comment and the Board approves the alternative contract Pilot project

Advantages

- Provides agency ability to evaluate contractor capabilities in addition to cost
- Enhanced ability for agency to select 'most' qualified responsible contractor at best cost
- Likely reduce cost overruns, changes in work and claims
- Likely improve overall quality, longer lasting and better built projects
- Likely improve agency overall project satisfaction
- Likely enhance agency goals in Minority/Women/Emerging Small Business utilization
- Likely enhance local purchasing of goods and services
- Upon successful completion, may establish another alternative method of agency construction project selection and delivery (or be modified to try on another project)

Disadvantages

- Contractor costs and time to prepare the response to the RFP (Proposal), prepare detailed cost information, selection interviews, undertake negotiations may inherently limit the potential pool of proposers; these are up front sunk costs and only recovered if that contractor is selected. This may limit number of interested contractors
- Agency time and effort to prepare Findings, conduct hearing and obtain LCRB approval to exempt the contract
- Agency and other project team members - time and effort to prepare a RFP, review proposals, conduct interview and negotiate GMP
- Subjective proposal evaluation and BV contractor selection may result in higher level of bid protest or lawsuit
- Highly technical aspects of the RFP Proposal may make evaluation and scoring difficult
- Entire BV selection and GMP contract delivery may not meet or exceed goals and expectations and potentially may actually cost more

- Pilot project may fail and upon reporting back to the LCRB and may inhibit future use of similar delivery on other projects in the future.

Risk Mitigation

- Pilot project on hard construction cost under $2 million reduces overall risk to agency in terms of protest of findings, protest of award or overall risk of managing GMP contract
- A robust RFP with clear instructions on requirements & selection criteria and open and transparent selection process should avoid protest or lawsuits
- Assemble qualified team of RFP Proposal reviewers
- Perform outreach to potential contractors and subcontractors
- Use PDC key procurement staff to manage selection and award process
- Use PDC key construction staff to negotiate GMP terms and conditions
- Backup strategy if Findings not approved or RFP Protest – use low bid solicitation
- Backup strategy if no proposals are received or no contract awarded –use low-bid solicitation or sole source direct contract
- Deploy strong construction project management to best obtain goals and minimize contract risk to agency
- Monitor and report success or failure of overall construction project

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RESOLUTION NO. 7002

RESOLUTION TITLE:

MAKING FINDINGS IN SUPPORT OF AND EXEMPTING THE DAWSON PARK IMPROVEMENT PROJECT FROM COMPETITIVE BIDDING

Adopted by the Portland Development Commission on May 8, 2013

PRESENT FOR VOTE	COMMISSIONERS	VOTE		
		Yea	Nay	Abstain
☑	Chair Scott Andrews	☑	☐	☐
☐	Commissioner Aneshka Dickson	☐	☐	☐
☑	Commissioner John Mohlis	☑	☐	☐
☑	Commissioner Steven Straus	☑	☐	☐
☑	Commissioner Charles Wilhoite	☑	☐	☐

☐ **Consent Agenda** ☑ **Regular Agenda**

CERTIFICATION

The undersigned hereby certifies that:

The attached resolution is a true and correct copy of the resolution as finally adopted at a Board Meeting of the Portland Development Commission and as duly recorded in the official minutes of the meeting.

[signature]	**Date:** May 16, 2013
Gina Wiedrick, Recording Secretary	