

PROJECT BIDDING AND CONTRACTING FOR WATERSHED COUNCILS AND LAND TRUSTS

February 18, 2021

Oregon Conservation Partnership

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Project Manager

Crooked River Watershed Council

ORIGINAL QUESTION

“...it would be nice to learn once and for all exactly how public contracting law (Oregon/USA) applies to watershed councils/non-profits as per the source of grant funds from OWEB, DEQ, USFWS, BLM, NFWF etc.- as it pertains to hiring contractors for restoration/survey/consultation work. Especially interested in what the guidelines are for justifying sole sourcing w/contractor for restoration projects.”

ANSWER

PUBLIC CONTRACTING LAW DOES NOT APPLY

Thank you all for coming...

AGENDA

- ▶ Introduction
- ▶ Public Contracting Law
- ▶ Interfacing with Funders
- ▶ Types of Contracts
- ▶ Contracting Methods
- ▶ Procurement Policies
- ▶ Questions & Discussion

LOTS OF ANIMATION

WHO AM I?

- ▶ Garry Sanders
 - ▶ Project Manager for CRWC since 2010
 - ▶ Owner of consulting company since 2016
 - ▶ Field time with ODFW, WYGF
 - ▶ MS in Aquatic Biology
 - ▶ BA in Geology

I AM NOT AN ATTORNEY!!!!

PUBLIC CONTRACTING LAW

- ▶ Are non-profits subject to public contracting law?
- ▶ No, we are not public entities/agencies!



PUBLIC CONTRACTING LAW

- ▶ Overview of public contracting law in Oregon:
<https://www.oregonlegislature.gov/lpro/Publications/BB2014PublicContracting.pdf>
- ▶ Generally, for procuring goods and services, a contracting agency must use either a competitive sealed bidding process to award a contract to the lowest responsible bidder or a competitive sealed proposal process to award a contract to the proposer whose proposal is most advantageous to the agency.

PUBLIC CONTRACTING LAW



**ROLL THE TAPE PLEASE,
MR. GARRISON.**

INTERFACING WITH FUNDERS

- ▶ Public contracting law may not apply, BUT...
- ▶ How do you ensure grant compliance?
 - ▶ Federal and State funding MAY come with contracting provisions
 - ▶ **“279A.030 Federal law prevails in case of conflict.** Except as otherwise expressly provided in ORS 279C.800 to 279C.870, and notwithstanding ORS 279C.005 to 279C.670 and this chapter and ORS chapter 279B, applicable federal statutes and regulations govern when federal funds are involved and the federal statutes or regulations conflict with any provision of ORS 279C.005 to 279C.670 or this chapter or ORS chapter 279B, or require additional conditions in public contracts not authorized by ORS 279C.005 to 279C.670 or this chapter or ORS chapter 279B.”
- ▶ Contracting and/or prevailing wage restrictions **USUALLY** stated in grant agreement

INTERFACING WITH FUNDERS

- ▶ Is there a required bidding process by funders?
- ▶ NO, NOT THAT I AM AWARE OF!
- ▶ More on that later!

INTERFACING WITH FUNDERS

EXHIBIT G

OREGON PREVAILING WAGE RATE LAW

Grantees may be required to comply with Oregon's prevailing wage rate law. ORS 279C.800-279C.870. This law requires that entities using public funds for public works must pay not less than the prevailing rate of wage for an hour's work, including fringe benefits, in the same trade in the locality where the work is performed. Contracts not exceeding \$50,000 are exempt from prevailing wage rate laws and nonprofit organizations are exempt for work other than construction. Public works is defined as including "roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest . . ." ORS 279C.800(6)(a). Construction is defined as "the initial construction of buildings and other structures, or additions thereto, and of highways and roads." OAR 839-025-0004(5)

Failure to comply with prevailing wage rate laws could result in a Grantee being liable to the workers affected in the amount of their unpaid minimum wages, including all fringe benefits, and in an additional amount equal to unpaid wages as liquidated damages.

Information regarding prevailing wage rate law can be found on the Bureau of Labor and Industries website at http://www.oregon.gov/BOLI/WHD/PWR/Pages/W_PWR_Pwrbk.aspx.

INTERFACING WITH FUNDERS

- ▶ What is prevailing wage?
- ▶ Unless specifically exempted by state law, prevailing wage rates are the minimum wages that must be paid to all workers employed on all public works. These rates are determined using data collected from a statewide construction industry wage survey of occupations and crafts performing commercial building and heavy and highway construction in 14 geographic regions of the state.
- ▶ Oregon passed its prevailing wage rate (PWR) law, sometimes referred to as the "Little Davis-Bacon Act," in 1959. As the nickname implies, the Act is modeled after the federal "Davis-Bacon" prevailing wage laws. Today, Oregon continues to update and refine its PWR law to reflect changes in the industry and to make it more like its federal counterpart.
- ▶ Administired by BOLI (State) and DOL (Federal)

INTERFACING WITH FUNDERS

- ▶ How does prevailing wage tracking work on a project?
- ▶ Make contractors aware of prevailing wage requirements
- ▶ Retain certifications of prevailing wage in project fiscal documentation
- ▶ For most contractors, they will already have these procedures in place

INTERFACING WITH FUNDERS

BUREAU OF LABOR AND INDUSTRIES
WAGE AND HOUR DIVISION

PAYROLL/CERTIFIED STATEMENT FORM WH-38
FOR USE IN COMPLYING WITH ORS 279C.845*

PRIME CONTRACTOR

SUBCONTRACTOR

PAYROLL NO. 1

Business Name (DBA): Robinson & Owen Heavy Construction				Phone: (541) 549-1848				CCB Registration Number: 124327										
Project Name: Stearns Dam Removal				Project Number:				Type of Work:										
Street Address: 750 Buckaroo Trail Suite 102, Sisters, OR 97759				Project Location: Prineville, OR														
Mailing Address: PO Box 267, Sisters, OR 97759				Project County: Crook County														
Date Pay Period Began: 10/07/13				Date Pay Period Ended: 10/13/13														
THIS SECTION FOR PRIME CONTRACTORS ONLY						THIS SECTION FOR SUBCONTRACTORS ONLY												
Public Contracting Agency Name: Crooked River Watershed Council						Subcontract Amount:												
Phone: (541) 447-8567						Prime Contractor Business Name (DBA):												
Date Contract Specifications First Advertised for Bid: July 2013						Prime Contractor Phone: ()												
Contract Amount: \$139,070.00						Prime Contractor's CCB Registration Number:												
						Date You Began Work on the Project:												
(1) NAME, ADDRESS AND EMPLOYEE'S IDENTIFICATION NUMBER	(2) CLASSIFICATION (INCLUDE GROUP # AND APPRENTICESHIP STEP IF APPLICABLE)		(3) DAY AND DATE							(4) TOTAL HOURS	(5) HOURLY BASE RATE	(6) HOURLY FRINGE BENEFIT AMOUNTS PAID AS WAGES TO EMPLOYEE	(7) GROSS AMOUNT EARNED (see directions)	(8) ITEMIZED DEDUCTIONS FICA, FED, STATE, ETC.	(9) NET WAGES PAID	(10) HOURLY FRINGE BENEFITS PAID TO BENEFIT PARTY, PLAN, FUND, OR PROGRAM	(11) NAME OF BENEFIT PARTY, PLAN, FUND, OR PROGRAM	
			M	T	W	TH	F	S	SU									
			7	8	9	10	11	12	13									
			HOURS WORKED EACH DAY															
Sitz, Olin 17217 Ivy Lane Sisters, OR 97759 XXX-XX-3361	Power Equipment Group 4 Excavator	OT									13.55	/	52.06	352.12				
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*Although this form has not been officially approved by the U.S. Department of Labor, it is designed to meet the requirements of both the state PWR law and the federal Davis-Bacon Act.

CONTRACTING DEFINITIONS

- ▶ RFQ vs RFP
- ▶ The Bidding Process
 - ▶ Sole Source
 - ▶ Invited Bid
 - ▶ Open Bid
- ▶ What is a deliverable?

RFQ VS RFP

- ▶ RFQ – Request for Quotes/Qualifications
 - ▶ You know what you want/need and you want to select the most qualified firm or the lowest cost firm
- ▶ RFP – Request for Proposals
 - ▶ You generally know what outcome you want but you may not know the best of most efficient way to get there

THE BIDDING PROCESS

- ▶ Sole Source
 - ▶ Assigned contract
- ▶ Invited Bid
 - ▶ “Short List”, IDIQ
- ▶ Open Bid

DELIVERABLES

- ▶ Projects create deliverables, which are simply the results of the project or the processes in the project. That means a deliverable can be something as big as the objective of the project itself or the reporting that is part of the larger project.

THE BIDDING PROCESS

Project Delivery Method	Procurement Method	Contract Type
Construction Management at Risk (CMR) <i>also known as CM/GC</i>	Best Value (BVS)	Cost Plus Fee
Design-Bid-Build (DBB)	Low Bid	Guaranteed Maximum Price (GMP)
Design-Build (DB)	Negotiated	Lump Sum (or Fixed Price)
	Qualifications-Based (QBS)	Target Price
	Sole Source (or Direct Select)	Unit Price

PROJECT DELIVERY METHOD: DBB

Project Delivery Method

Construction Management at Risk (CMR)
also known as CM/GC

Design-Bid-Build (DBB)

Design-Build (DB)

PROJECT DELIVERY METHOD: DBB

▶ Benefits

- ▶ Design team is impartial
- ▶ The design team prepares documents on which all general contractors place bids.
- ▶ Ensures fairness to potential bidders and improves decision making by the owner by providing a range of potential options
- ▶ Assists the owner in establishing reasonable prices for the project.
- ▶ Uses competition both in the selection of the architect and the contractor to improve the efficiency and quality for owners.

▶ Risks

- ▶ Potential cost increases during the design phase could cause project delays
- ▶ Development of a "cheaper is better" mentality amongst the general contractors bidding the project
- ▶ As the general contractor is brought to the team post design, there is little opportunity for input on effective alternates being presented.
- ▶ Pressures may be exerted on the design and construction teams due to competing interests (e.g., economy versus acceptable quality), which may lead to disputes between the architect and the general contractor, and associated delays in construction.

PROJECT DELIVERY METHOD: DESIGN-BUILD

▶ Benefits

- ▶ Saves time and money
- ▶ Achieve innovation in the delivered facility
- ▶ Allows owners to avoid being placed directly between the architect/engineer and the contractor.

▶ Risks

- ▶ Does not make use of competitive bidding where prospective builders bid on the same design.
- ▶ Criteria to select contractor is subjective and difficult to evaluate and to justify later.
- ▶ The design and price selected arouses public suspicion, true or not.

PROJECT DELIVERY METHOD: CM-GC

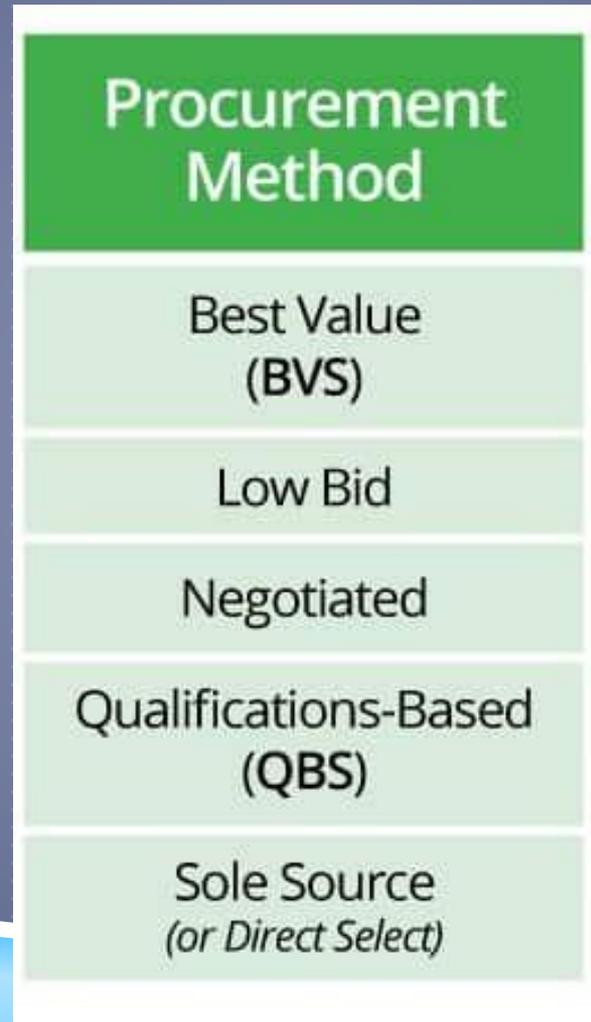
▶ Benefits

- ▶ Construction contractor brought in during design phase
- ▶ May save money and/or time
- ▶ Construction contract negotiated during design phase based on a mutually agreed upon amount

▶ Risks

- ▶ “locked in” to contractor
- ▶ Reduces opportunity for contracting awards in community
- ▶ Requires project development time from contractor to be a part of the design team

PROCUREMENT METHOD



PROCUREMENT METHOD

- ▶ Contracts based on other factors as well as cost
- ▶ The goal is best combination of price and performance
- ▶ Contracting agency will define source selection criteria that add value to a bid. These can include past performance, more robust management approach, highly qualified key staff, or other factors
- ▶ Gives owners, who might otherwise be compelled by law to choose only on price, greater flexibility.



PROCUREMENT METHOD

- ▶ The most common procurement method is competitive bidding with the lowest bidder winning.
- ▶ Contractors invited to submit their best bid by a deadline, and the owner compares bids against one another. This is called sealed bidding.
- ▶ Bids are all to build the structure according to the designs and specifications developed by the engineer, the contractor who bids the lowest amount wins. In fact, the bid number may be the only piece of information reviewed.



PROCUREMENT METHOD

- ▶ Owner can select a contractor without advertising or competitive bidding
- ▶ Proposals subject to further negotiations, proceed with those that appear to meet broad technical and cost specifications.
- ▶ While the process is competitive, may not focus only on price, but rather on a range of factors such as technical ability
- ▶ Allows greater flexibility to finetune the deal in terms of management approach, technical solution to a problem and terms.
- ▶ Most attractive proposal wins



PROCUREMENT METHOD

- ▶ Two-step bidding, a first round of review examines the technical qualifications of all the bidders.
- ▶ Bidders must show they have the skills and experience to handle the project.
- ▶ Builder has demonstrated expertise in this type of project.
- ▶ Owner creates a short list of those bidders who meet the technical qualifications.
- ▶ Bids from contractors who passed the first round move to the second round. Their proposals are called qualifying bids, meaning that they meet the requirements of the customer for technical expertise.



PROCUREMENT METHOD

- ▶ Sole source procurement, AKA single-source procurement, direct select, or a no-bid contract
- ▶ Non-competitive method you use when only one provider can fulfill the requirements of the project
- ▶ Emergencies, unique and complex specifications, only one contractor is capable of handling the project.
- ▶ Can be vulnerable to abuse, so proceed with caution
- ▶ Successful relationship with a contractor and want to replicate a prior contract or project.



CONTRACT PAYMENT TYPES

Contract Type
Cost Plus Fee
Guaranteed Maximum Price (GMP)
Lump Sum <i>(or Fixed Price)</i>
Target Price
Unit Price

CONTRACT PAYMENT TYPES

- ▶ Cost plus Fee/Cost plus Percentage: A contract in which the buyer agrees to pay for all supplies and labor, as well as an additional amount for contractor profit.
- ▶ Guaranteed Maximum Price (GMP): Also called not-to-exceed price, NTE, NTX, or open-book contract, this contract sets a ceiling on how much the owner will pay. The contractor is responsible for any excess or overrun, unless there has been a formal agreement on scope change. If the project costs less than the GMP, the owner retains the savings or may have an agreement to share them with the contractor.



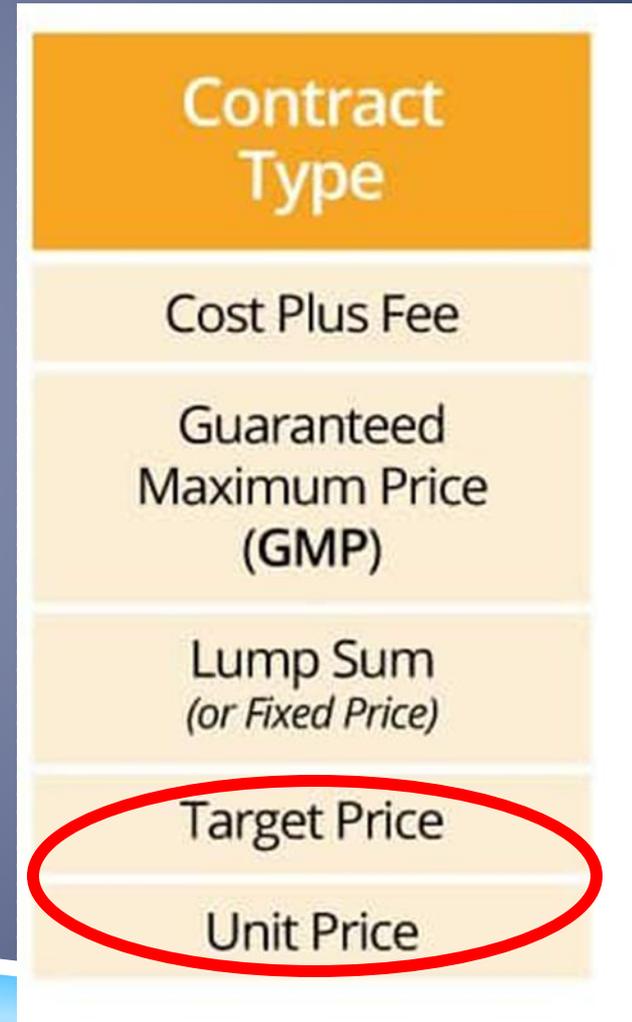
CONTRACT PAYMENT TYPES

- ▶ Time and Material: A contract in which an agreed-upon price is set based on the time involved and materials used for the project.
- ▶ Hard Bid/Fixed Price/Stipulated Lump Sum: A contract in which the contractor accepts one total sum for all components on the project. This is generally used for projects that have well-defined costs and components. The builder does not have to provide a cost accounting of the completed work. Additional payments may be included as incentives for early completion or penalties for delays.

Contract Type
Cost Plus Fee
Guaranteed Maximum Price (GMP)
Lump Sum (or Fixed Price)
Target Price
Unit Price

CONTRACT PAYMENT TYPES

- ▶ Unit Price: final cost is determined based on the unit prices of work, including materials and services.
- ▶ Target Price: set a targeted price for the project, and the contractor tries to meet or come in below that price. The price includes base costs such as subcontractor costs, contractor overhead, and profit. The owner reimburses the contractor for his actual costs. The owner and contractor share any cost savings or overrun under a formula agreed-upon in advance.



WHAT SHOULD YOU DO?

- ▶ How does your organization want to select contractors?
- ▶ What factors do you consider important?
- ▶ What is the capacity of your organization to oversee contract development, contract management, and contractor oversight?
- ▶ What types of relationships do you already have with contractors?
- ▶ What are the viewpoints of your board – open competition, building lasting relationships, local priority?

CONTRACTING SCENARIO

- ▶ You contract a restoration project involving excavation and potential sub-contractors. The project is anticipated to last 4 weeks with a total budget of \$400,000. You have a mix of Federal and State funding for the project. The designs were completed as in-kind by local NRCS staff but no NRCS funds are being used for implementation
- ▶ How would you bid, contract, and implement this work?

CONTRACTING WITH CRWC

- ▶ Type of contract (Build, Design-Build) is project specific
- ▶ Contracting process is determined by procurement policy
 - ▶ Open bid involves two phases
 - ▶ RFQ – based on project specific minimum qualifications
 - ▶ Qualified contractors submit bids, low bid wins contract

1.3 Minimum Contractor Qualifications

Dam removal and river restoration are unique construction processes that require specialized experience and expertise. In order to be eligible for proposing on this project, the contractor must be able to demonstrate, through past project experience and references, the following: 1) removal of at least two in-stream structures from an active river in excess of 25 cubic yards of concrete or similar material, 2) reconstruction or restoration of a river channel using natural products and techniques, and 3) two projects with dewatering and work area isolation in active rivers. References must be provided to validate the required experience. The experience must be within the company or project team that will perform the work and individual experiences at different companies will not qualify. Furthermore, stabilizing an eroding stream bank does not qualify as adequate experience. Each project description should be kept to one page per reference project.

PROCUREMENT POLICIES

- ▶ Why have a Procurement Policy?
 - ▶ Consistency – staff change, documentation, prevents litigation
 - ▶ Fairness – open, transparent process for contractors
 - ▶ Compliance with funders: “OWEB shall review the bylaws or charter and policies and procedures (“governing documents”) to determine whether they contain the topics listed in Section IV.E.2 and 3.”
 - ▶ “Councils receiving public funds shall have policies and procedures in place for accountable financial management and best-practice business operations that are open and inclusive and promote the balance of interests and citizen involvement required by Oregon statutes.”
 - ▶ Procurement Policies are not specifically mentioned, but a good idea to consider
- ▶ Don't reinvent the wheel! Lean on your local partners and county agencies to get a template and modify from there

CRWC PROCUREMENT POLICY

Type of Service	Professional Services	Construction	Supplies and Materials
Sole source	\$10k or less	\$30k or less	\$20k or less
Min. Two quotes	\$10k > \$20k	NA	> \$20k
Open bid	> \$20k	> \$30K	NA

- ▶ “This policy does not apply to landowner projects where the landowner has selected the contractor or will complete the work himself and has indicated this preference to the CRWC prior to the start of the work.”
- ▶ Policy also includes emergency clause, contracting cmte review, etc.

CRWC PROCUREMENT POLICY

- ▶ CRWC Examples
 - ▶ CRC Fish Passage
 - ▶ Ochoco Lumber Restoration
 - ▶ Stearns Dam Removal

