

PASSED

IN THE BOARD OF COUNTY COMMISSIONERS OF LANE COUNTY, OREGON
SITTING AS LOCAL CONTRACT REVIEW BOARD FOR HOUSING AND
COMMUNITY SERVICES AGENCY OF LANE COUNTY OREGON

ORDER NO.

05-5-11-1

)In the Matter of Adopting
)Special Class Procurements and
)Exemptions to Formal Bidding and
)Other Rules

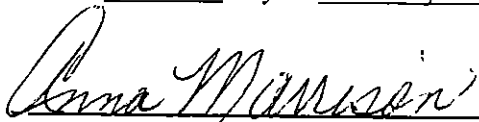
WHEREAS, public contracting law allows a local contract review board and local contracting agency to 'opt out' of the State Attorney General's Model Rules and Public Contracting Code, and

WHEREAS, the Board sitting as the local contract review board and HACSA as a local contracting agency decided to adopt its own rules for public contracts separate from the Attorney General's Model Rules 2004

NOW, THEREFORE, sitting as local contract review board, having examined and considered the findings in Exhibit A, incorporated by this reference, the record submitted and any evidence or testimony provided at the Board's public hearing, the Board of County Commissioners hereby orders and finds as follows:

1. The Board adopts Exhibit A findings and conclusions in support of amendments to the Statement of Procurement Policy, Housing And Community Services Agency (HACSA) for exemptions and class special procurements.
2. The Board approves and adopts the exemptions, class special procurements, and other rules as described in the agenda cover memo as set forth in the Statement of Procurement Policy for HACSA.
3. The Board 'opts out' of the State Attorney General's model public contract rules, including the 2004 version.

DATED this 11th day of May, 2005.


Chair, Lane County Board of Commissioners

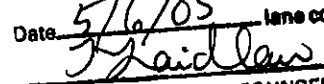
APPROVED AS TO FORM
Date 5/16/05 lane county

OFFICE OF LEGAL COUNSEL

EXHIBIT A

LOCAL CONTRACT REVIEW BOARD FINDINGS ON PUBLIC CONTRACT EXEMPTIONS AND RULES FOR LANE COUNTY

1. Nature of Project

Lane County has been utilizing certain contract exemptions and rules adopted by the Board of County Commissioners, sitting as the local contract review board (LCRB). Originally, the LCRB simply adopted the exemption rules adopted by the Department of General Services for the State of Oregon which were in effect on November 30, 1994. Those exemptions are included in Lane Manual Chapter 20. The LCRB adopted more significant amendments to the LM Chapter 20 exemption rules in December 1998, and in June 2004. The purpose of the exemption rules was to set forth exceptions to formal competitive bidding for certain classes of contracts. While formal competitive bidding may be favored, there are certain classes of contracts for which such a formal and expensive process may not be needed or warranted in relation to cost and effect on competition.

The purpose of these findings and conclusions, and any resulting Board Order is to:

1. Readopt the same special class rules, with certain modifications.
 - a. For public improvement contracts, LM Chapter 20 will continue to establish exemptions from formal competitive bidding.
 - b. For non-public improvement contracts, LM Chapter 20 will reflect "class special procurements."
2. The modifications include:

The following LM Chapter 20 special class rules and exemptions are covered by these findings as either exemptions which may apply to public improvement contracts or special procurements which may apply to non-public improvement contracts: LM 20.096, 20.100, 20.105 (excluding personal service subsection), 20.110 (excluding personal service subsection), 20.115, 20.120, 20.125, 20.128, 20.130, 20.135, 20.155, 20.160, 20.165, 20.170, 20.175, 20.180, 20.185, 20.190, 20.195, 20.200, 20.205, 20.206, 20.207, 20.210, 20.215, 20.220, 20.225, 20.230, 20.235, 20.240, 20.245, 20.250, 20.255, 20.275, 20.098.

2. Standards to be Applied

- A. Public Improvement Contracts.

The LCRB is authorized to grant contract class exemptions pursuant to ORS 279C.335(2). The findings which the Board must approve in order to grant such exemptions include:

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

2. The awarding of public contracts pursuant to the exemption will result in substantial cost savings to the public contracting agency. In making such findings the Board may consider the type, cost, amount of the contract, number of persons available to bid and such other factors as may be deemed appropriate.

3. Findings which are used to support 1. and 2. include information regarding:

- a. Operational, budget and financial data
- b. Public benefits
- c. Value engineering
- d. Special expertise required
- e. Public Safety
- f. Market Conditions
- g. Technical complexity
- h. Funding sources.

4. In granting an exemption, the Board shall:

a. Where appropriate, direct the use of alternate contracting and purchasing practices that take account of market realities and modern or innovative contracting and purchasing methods which are also consistent with the public policy of encouraging competition.

b. Require and approve or disapprove written findings that support the awarding of a particular public contract, or class of contracts, without the requirements of competitive bidding. The findings must show that the exemption complies with A and B above.

B. Non-Public Improvement Contracts.

The LCRB is authorized to grant "class special procurements" pursuant to ORS 279B.085. The County needs to submit a written request to the LCRB that describes the proposed contracting procedure, the class of goods or services (including construction services) to be acquired through the special procurement and the circumstances that justify the use of a special procurement.

In order to authorize the class special procurement, the LCRB must make written findings that the procurement as described in the request, or an alternative procedure, will:

1. Be unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts, and
2. Result in substantial cost savings to the County or to the public, or
3. Otherwise substantially promote the public interest in a manner that could not practicably be realized by complying with requirements that are applicable under formal bidding, request for proposals, small procurement procedure, or intermediate procurement procedure.

3. General Findings with Respect to Certain Criteria in 2.A.3 Above

Funding sources is not a significant factor for this exemption request, which involves rules to exempt classes of contracts, with no particular contract at issue. It would be speculation to attempt to ascertain how funding sources for future contracts would impact a determination on whether to grant a class exemption.

In addition, it does not appear that public safety is a significant factor to a decision about whether to adopt exemption rules for certain classes of contracts where there is no direct connection to any specific public safety concern. Operational, budget and financial data would likely be more significant on the issue of cost savings to the public if there were specific contracts at issue. The classes in this request are general in many cases, and to attempt to apply this criteria without a more specific contract or set of contracts in mind would require speculation.

4. General Findings with Respect to Criteria in 2.A.4.(a) and 2.B. Above

The following exemption rules subject to this request explicitly include alternative competitive selection processes which result in avoidance of favoritism in the awarding of these public contracts, in substantial cost savings to the County by not incurring the expense of a formal bid process and in not substantially diminishing competition:

- A. LM 20.105 Dollar Amount of Contract Under \$50,000
- B. LM 20.125 Price Set By Federal Contracts
- C. LM 20.128 Client/Patient Services
- D. LM 20.130 Request for Proposal
- E. LM 20.135 Requirements Contracts
- F. LM 20.140 Sole Source
- G. LM 20.160 Construction Manager/General Contractor

- H. LM 20.180 Food Service Contracts
- I. LM 20.185 Gasoline, Diesel Fuel, Heating Oil, Lubricants and Asphalts
- J. LM 20.190 Oil or Hazardous Material Removal
- K. LM 20.195 Office Copier Purchases
- L. LM 20.200 Laboratory and Medical Supplies
- N. LM 20.207 Purchases of Used Personal Property
- O. LM 20.225 Single Manufacturer or Service Provider
- P. LM 20.235 Insurance Contracts
- Q. LM 20.255 Emergency Contracts Under ORS 279.015(2)

5. Adoption of Findings of State to Support Substantially Similar Exemptions

The specific rules below are substantially similar to corresponding rules adopted by the State Department of Administrative Services in OAR Chapter 125 Divisions 246-249 rules. The facts, analysis, findings and conclusions considered in adopting the state rules are applicable to the situation that exists in Lane County and are adopted to support adoption of these Lane County exemption rules. These rules are:

LM 20.105	LM 20.175	LM 20.245
LM 20.110	LM 20.180	LM 20.255
LM 20.115	LM 20.207	LM 20.128
LM 20.120	LM 20.210	
LM 20.130	LM 20.215	
LM 20.096	LM 20.225	
LM 20.155	LM 20.160	

In addition, the Oregon Legislature has implicitly expressed approval of the Oregon Attorney General (AG) model public contracting rules, as they are to be reviewed by local contracting agencies and if such an agency does not adopt its own rules, the AG model rules automatically apply. Specific proposed county rules below are similar to corresponding rules adopted by the Oregon Attorney General in OAR Chapter 137 Divisions 47, 48, and 49. The facts, analysis, findings and conclusions reached in adopting these state rules are applicable to Lane County and are adopted to support the following Lane County rules:

LM 20.105	LM 20.255	LM 20.160	LM 20.215
LM 20.096	LM 20.230	LM 20.210	

6. Specific Findings

In addition to the above general findings, the following more specific findings apply to the exemptions as identified in LM Chapter 20 for adoption:

A. 20.100(1)(a) – (p) General Statutory Exemptions

The Oregon Legislature has already recognized these exemptions for all public contracts, including those of Lane County. Lane County relies upon the facts, analysis, conclusions of the Oregon Legislature.

B. 20.105 Contracts Under \$50,000

Lane County's current exemption rule sets a limit at which less formal quotes must be obtained at \$5,000 and a limit of \$50,000 at which formal competitive bids must be obtained. The 2003 Oregon Legislature adopted a small procurement statute for public improvement and non-public improvement contracts, weighing factors such as public interest/benefit and cost-effectiveness. It expressly approved contracting directly with a contractor, without competitive selection for contracts at \$5,000 or less. Lane County's proposed rule would permit direct contracting but encourage informal quotes for new projects. When there is a new project, there may be more uncertainty about the existence of competition than for a contract which has been regularly executed. Lane County's rule would encourage learning about the competitive environment for a new project, in the event this is unknown. Lane County's rule is less likely to encourage favoritism or substantially diminish competition for new contracts for new projects than the Oregon statute.

The 2003 Legislature also adopted an intermediate procurement statute for public improvement and non-public improvement contracts, weighing factors such as public interest/benefits and cost effectiveness. For non-public improvement contracts, it concluded that 3 informal quotes could be sought for purchases of \$150,000 or less. Lane County's rule provides for greater competition because a more formal selection process would be required for contracts between \$100,000 and \$150,000. For public improvement contracts, Lane County's threshold of \$100,000, except for highway, bridge, and other transportation contracts at \$50,000, would be the same as that adopted by the Oregon Legislature. However, Lane County's rule for both public improvement and non-public improvement contracts would be less likely to encourage favoritism and would encourage greater competition than the statute, because it provides a right to protest by an unsuccessful offeror to the Board of County Commissioners for contracts exceeding \$50,000. Lane County relies on the Oregon Legislature's analysis and conclusions to support these findings in addition to the above.

C. 20.110 Contract Amendments

This exemption would allow for change orders, extra work, and continued services on projects and in programs already underway. The original contract would have been awarded pursuant to a competitive process, or be exempt or excepted from that process. This rule would not substantially diminish competition because the percentage increase in amendment authority is not substantial, at 25%. Where additional work or services may not have been an-

anticipated, there is a greater potential for cost savings and benefit to the public by allowing the contractor to complete performance without delay, saving any "wind up" costs and "start up" costs for a new contractor to begin where the original contractor stopped. Lane County's rule would provide for a reasonable limit on the continuation of a contract before an additional competitive selection would be required. Lane County relies upon the analysis and conclusions reached by the Attorney General in determining that 25% was an acceptable limit for intermediate procurements, and up to a potential 50% in public improvement contract in certain circumstances.

D. 20.115 Life Cycle Costing

This is a competitive value process that is used within a competitive selection process that allows for all costs of use, from the acquisition through disposition, to be considered. Substantial cost savings over the entire useful life of a product will accordingly be realized without substantially diminishing competition, because competitive bidding could still be used.

E. 20.120 Price Regulated Items or Services and 20.125 Price Set by Federal Contract

The County has no authority to alter prices established by federal or state law. Formal bids would not provide useful information since each would be the same price. The County would incur unnecessary expenses with little or no benefit.

Since federal contracts may be subject to similar public contracting requirements, any price set would have presumably risen from a competitive selection process. If not, Lane County's rule would require some demonstration of cost effectiveness by requiring comparison with other vendors through informal quotes. The Oregon Legislature has decided that public agencies, such as the County, may use the competitive selection process of other public agencies under certain circumstances pursuant to ORS 279A.200 - ORS 279A.225. There is no express prohibition against Lane County and a federal agency agreeing to the County's use of a price set by federal contract, provided this state law is complied with. Lane County's rule would add a procedure for determining cost-effectiveness and competition, which is probably not required under Oregon law.

F. 20.130 Request for Proposal

The RFP process is used when other factors, besides cost alone, are of significant importance to a decision to award a contract. Specialized expertise, market conditions and technical complexity are integral elements to this process. Cost savings are realized through purchases that have higher quality, better service, operating efficiency and are more cost effective over the long term. Lane County has already established an alternative request for proposal

process which includes substantially similar requirements as for formal bidding. See Lane Manual 21.107. There is an additional protection for competitors under the County's request for proposal process, ie., appeal for protesting evaluation committee's recommendation, which is not required under a formal competitive bidding requirement. Accordingly, it is unlikely that this exemption will encourage favoritism or substantially diminish competition.

G. 20.135 Requirements Contracts

This exemption requires whichever competitive selection process is appropriate based on the underlying subject, including competitive bidding and other alternative processes. Thus, competition will not be substantially diminished and favoritism is avoided. The exemption also would allow the county to utilize another public agency's competitive selection process under certain conditions, thus competition will not be diminished. This exemption contemplates one competitive process with subsequent amendments issued, if necessary, based on the results of that process over a three year period. This eliminates the need to conduct duplicative competitive processes during that time period and results in cost savings to the County, both in terms of time and money. It allows the County to budget and plan for future needs. It encourages lowest cost over the life of a project while ensuring availability. It protects the County from unanticipated cost increases.

H. 20.096 Sole Source

Products and services that are available through only a single seller or provider are not subject to competitive supply. As no competitive market is available, competitive bidding would be unnecessary and an unjustified use of county and public resources to prepare. Cost savings are not applicable. This exemption would require that the County take steps to confirm that the contractor is a sole source. If other competition were located, then the appropriate competitive selection process would be used. Competition would not be substantially diminished.

I. 20.155 Advertising Contracts

Advertising is limited to specific companies in given geographic locations and is further limited by the needs of the County. Further, state law requires the designation of an official newspaper for public notices. The rates for legal notices in many cases are regulated by statute. It may be necessary to target certain geographic areas or classes of members of the audience.

J. 20.160 Construction Manager/General Contractor

This exemption allows the use of a request for proposal (RFP) process which reflects the specialized expertise required, and technical complex-

ity of large construction projects for which a CMGC would be selected. The County's RFP process is so substantially similar to formal competitive bidding that there would not be significant effect on competition. There would be substantial cost savings to the public and the County through the selection of a high quality professional to meet this need.

K. 20.165 Copyrighted Materials

By definition, there is no alternative vendor and no competition. The County must ensure that all purchases are in accordance with federal and state laws protecting copyrighted or trademarked items.

L. 20.170 Election Supplies and Services

The materials included within this exemption are specialty items that must be compatible with both state elections law and the type of equipment used by the County in processing the ballots. Due to the technical complexity of the equipment and materials, there are only a limited number of vendors. Competition would not be substantially diminished in a field with so little competition to begin with. There is only one vendor currently who is able to provide the appropriate envelopes. Drop site signs are approximately \$50 per sign, and it is not likely that a competitive process would even be required under Lane County's rules. In addition, the need to act quickly and to be able to rely on the most dependable contractor is critical. There are short election timeframes for both ballots and envelopes. The public benefit would be promoted by allowing this exemption and a cost savings in not spending additional funds for an expedited selection process and a potential higher cost for the products as a result of time constraints. Thus, the purchase of these materials does not lend itself to a competitive process.

M. 20.175 Equipment Repair and Overhaul

Work performed under this exemption is in support of maintenance agreements or warranties that are obtained as part of a purchase process for new equipment. Often this maintenance is required in order to maintain warranty coverage on the equipment. Warranty work is unique to the manufacturer of the equipment. Use of competitive bidding would invalidate the warranty coverage and cost the County more for maintenance work in the future. This would encourage competitors to deliver good quality products and to stand behind their products for the benefit of the public. It would discourage competitors who care less about quality.

N. 20.180 Food Service Contracts

The provision of food services to the County involves the review and analysis of factors other than cost to ensure a quality service and product.

This exemption allows the County to solicit and review these factors through an RFP, instead of a bidding process. This extended review opportunity allows the County to provide and maintain a better level of service that is more cost effective for the users.

O. 20.185 Gasoline, Diesel Fuel, Heating Oil, Lubricants and Asphalts

Prices for these items are highly volatile. The rule ensures continued competition utilizing the quotation process between many vendors of highly fungible product(s). Few, if any vendors would provide fixed price bids unless the price was sufficient to cover eventualities beyond the control of all parties.

P. 20.190 Oil or Hazardous Material Removal

This exemption applies when there is a state agency order requiring the County to act quickly and when a formal bidding process would likely result in violating that order and the imposition of monetary penalties. The rule requires alternative selection if feasible. Because of this and the limited application of the rule, competition would not be substantially reduced and there would be substantial cost savings as legally imposed penalties could be high.

Q. 20.195 Office Copier

This rule provides an alternative competitive process that reflects the nature of this good and the critical nature of these items to County operations. Service capabilities, specialized expertise, and technical expertise of vendors are of predominant importance and are difficult to ascertain through bidding.

R. 20.200 Laboratory and Medical Supplies

Competition is not diminished as competitive bidding is still required. Generally, there are multiple vendors of such items, but there may be few or only one manufacturer, or individual health care practitioners may have a medical basis for specifying a certain manufacturer. The ability to split medical and laboratory supplies into multiple groupings will enhance competition by providing an opportunity to bid to specialized vendors in the field, or those that cannot maintain the necessary inventory to cover all needed supplies. Such enhancement will allow the County to obtain more competitive prices for those products requested.

S. 20.205 Purchases of Hospital and Medical Supplies and Equipment

The advantage of buying through a cooperative is that the public will benefit from cost savings after a paying a lower group rate, which is likely to

be lower than any price proposed by a contractor through a single contract competitive selection. Thus, competition would not be substantially diminished.

T. 20.206 Library and Reading Materials

Many library circulation materials at the wholesale level are available through limited sources and are not subject to competitive supply. Books and periodicals are only published through one source. As no competitive market is available at the wholesale level, competitive bidding would not be appropriate and cost savings are not applicable. Libraries nationwide participate in a sophisticated computerized purchasing program designed to maximize efficiency and cost savings by providing up to date cost and availability data. While libraries may order many books at one time, only one or a few of each book is ordered from a particular publisher. Bids would be expensive and ineffective, and a process not in keeping with generally accepted practices.

U. 20.207 Purchases of Used Personal Property

Used personal property is available through limited market sources. Use of a quotation process as an alternate purchasing practice will continue to provide competition in the process while minimizing administrative costs to the County in terms of both time and money. Quality and availability are not as uniform as in new products making comparisons based on written information difficult. Generally, personal inspection is required and initial cost may not be the most important factor in long term cost savings.

V. 20.210 Specifying Brand Names or Products, 20.215 Brand Name Exemption Applications, 20.220 Copyrighted Materials, 20.225 Single Manufacturer

These exemptions allow for acquisition still using competitive bidding by brand, copyright, and/or single manufacturer. Cost savings are obtained by the efficient utilization of existing equipment and supplies and by obtaining products of the quality required.

X. 20.230 Product Pre-Qualification

Prequalification of products in certain circumstances simply reduces the amount of resources the county must expend to create design or performance specifications. There is an alternative selection process included which recognizes the value of competition in deciding which products to prequalify and includes a right to protest, which is similar to formal bidding.

Y. 20.235 Insurance Contracts, 20.240 Employee Benefit Insurance, 20.245 Investment Contracts, 20.250 Litigation Services

Predominant factors for these exemptions include the specialized expertise required, the technical complexity of the subject matter, and the limited market once the County's special needs are considered. As to investment contracts, the market of stocks and bonds is quite volatile and not conducive to a formal competitive selection process. With the exception of litigation services, the contracts under these rules would be considered personal service contracts and subject to the alternative selection process in LM Chapter 21. As to litigation services, the County is typically not in sole control of the selection of arbitrators and mediators as many contract provisions require a joint selection process. The new Oregon statute excludes certain contracts for legally related services and that is now being incorporated into the County's rule. There is a significant public and County interest in the County being able to secure the assistance of capable and often specialized professionals in order to resolve disputes prior to and after litigation if filed. Lane County's rule would provide that a list of qualified specialized personnel would be maintained if practicable, thus allowing the possibility of some competition.

Z. 20.255 Emergency Contracts

The Oregon Legislature has by statute authorized emergency contracts under rules to be adopted by each contracting agency. An exemption or special procurement approval is not specifically necessary. However, this rule in conjunction with procedures in LM 21.128 set forth informal quote solicitations to the extent reasonable, and limit the work to that which is necessary to address the emergency. There would not be a substantial diminution of competition as appropriate competition would presumably take place after the emergency subsided. The public would benefit by a preservation of public funds, property or the uninterrupted provision of government services.

AA. 20.265 LCRB Exemption for Other Public Improvement Contracts and Special Procurements

This exemption recognizes a process for the Board to consider other exemption and special procurement requests not included in these rules. This has no effect on competition at this time.

BB. 20.275 Bid Security and Performance Bond

These exemptions allow for waiving bonding requirements for certain bid projects and encourages competition due to less costs and paperwork being required by bidders. Cost savings are realized as more bidders will bid these certain projects and provide better pricing.

CC. 20.098 Electronic Advertising

Last year, Lane County spent approximately \$30,000 in competitive selection advertising costs to various newspapers including the Register Guard, Oregonian, and Skanner. Electronic advertising on Lane County's website, as well as through the State of Oregon Vendor Information Program, would eliminate this cost. Other electronic websites may also be available and/or cheaper than this print advertising cost. As the internet becomes the more preferred resource for information, it also reaches the greater number of vendors, generally. There are service companies who, for a fee, search the web on behalf of vendor groups and compile and distribute solicitation information for those groups. The procedural rule in LM 21.105(3) to implement electronic advertising recognizes there may be County contracts in which competition may be greater using a newspaper ad, and provides that the newspaper ad should be used in such a circumstance. This rule is not likely to substantially diminish competition and is cost effective.

7. Conclusions

Based on all of the above, it is unlikely that the subject class exemptions will encourage favoritism in the awarding of public contracts, would not substantially diminish competition and awarding such contracts pursuant to these exemptions will result in substantial cost savings to the public and to Lane County.