AGENDA REQUEST & STAFF REPORT

For Board Business Meeting of February 17, 2016

DATE: February 16, 2016

FROM: David Doyle  Legal Department  388-6625

TITLE OF AGENDA ITEM:

PUBLIC HEARING ON THIS DATE?  No.

BACKGROUND AND POLICY IMPLICATIONS:
On January 27, 2016, Deschutes County issued a Notice of Intent to Award Contract regarding the Powell Butte Roundabout. JAL Construction timely submitted its protest. The BOCC, convening as the Deschutes County Contract Review Board held a hearing on February 10, 2016, and after receiving testimony and information voted 3-0 to deny the protest.

FISCAL IMPLICATIONS:
JAL's bid, while incomplete and non-responsive, was approximately $3,000 less than the successful bidder; staff costs associated with this protest likely exceed $3,000.

RECOMMENDATION & ACTION REQUESTED:
Move approval and signature of Order No. 2016-012.

ATTENDANCE:  David Doyle, Legal

DISTRIBUTION OF DOCUMENTS:
Original to BOCC
Copies to Road, Legal, JAL Construction
Before the Board of County Commissioners of Deschutes County, Oregon, convening as the Deschutes County Contract Review Board

An order denying the bid protest submitted by JAL Construction, Inc., concerning the Notice of Intent to Award Contract for the Powell Butte Highway Roundabout.

WHEREAS, on January 27, 2016, Deschutes County issued a Notice of Intent to Award Contract letter concerning the Powell Butte Highway Roundabout Project; and

WHEREAS, JAL Construction, Inc., did, on February 1, 2016, submit a timely Bid Protest; and

WHEREAS, a hearing was held on February 10, 2016, during which testimony was received, the Board openly deliberated and then voted 3-0 to deny the protest; now therefore,

The Board of County Commissioners of Deschutes County, Oregon, convened as the Deschutes County Contract Review Board hereby orders as follows:

Section 1. The protest of JAL Construction, Inc., is denied.

Section 2. The Written Disposition – Findings, attached hereto as Exhibit 1 are adopted as the Written Disposition/Findings in support of the denial of the protest.

Section 3. The Notice of Intent to Award Contract, Document No. 2016-002 is affirmed.
Section 4. This Order is effective upon signing.

Dated this 17th day of February, 2016.

THE BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON,
CONVENING AS THE DESCHUTES COUNTY
CONTRACT REVIEW BOARD

________________________________________
ALAN UNGER, Chair

________________________________________
TAMMY BANEY, Vice-Chair

ATTEST:

________________________________________
Recording Secretary

________________________________________
ANTHONY DEBONE, Commissioner
EXHIBIT “1”

WRITTEN DISPOSITION - FINDINGS
EXHIBIT 1 Written Disposition – Findings

Project: Powell Butte Highway Roundabout

Timeline of Events:

1. 12/30/15 bid documents issued (publication) for project; Exhibit A
2. 1/12/16 mandatory pre-bid meeting of prospective bidders; Exhibit B
3. 1/14/16 9-page Addendum #1 issued; Exhibit C
4. 1/19/16 project bids opened; JAL Construction bid submission included only 1-page of 9-page Addendum #1, and did not include signature/acknowledgement; Exhibit D
5. 1/27/16 County issues Notice of Intent to Award Contract; Exhibit E
6. 2/1/16 JAL Construction submits Bid Protest; Exhibit F
7. 2/3/16 County Road Department submits Staff Report; Exhibit G
8. 2/10/16 Board of County Commissioners Convening as the Deschutes County Contract Review Board holds hearing, receives testimony, deliberates and votes 3-0 to DENY the Protest; Exhibit H

General:

1. Deschutes County Code (DCC) 2.36 authorizes the Board of County Commissioners to function as the local contract review board.
2. DCC 2.37 provides that the Model Rules of Public Contract Procedure, OAR 137, divisions 46, 47, 48 and 49 “shall be the rules of the Deschutes County Contract Review Board.”
3. General Condition 26 (page 15 of 65 in bid document package) provides that “the rules applicable to this contract are the Attorney General’s Model Public Contracting Rules, Chapter 137-046 and Chapter 137-049, as presently constituted and Deschutes County Code (DCC) Chapter 2.37.”
4. Special Provisions (page 18 of 65 in bid document package) states that “the standard specifications which are applicable to work on this project are Oregon Standard Specifications for Construction, 2015.”
Protest - Claims / Findings:

1. **Claim:** JAL’s Bid Utilized all Bid Forms Required by the Bid Documents, including the Revised Bid Schedule Page from Addendum #1.

   **Finding:** This claim is incorrect and is denied. JAL’s bid included only 1-page of the 9-page Addendum #1, and did not include the mandated signed acknowledgement evidencing a final submitted bid that assured consideration of the 25 points of clarification and change to the original project scope.

2. **Claim:** County Staff’s Reliance on Section 18a of the Information for Bidders is Misplaced.

   **Finding:** This claim is incorrect and is denied. Section 18a requires that bids be submitted on forms furnished by the County, and include a complete set of contract documents. We understand JAL to assert that the Addendum, because it was issued after the initial bid documents, can never be considered part of the “contract documents.” We note that the first sentence on Addendum #1 reads: “The contract documents for the Construction of the Powell Butte Highway Roundabout are amended as follows:” and the last sentence on the correspondence portion of Addendum #1 reads: “THIS SHEET, COMPLETE WITH ATTACHMENTS, TO BE SUBMITTED WITH BID PROPOSAL.” We find further that OAR 137-049-0250 is controlling and provides as follows: **Addenda to Solicitation Documents. (1) Issuance; Receipt.** The Contracting Agency may change a Solicitation Document only by Written Addenda. An Offeror shall provide Written acknowledgement of receipt of all issued Addenda with its Offer, unless the Contracting Agency otherwise specifies in the Addenda or in the Solicitation Document.” We also find that section 00120.70 of the Oregon Standard Specifications for Construction, 2015 (included in Exhibit G) identifies bids that do not acknowledge issued Addenda as constituting an “irregularity” that may render the bid “non-responsive.”

3. **Claim:** JAL’s Bid was Signed on Space Provided on the Bid Form. The Bid Documents Do Not Require a Signed Addendum to Be Submitted.

   **Finding:** This claim is essentially the same as Claim #2. It is also incorrect and is denied. We note that the first sentence on Addendum #1 reads: “The contract documents for the Construction of the Powell Butte Highway Roundabout are amended as follows:” and the last sentence on the correspondence portion of Addendum #1 reads: “THIS SHEET, COMPLETE WITH ATTACHMENTS, TO BE SUBMITTED WITH BID PROPOSAL.” We find further that OAR 137-049-0250 is controlling and provides as follows: **Addenda to Solicitation Documents. (1) Issuance; Receipt.** The Contracting Agency may change a Solicitation Document only by Written Addenda. An Offeror shall provide Written acknowledgement of receipt of all issued Addenda with its Offer, unless the Contracting Agency otherwise specifies in the Addenda or in the Solicitation Document.” We also find that section 00120.70 of the Oregon Standard Specifications for Construction, 2015 (included in Exhibit G) identifies bids that do not acknowledge issued Addenda as constituting an “irregularity” that may render the bid “non-responsive.”

4. **Claim:** JAL’s Bid Complied with Plain Requirements of the Bid Documents and County is Mandated to Award Contract to JAL.

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Order No. 2016-012 (Exhibit 1)
Finding: This claim is essentially the same as Claim #2. It too is incorrect and is denied. We note that the first sentence on Addendum #1 reads: “The contract documents for the Construction of the Powell Butte Highway Roundabout are amended as follows:” and the last sentence on the correspondence portion of Addendum #1 reads: “THIS SHEET, COMPLETE WITH ATTACHMENTS, TO BE SUBMITTED WITH BID PROPOSAL.” We find further that OAR 137-049-0250 is controlling and provides as follows: “Addenda to Solicitation Documents. (1) Issuance; Receipt. The Contracting Agency may change a Solicitation Document only by Written Addenda. An Offeror shall provide Written acknowledgement of receipt of all issued Addenda with its Offer, unless the Contracting Agency otherwise specifies in the Addenda or in the Solicitation Document.” We also find that section 00120.70 of the Oregon Standard Specifications for Construction, 2015 (included in Exhibit G) identifies bids that do not acknowledge issued Addenda as constituting an “irregularity” that may render the bid “non-responsive.” The bid submitted by JAL was not responsive as it failed to include the mandated signed acknowledgement evidencing a final submitted bid that assured consideration of the 25 points of clarification and change to the original project scope. Staff indicated and we find that all other bidders returned the signed acknowledgement page from Addendum #1.

5. Claim: The Bid Documents Require, as does Common Sense and Fairness, that the Contract be Awarded to JAL.

Finding: This claim is incorrect and is denied. As noted above in Findings on Claims 2-4, the bid documents do not require awarding the contract to JAL. To the contrary, the bid documents (read Solicitation Documents) include Addendum #1 and as such the County may not award the contract to JAL – despite it being the lowest bidder by $3,000.

6. Claim: Section 16 of the Information for Bidders Binds the Bidder to Addendum.

Finding: This claim is incorrect and is denied. Section 16 is a general disclaimer in favor of the County that obligates the bidder to alert the County to any discrepancies in the bid documents. It has no direct applicability to the present issue and it does not relieve JAL of the signature/acknowledgement requirement expressly stated in Addendum #1.

7. Claim: Section 18h of the Information for Bidders Allows Less than Complete Submissions.

Finding: This claim is incorrect and is denied. We find that Section 18h actually precludes the County from awarding the contract to JAL. Specifically, Section 18 mandates strict compliance with bid requirements and allows that “variance from these requirements will result in rejection of the bid as unresponsive.” Subsection h provides that failing to submit all of the bid documents will not render the bid unresponsive provided that the submission included “a sufficient number of the pages of the bid documents to allow the evaluation of the bid..” Accordingly, staff ascertained, and we find that the JAL bid could not be properly evaluated since it did not include the signed acknowledgement evidencing a final submitted bid that assured consideration of the 25 points of clarification and change to the original project scope.
Additional Findings:

OAR 137-049-0280 provides in part that (a) the Bid is the Proposer’s offer to enter into a contract and that upon signing and returning the Bid the Offeror acknowledges that it has read and understands the terms and conditions in the Solicitation Document, and (b) the Contracting Agency “may Award a Contract only to a Responsible Offeror with a Responsive Offer.”.

OAR 137-049-0250 provides that the Contracting Agency “may change a Solicitation Document only by Written Addenda” and that the “Offeror shall provide Written acknowledgement of receipt of all issued Addenda with its Offer, unless the Contracting Agency otherwise specifies in the Addenda or in the Solicitation Document.”

We are hard-pressed to conceive of a situation that could be clearer on this point. As we have noted previously, the first sentence on Addendum #1 reads: “The contract documents for the Construction of the Powell Butte Highway Roundabout are amended as follows:” And just to make sure that the point was driven home and received, the last sentence on Addendum #1, just below the signature/acknowledgement block reads (in BOLD): “THIS SHEET, COMPLETE WITH ATTACHMENTS, TO BE SUBMITTED WITH BID PROPOSAL.”

We find that upon issuance, Addendum #1 became part of the bid documents. Addendum #1 provided 25 points of clarifying information, adjusted quantities and other details of the work. We cannot consider the JAL bid as responsive, since to do so would require us to speculate as to whether they accepted the entire package of changes or just those contained on the single, unsigned page of Addendum #1 that they did return.

We are not prepared to violate the integrity of the bid process that assures a level playing field and an apples to apples evaluation of bid proposals.

The bid protest submitted by JAL is DENIED.

February 17, 2016

DESHUTES COUNTY BOARD OF COMMISSIONERS, CONVENED AS THE DEschutes COUNTY CONTRACT REVIEW BOARD.

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1 The terms “Bid documents,” “Contract Documents,” and “Solicitation Documents” are used interchangeably.