

CONTEMPORANEOUS DEVELOPMENT

FINDINGS IN SUPPORT OF AN EXEMPTION FOR A CLASS OF PUBLIC IMPROVEMENT CONTRACTS

The Clackamas County Board of County Commissioners makes these findings to establish an exemption for a class of public improvement contracts (the “Contemporaneous Development Exemption”). The Contemporaneous Development Exemption will be applicable to Clackamas County, Water Environment Services, the Development Agency of Clackamas County, the Housing Authority of Clackamas County, North Clackamas Parks and Recreation District and any other district or agency governed by the Board of County Commissioners.

The Contemporaneous Development Exemption will permit a County department, district, or other agency to contract directly with a Person, defined below, to perform certain construction work, including Public Improvement, minor alterations or repairs (“Construction”), provided the conditions of the exemption are satisfied.

A. Alternative Contracting Exemption under Oregon Law

Oregon law requires all contracts for public improvement projects to be based on competitive bids unless the local contract review board grants an exemption under ORS 279C.335, which is also reflected in Clackamas County’s Local Contract Review Board (“LCRB”) rule C-049-0600. ORS 279C.335(2) requires the local contract review board to approve a definition of the class of contracts to be exempt and two main findings: (1) that the exemption is unlikely to encourage favoritism in the awarding of public improvement contracts or substantially diminish competition; and (2) awarding a public improvement contract under the exemption will likely result in substantial cost savings and other substantial benefits to the public agency or public.

In making findings to support an exemption for a class of public improvement contracts, the agency shall clearly identify the class using the class’s defining characteristics. The characteristics must include a combination of project descriptions or locations, time periods, contract values, methods of procurement or other factors that distinguish the limited and related class of public improvement contracts from the agency’s overall construction program.

B. Background Information

When a Person is engaged in a development or construction project, they typically need to make improvements to comply with land use or other permitting requirements. A Person is defined in the LCRB rules as an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation or any other legal or commercial entity. While the Person is already mobilizing resources to make those improvements, the County could benefit by contracting directly with that Person or their contractor to make additional improvements to infrastructure owned or managed by the County. In those instances where the Person agrees to make the improvements, the County needs to be able to directly contract in order to realize the benefits of resources already being available and mobilized on the nearby property.

Example situations:

1. Water Environment Services (“WES”) requires a developer building a subdivision to construct on-site public sanitary sewer or storm systems, and WES requests the installation of the service connection laterals to each of the adjacent properties for future connections.

2. A developer of a subdivision is required to install an eight-inch sanitary sewer or storm pipe to serve the property, but WES would like a twelve-inch pipe installed for future demand.
3. The Department of Transportation and Development has required a developer to install sidewalks and curbing along with paving for half of the road, and it would be beneficial to have the other side of the street upgraded with sidewalks, curbing and new paving at the same time.
4. A developer is required to install new curb ramps adjacent to its property to comply with requirements under the Americans with Disabilities Act, and it would be beneficial for connecting curb ramp facilities located offsite to be constructed at the same time.

C. Findings

1. Class Defining Characteristics.

The Contemporaneous Development Exemption permits the direct procurement of construction services without competitive bids or proposals when a Person* is engaged, or is planning to engage, in a development or construction project within Clackamas County and adjacent to an area where a Contracting Agency* desires to perform certain construction work, including Public Improvement*, minor alterations or repairs (“Construction”). In order for a Construction project to qualify for this exemption, the department director of the Contracting Agency (“Department Director”) must show, in writing, that the following requirements are met:

1. The Construction work would occur adjacent to, or within close proximity of, the Person’s existing or planned project;
2. Contracting Agency has identified the Construction work through one of the following methods:
 - i. Identified in an adopted capital improvement plan or other inventory list of infrastructure needs; or
 - ii. Upon a recommendation by the Director of the Department;
3. The Person engaged, or planning to engage, in the development project is willing and able to perform the Construction work;
4. Contracting Agency has sufficient funds to complete the Construction work;
5. The use of this class exemption will result in cost savings and efficiencies as a result of the Person’s equipment or other resources, including engineering or other personal services, being present or utilized for project work adjacent to, or within close proximity of, where Contracting Agency desires the Construction work to take place; and
6. The use of this exemption is in the public’s best interest.

2. No favoritism or diminished competition.

The use of this exemption will not encourage favoritism or diminish competition as the Person, not the County, selects the contractor who will perform the work. Further, the kinds of projects contemplated by this exemption are effectively projects of opportunity wherein the County receives a benefit from already mobilized resources on nearby property. That, by its very nature, is unlikely to encourage favoritism because the County typically would

* As defined in the Clackamas County Local Contract Review Board Rules.

not know the details of a project, let alone who the contractor performing the work would be, until the permitting phase. The opportunity to contract with the County is open to anyone who is engaging in development within proximity of an area the County has determined is in need of improvements. In addition, the proposed exemption has multiple safeguards and review processes that are intended to prevent abuse. Only a narrow category of projects would qualify for the exemption, with all others following applicable procurement procedures. These factors all support a finding that the exemption would not encourage favoritism or diminish competition.

3. Substantial cost savings or other benefits.

Approval of the exemption will result in significant savings for the County for the following reasons: there will not be a need to produce a separate full set of plans and specifications, or a need to obtain separate permits; construction mobilization costs will typically be lower as they are absorbed by the existing project; unit material costs are typically lower when purchased in larger quantities as a part of a larger project; and indirect and overhead costs are typically lower for public improvements that are added to existing development projects. Other substantial benefits include reduced traffic delay for the public; improved road safety where there is an urgent condition or situation; fewer instances of mismatched improvements where portions of the same roadway section are upgraded in separate pieces; more streamlined traffic control with a single contractor responsible for scheduling the work and the finished work product; greater access to public services such as sewer; and potential access to resources or specialized equipment that allow the contractor to complete the work more quickly and efficiently. Being able to take advantage of these resources when available enables the County to make long-term infrastructure updates and other enhancements that may not otherwise occur, ultimately benefiting the public using those improvements.

In making the finding of substantial cost savings or other benefits, the Board must consider the following factors to the extent applicable to the particular class of public improvement contracts:

- a. *How many persons are available to bid.* Typically 3-5 companies will bid on small scale projects like the ones contemplated by this exemption.
- b. *The construction budget and the projected operating costs for the completed public improvement.* Each project will have its unique specifications and associated costs. While most projects will likely be under \$50,000, some projects may be significantly more based on the project circumstances. The operating costs of the completed improvements will typically not be significant due to the smaller scale of the projects as they are smaller and will typically be a small part of a larger inventory already being operated and maintained.
- c. *Public benefits that may result from granting the exemption.* See discussion above.
- d. *Whether value engineering techniques may decrease the cost of the public improvement.* Value engineering techniques are typically not employed on small public improvements like short sewer line extensions or sewer line lateral installations; however, those techniques may be employed by the construction team as a part of the larger project.
- e. *The cost and availability of specialized expertise that is necessary for the public improvement.* The County will have access to the specialized expertise that the Person engaged in development has obtained and mobilized for their project.

- f. *Any likely increases in public safety.* The County will benefit from reductions in road closures, traffic adjustments, and trenching; improved road safety where there is an urgent situation; decreases in public health risks if a public improvement addresses a failing septic system; and other benefits that necessarily flow from consolidating multiple projects into a single effort.
- g. *Whether granting the exemption may reduce risks to the agency that are related to the public improvement.* There will potentially be a lower financial risk and a lower safety risk to County staff who would otherwise be required to construct the improvement as a standalone project.
- h. *Whether granting the exemption will affect the sources of funding for the public improvement.* No, the use of the exemption would not impact the source of funding. Further, any department utilizing the exemption must have resources available in its current budget to cover the cost of the project, so additional funding from other sources not included in a department's budget are not contemplated by this exemption.
- i. *Whether granting the exemption will better enable the agency to control the impact that market conditions may have on the cost of and time necessary to complete the public improvement.* The use of this exemption will expedite the time it would take to contract for and construct the improvements. In terms of market conditions, the expedited time table would allow the County to take advantage of the best pricing for materials and services in the current market, instead of allowing prices to potentially inflate over a longer period of time.
- j. *Whether granting the exemption will better enable the agency to address the size and technical complexity of the public improvement.* The ability to add a public improvement project onto a larger ongoing project results in less technical complexity for the County, as it would not be required to directly manage the design and construction contracts.
- k. *Whether the public improvement involves new construction or renovates or remodels an existing structure.* Typically the public improvement would involve new construction, but it could also involve redevelopment situations.
- l. *Whether the public improvement will be occupied or unoccupied during construction.* Not applicable to the types of public improvements currently contemplated under this exemption.
- m. *Whether the public improvement will require a single phase of construction work or multiple phases of construction work to address specific project conditions.* The public improvements will typically be constructed in a single phase that is managed by the private developer.
- 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.* County staff have sufficient experience in working with public improvement projects to negotiate, administer and enforce the terms of the resulting contract, which will be substantially similar to the County's standard public

improvement or personal service contracts.

D. Reservation of Rights

ORS 279C.335(6) provides that the representations in and the accuracy of these findings are the bases for the class exemption if adopted by a Board resolution. These findings also describe, to some extent, anticipated features of the resulting public improvement contracts, but the final parameters of those contracts are those characteristics that will be negotiated between the department and the Person, and the Board specifically reserves all of its rights in this regard.