

PROPOSED FINDINGS SUPPORTING AN EXEMPTION FROM COMPETITIVE BIDDING REQUIREMENTS AND USE OF THE CONSTRUCTION MANAGER/GENERAL CONTRACTOR METHOD OF PROCUREMENT FOR NEHALEM ELEMENTARY SEISMIC REHABILITATION

Before the Local Contract Review Board,

In the Matter of Exemption)	FINDINGS OF FACT
Request of)	
Neah-Kah-Nie School District)	
Nehalem Elementary)	
Seismic Rehabilitation)	

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 Neah-Kah-Nie School Board, to grant, under certain conditions, specific exemptions from the requirement for competitive bidding upon the approval of specified 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 6:30 PM on December 12, 2016 at the Neah-Kah-Nie District Office, 504 N Third Avenue, Rockaway Beach, OR 97136, as published in the public notice section in the Daily Journal of Commerce on November 28, 2016 and the Tillamook Headlight-Herald on November 30, 2016.

**I
BACKGROUND**

Neah-Kah-Nie School District received a grant through Oregon's Seismic Rehabilitation Grant program for a total value of \$1,396,000. The purpose of the grant is to seismically retrofit the Nehalem Elementary building to meet or exceed the code requirements outlined in ACSE41-13. It was determined during the initial grant application that the building would be renovated during the rehabilitation work as permitted by budget. All renovated areas will increase Life and Safety elements.

This Project is limited to the funding outlined in the grant package, additional funding is not available. The current budget does not reflect a contingency typically allotted for a project of this size and scope. 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's (a) functioning as a member of a project team that includes the 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, constructing portions of the Project and subcontracting portions to other contractors, and (f) coordinating and overseeing the construction process. In this Project, the CM/GC contract allows the School 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 Neah-Kah-Nie School District proposes utilizing the Construction Manager/General Contractor contract delivery methodology to obtain proposals for the Nehalem Elementary Seismic Rehabilitation.

The exempted procurement process for this Project includes the following:

- 1) 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 findings 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 requirement 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 Neah-Kah-Nie School District finds that selecting the contractor through an exempted competitive proposal selection process in accordance with OAR 125-249-0620 and 125-249-0630 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 Neah-Kah-Nie School District to select a firm to Seismically Rehabilitate Nehalem Elementary School at the best possible value. Simple price competition is not feasible due to technical complexity associated with a seismic rehabilitation Project of this nature. The technical complexity of the 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.

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:

- a. How many persons are available to bid;
 - 1) 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;
 - 1) Limited or no additional funding is available for the Nehalem Elementary Seismic Rehabilitation above and beyond the awarded grant funding source.
- c. Public benefits that may result from granting the exemption;
 - 1) Utilization of the CM/GC contract delivery process will allow the School District to deliver the most comprehensive project for the allotted funding.
- d. Whether value engineering techniques may decrease the cost of the public improvement;
 - 1) 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.

- e. The cost and availability of specialized expertise that is necessary for the public improvement;
 - 1) An exemption from competitive bidding will allow the Neah-Kah-Nie School District to take advantages of specialized general contractors knowledgeable in the rehabilitation of existing structures and value engineering the Project during the design phase. This will allow the Neah-Kah-Nie School District to be provided the best value and potentially eliminate costly change orders resulting from unknowns in the field.

- f. Any likely increases in public safety;
 - 1) There are currently concerns with public safety during the scheduled work as Nehalem Elementary School will remain functional during the proposed work. The CM/GC will assist with the development of a safety plan.

- g. Whether granting the exemption may reduce risks to the contracting agency, the state agency or the public that are related to the public improvement;
 - 1) Risks associated with contract overruns, schedule increases and unqualified contracts are greatly reduced with the granting of the exemption to competitive bidding.

- h. Whether granting the exemption will affect the sources of funding for the public improvement;
 - 1) Granting the exemption will not affect funding sources for Nehalem Elementary Seismic Rehabilitation.

- i. Whether granting the exemption will better enable the contracting agency to control the impact that market conditions may have on the cost of and time necessary to complete the public improvement;
 - 1) The specialty products, services and supplies needed under this contract are not particularly impacted by market conditions.

- j. Whether granting the exemption will better enable the contracting agency to address the size and technical complexity of the public improvement;
 - 1) Implementation of this Project involves a number of issues of technical complexity. Special skills and expertise are needed for optimizing the related foundation strengthening and the seismic strengthening and element installation.

- k. Whether the public improvement involves new construction or renovates or remodels an existing structure;
 - 1) The public improvements of Nehalem Elementary Seismic Rehabilitation will renovate and seismically rehabilitate the building.

- i. Whether the public improvement will be occupied or unoccupied during construction;
 - 1) The project improvements will occur while the building is occupied by summer staff. Parts of the Project may occur during normal school hours while students are in classes.

- m. Whether the public improvement will require a single phase of construction work or multiple phases of construction work to address specific project conditions;
 - 1) It is the intent of Neah-Kah-Nie School District to construct the Project under a single phase of the Project.

and

- n. 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 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.
 - 1) Neah-Kah-Nie School District will enlist the assistance of ZCS Engineering, Inc. as the Project Manager to assist with the enforcement of the terms of the scope of work associated with public improvement contract. Neah-Kah-Nie School District will enlist the Hungerford Law Firm, L.L.P. 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 Nehalem Elementary Seismic Rehabilitation is an appropriate use of that 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 Neah-Kah-Nie School District will perform the post project evaluation required by ORS 279C.355. Based upon previously listed findings, the Neah-Kah-Nie School District 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;
and
- 2) The exemption will result in substantial cost savings to the affected Neah-Kah-Nie School District for the services provided.

The Neah-Kah-Nie School District submits that this Request meets all of the criteria above and requests approval of this Exemption. If you have any questions, please call Mark Sybouts at 503-355-3434.

Mark Sybouts
Neah-Kah-Nie School District
Business Manager

Date

Reviewed by Neah-Kah-Nie School District Attorney:

Reviewed by Legal Counsel

Date