

RESOLUTION NO. 3065

A RESOLUTION OF THE BEND CITY COUNCIL IN ITS CAPACITY AS THE LOCAL CONTRACT REVIEW BOARD AUTHORIZING AN ADDITIONAL EXEMPTION TO THE LOW-BID REQUIREMENT FOR CONSTRUCTION CONTRACTS

FINDINGS

- A. The City Council, acting as the Local Contract Review Board (LCRB), adopted Resolution No. 2967 authorizing certain exemptions to the requirement that construction contracts be awarded by a formal competitive bid process.
- B. The LCRB wishes to add an additional exemption to the low-bid requirement for public contracts to be applicable only to the contract for completion of the unfinished work on the Water Reclamation Facility capacity improvement project. The exemption adopted by this Resolution is in addition to the exemptions adopted in Resolution No. 2967 and is not subject to the terms of that resolution.
- C. The completion of the work described in Recital B presents a unique situation in which one contractor, M.A. Mortenson Company, has acquired so much knowledge about the work that has been performed and that remains to be performed that the use of a competitive bid would not result in any cost savings because no other contractor could provide a competitive bid given the cost of obtaining the information that Mortenson already has. No other contractor would be able to proceed on the same time schedule. Furthermore, the City can save hundreds of thousands of dollars by avoiding hiring an engineer to prepare specifications which would be needed for a competitive process and that are not needed for Mortenson to complete the work.
- D. The City is adopting this Resolution after a duly-noticed public hearing.

Based on these findings, the City of Bend resolves as follows:

1. The City Council adopts the findings stated above and the Findings included in Exhibit A.
2. The City adopts an individual exemption for the contract for completion of the Secondary Expansion Protect and authorizes direct appointment of M.A. Mortenson Construction Company to complete the work.

Adopted by Roll Call Vote: April 19, 2017

YES: Casey Roats, Mayor
Sally Russell
Bill Moseley
Bruce Abernethy
Nathan Boddie
Justin Livingston
Barb Campbell

NO: NONE



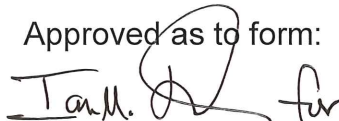
Casey Roats, Mayor

Attest:



Robyn Christie, City Recorder

Approved as to form:



Mary A. Winters, City Attorney

EXHIBIT A

CITY OF BEND WATER RECLAMATION FACILITY CAPACITY IMPROVEMENTS

FINDINGS IN SUPPORT OF DIRECT APPOINT CMGC PROCUREMENT

1. General

ORS 279C.335(2) allows public agencies to create exemptions to the competitive bidding requirements for construction contracts if the agency makes certain findings.

The City adopts these findings to support its decision to create an exemption to competitive bidding under ORS 279C. 335(2) to authorize direct appointment of MA Mortensen Co. to complete the improvements to the City's Water Reclamation Facility (WRF). This process is necessary given the fact that the previous contract was de-scoped leaving work to be completed and Mortenson is the only firm that has the necessary knowledge of the existing WRF to complete the work in a cost effective and expeditious manner.

This procurement method provides a high degree of assurance that the overall goals of increased treatment capacity at the earliest possible date will be met because it takes advantage of Mortenson's exclusive knowledge of the project.

2. Project Background

Planning for expansion of the WRF began in 2008. Since that time, a significant amount of design and construction has taken place. In 2013, the City entered into a low-bid contract with Apollo, Inc. to complete a significant upgrade to the facility. In October 2015, the City removed a portion of the remaining work from Apollo's contract because the project was significantly behind schedule and the City lost confidence in Apollo's ability to finish the project in a timely, workmanlike and otherwise suitable manner. The proposed project will complete the remainder of the work removed from Apollo's contract. In order to continue meeting the demands of the growing community and DEQ permit requirements, it is imperative to move forward with this project at the soonest possible date.

The proposed project includes improvements to the following systems:

Yard Piping – Increases hydraulic capacity

Aeration Basin Upgrades – Improves both quantity and quality of secondary treatment

Plant Effluent Facilities – Improves both quantity and quality of final treatment

This is a complex project that contains various mechanical, electrical, control, piping, and structural systems that must all integrate and work well together. This work must also be completed while the existing plant is operating at full capacity while continuing to meet DEQ treatment requirements.

The project also requires close coordination with various internal and external stakeholders which include the City of Bend Utilities Department to maintain existing plant operations at all times, Deschutes County as the Authority Having Jurisdiction for

construction permits, Oregon Department of Environmental Quality as the funding and treatment permitting agency, and federal agencies including the Federal Aviation Administration due to the proximity to the Bend Airport and Bureau of Land Management due to proximity to federal lands.

Because of the complexities and unique circumstances of this project, direct appointment of Mortenson to complete the work is the best path forward.

The following findings justify an exemption to allow direct appointment of Mortenson.

3. Findings Justifying Competitive Bidding Exemption

(a) The Exemption Is Unlikely to Encourage Favoritism or Substantially Diminish Competition for Public Contracts

The City of Bend supports open competition for its public improvement contracts. Under normal circumstances the City would engage in a competitive process to procure services for the proposed work. However, this is a unique situation which requires a unique solution.

There is no risk of favoritism or diminished competition because (a) no other contractor possesses the unique knowledge and experience of Mortenson and (b) contract award will be vetted in an open and public process before the Local Contract Review Board to ensure fairness and objectivity. The City Attorney, City Manager, and Procurement Manager will also be fully engaged throughout the process.

Furthermore, although the direct appoint selection of the prime contractor is not a competitive process, the City will impose contract provisions to ensure competitive sub-contractor quotes for much of the trade work as well as limitations on overhead and profit.

(b) The Exemption Is Reasonably Expected to Result in Substantial Cost Savings

Selecting a contractor with extensive project knowledge will likely result in overall cost savings as compared to any other contractor. This leads to fewer contested issues and cost increases throughout the course of the project that might otherwise occur when using a contractor unfamiliar with this partially completed, complex and mission-critical project. Significant cost savings are also likely to be accomplished by the reduced staff and engineering consultant effort necessary to administer the contract.

Contractor input during the pre-construction process is also expected to contribute to costs savings. The City may consider value engineering, concurrent delivery, and other efficiency measures in order to reduce costs.

The following factors support the conclusion that it is reasonable to expect substantial cost savings:

- (A) No other contractor is available to bid that has the unique knowledge and experience Mortenson possesses;
- (B) The City has already incurred significant financial damages as a result of the previous contractor's poor performance and paying for design re-packaging, the learning curve and the heightened risk of delays and claims with a new contractor mid-stream is not recommended;
- (C) The public will benefit from reduced costs and earlier delivery when compared to what a new contractor is likely to achieve
- (D) With a uniquely qualified construction manager (CM) under contract who would also serve as the contractor, the City would optimize opportunities for value engineering;
- (E) At this juncture in the partially-completed, complex, mission-critical and already severely late project, the uniquely specialized expertise of Mortenson is necessary for this project;
- (F) Given that this is a secured facility that handles human waste and will be operational during the work, we believe hiring the uniquely qualified contractor will increase public health and safety;
- (G) For all the reasons above, we believe the direct appointment award will reduce risks to the City, the State and the public;
- (H) Initial consultations with DEQ suggest that granting this direct appointment exemption will not materially change the funding sources;
- (I) There are no special market conditions that the City is attempting to better control, other than the reality that no other contractor in the market has the unique knowledge and experience of Mortenson;
- (J) For all the reasons above, we believe the direct appointment award will allow the City to better address the size and technical complexity of this partially-completed, complex, mission-critical and already severely late project;
- (K) This project involves renovation and expansion of an existing and in-use facility that provides a core function and service for the public;
- (L) The facility will be occupied and operational during the work, adding to its complexity and risk; and
- (M) The work will involve two phases including an initial pre-construction (CM) phase followed by a General Contractor (GC) phase after a Guaranteed Maximum Price (GMP) is agreed to; and
- (N) The City itself has experience in CMGC contracting and is employing the use of an outside attorney experienced in CMGC and alternative contracting approaches in general to help negotiate, administer and enforce the terms of the contract.

(c) The Exemption Will Result in Additional Public Benefit

Time is of the essence to complete the work and Mortenson is the only contractor that can step into this project without substantial investigation, learning, and cost to determine what work has been completed and what work is left to do. The prior

contractor stopped performing the work in its contract in May of 2016. Since that time, Bend has continued to grow rapidly. It has become apparent that the treatment capability of the WRF, as it presently configured, will not be able to reliably keep pace if work to complete the upgrade is not completed in a timely fashion. Direct appointment will allow the work to be completed several months sooner than if a competitive process is used. Specific concerns include:

- Need to continue to comply with DEQ permit requirements especially total nitrogen removal
- Recent business expansion plans including St. Charles Hospital, Bend Research, Jeld Wen, multiple breweries, Patheon Research, Fed Ex, and Humm Kombucha to name a few
- Ability to reliably deliver Class A re-use water to Pronghorn Resort per existing contract
- Urban Growth Boundary expansion recently added approximately 2,400 acres of mostly housing and employment lands to the City. There is significant interest in developing these new lands which will all contribute flow to the WRF.

4. Other Related Findings

Goods or Services are Available from Only One Source

Mortenson provided construction management services over 8 months on the prior WRF expansion project that was not ultimately completed. Mortenson is still under contract with the City for that work. In providing construction management services, they have gained extensive knowledge of the current status of the facilities (35 buildings/structures over 25 acres), the plans (358 pages), and the specifications (8 volumes with nearly 4,000 pages) which is extremely important in order to complete the remaining work. No other contractor has this unique knowledge or could step into this project and complete it like Mortenson can. It would be time consuming and expensive for another contractor to gain this level of understanding and the City would essentially waste its significant investment with Mortenson (about \$800,000 to date) if another contractor was selected. Furthermore, if a contractor unfamiliar with the project were retained, the City would need to engage the designer, CH2M Hill, to re-package the drawings and specifications in a way that would allow a project new-comer to understand the existing configuration of the plant; what work has been done and what work has not been done and the current status of each. This additional effort as compared to direct appointment is estimated at \$210,000. Mortenson's deep familiarity with the project and the status of the completed v. uncompleted work gained over 8 months of experience as construction manager of the project will avoid the re-packaging expense, avoid the learning curve with the plans and specifications, and will significantly reduce the risk of further schedule delays or further claims from a less-knowledgeable contractor coming to the project mid-stream. Finally,

if the re-packaging work was required for a new contractor, project completion would be delayed about 5 months.

5. Summary

Using a contractor with extensive knowledge of the project provides many favorable benefits. The use of a direct appoint procurement process will not diminish competition or result in favoritism and will likely result in overall cost savings to the City. Most important, completion of the project in a timely manner reduces risk to the City and ensures quality, safety, and reliability both during and after construction.