

BEAVER SLOUGH DRAINAGE DISTRICT

RESOLUTION NO. 2016- _____

A RESOLUTION ADOPTING FINDINGS OF FACT, DECLARING AN EXEMPTION FROM COMPETITIVE BIDDING, AND AUTHORIZING THE CM/GC FORM OF CONTRACTING FOR THE CP3 CONSTRUCTION PROJECT

WHEREAS, the Beaver Slough Drainage District (“District”), an Oregon drainage district formed pursuant to Oregon Revised Statutes (“ORS”) chapter 547, is subject to Oregon’s public contracting laws, including ORS chapter 279C relating to construction of public improvements; and

WHEREAS, ORS 279C.335 permits the District’s Board of Supervisors, acting as the Local Public Contract Review Board, to exempt specific projects from the standard competitive bidding requirements of ORS 279C after following required statutory procedures, specifically adopting written findings of fact justifying both use of the an exemption from bidding and an alternative contracting method; holding a public hearing on the adoption of the findings; and declaring an exemption from competitive bidding; and

WHEREAS, when approving the exemption in ORS 279C.335, the Local Contract Review Board “shall, where appropriate, direct the use of alternative 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”; and

WHEREAS, the District has determined that, due to the uniqueness of the proposed project, the complexity of the site conditions, the short construction window, and the urgency of preventing failure of infrastructure before the next winter storm season, the Construction Manager/General Contractor form of contracting is preferred to traditional design-bid-build construction; and

WHEREAS, the District has drafted written findings of fact to support the exemption from competitive bidding and the use of the CM/GC form of contracting, which are attached hereto as Exhibit A and incorporated herein by this reference, and a public hearing on the written findings was duly noticed, and held on _____, 2016; and

NOW, THEREFORE, the District’s Board of Supervisors, acting as the District’s Local Contract Review Board, hereby resolves as follows:

1. The written findings of fact attached hereto as Exhibit A are hereby adopted.
2. An exemption from traditional construction bidding processes and authorization of direct award of a contract are hereby authorized for completion of the described project.
3. Staff is directed to enter into contract negotiations directly with Nehalem Marine Manufacturing.

APPROVED AND ADOPTED on _____, 2016.

Board President

ATTEST:

Recording Secretary

RESOLUTION AUTHORIZING USE OF CM/GC FORM OF CONTRACTING FOR C3P CONSTRUCTION PROJECT

EXHIBIT A

FINDINGS OF FACT

I. IN SUPPORT OF AN EXEMPTION TO TRADITIONAL COMPETITIVE BIDDING AND AWARD OF A CM/GC CONTRACT FOR THE C3P CONSTRUCTION PROJECT

The Beaver Slough Drainage District (“District”) was formed in 1906 to protect the 1,700-plus acres in the District from the effects of twice-daily high tide, and facilitate drainage of land. Winter flood events in the Coquille River system are uncontrollable and the District works to protect its infrastructure during these times. The District is organized and operates within the parameters of Oregon Revised Statutes chapter 547. Landowners vote on an acreage basis and elect a five-member Board of Supervisors who are responsible for District operations, repairs, and maintenance. Although voting is on an acreage basis, the District is obligated by law and policy to treat all landowners in an equitable manner. An annual assessment is made on an acreage basis to provide funds for operations, repairs, and maintenance of District infrastructure.

District infrastructure consists of four 8.0’ CMP culverts with wooden tide gates, 1,200 feet of protective berm, at 18.5 feet NAVD88 elevation, at the Coquille River with an additional 8.0 miles of canals with associated berms throughout the district. The current CMP culvert/tide gates are at the end of life (20+ years), and in fact two of them failed and required extensive repairs in 2014. There continues to be considerable leakage as well as evidence of potential bulkhead failure. The last three winter storm seasons have been rather mild, with few major storm events, so the infrastructure has not yet failed completely. But the risk and potential costs of delaying replacement of this infrastructure is quite high. A failure would result in significant extra cost to reestablish the protective berm and necessary temporary culvert/tide gate infrastructure to not only protect District landowner’s properties, but also dry out the area to allow construction of the planned culvert/tide gates and the interior restoration and canal/berm reconstruction.

The District has been working since 2009 to bring the resources together to be able to replace this infrastructure. Given the risk of failure of the current infrastructure, location, technical complexity, and limited timeframe for completion of the work, it is in the best interests of the District and its landowners to expedite the contracting and work schedule.

The use of an alternative contracting method will significantly help to address the following relevant factors:

- Unique Project. This project is unique in that the necessary elements (size, volume, velocity, etc.) needed to satisfy fish passage criteria and the regulatory requirements have never been attempted at this proposed size and scale. Engineering and permitting/regulatory compliance issues are ongoing, driven by concerns for the endangered Coho Salmon. Design of a foundation that will both support vertically the concrete box culverts/tide gates and prevent the horizontal movement of water through the shallow mat pad foundation has been a difficult challenge.

RESOLUTION AUTHORIZING USE OF CM/GC FORM OF CONTRACTING FOR C3P CONSTRUCTION PROJECT

In addition, the equipment necessary to the project is unique. The project design, permitting, and fish passage approval call for a side hinged tide gate, mounted on a slide frame, controlled by muted tidal regulator (MTR) technology. The MTR technology is patented by Nehalem Marine Manufacturing, which is the only company licensed and qualified to install it. [See attached patent information (Exhibit B).]

- Time is of the Essence. If work occurs past the in-water work window necessary to protect fish, conditions on the ground are highly unlikely to allow access prior to the first part of June, and any work past the end of September could not be possible due to the potential for an early fall storm creating unworkable conditions on the ground. The short work season leaves little if any room for error or contingencies. Additionally, the uncertainties of permitting timelines and final approval of funding commitments are already crowding this year's schedule.
- Challenging Site Conditions. The site location and conditions on the ground are such that we are working on a converted wetland, subject to twice daily tidal flooding without the protective infrastructure, with the site 1.5 miles from Highway 42N and soil conditions beneath the thin dry crust being the equivalent of 400 feet of chocolate pudding. Additionally the proximity of the Coquille River channel and current culvert/tide gates to the construction site as well as the need to maintain operational functionality at all times adds considerable complexity to the cofferdam, shoring, and dewatering. With an average daily high tide level of 6.8 feet and subsoil level of - 6.5 feet under the shallow mat pad foundation there is over 14 feet of differential to deal with. Due to the need to protect the infrastructure during the winter storm seasons and the expense of creating temporary protective infrastructure it is not an option to split the construction over two seasons.
- Uniquely Qualified Contractors. Contractors with the qualifications and experience to complete this project are limited. Not only is the project somewhat removed from the mainstream but the knowledge of the site, the site conditions, and past experience with projects of this type and scale will be key. With the difficult parameters involved, there is little margin for error.
- Limited Financial Resources Require Cost Savings. The resources available for this project are limited and the best efficiency is critical making cost control a top priority. It is important the most qualified, experienced and talented people possible be brought on board to complete this project.
- Qualified Consultants. The design process working with Leo Kuntz, Nehalem Marine Mfg., as a consultant as well as qualified, experienced engineering talent has allowed us to move this project forward to the construction phase. The synergy, hybrid vigor, and lack of "group think" has been efficient and served us well. The project will be guided by experienced Board members, technical consultants, as well as legal and project management consultants that provide a qualified management team.

RESOLUTION AUTHORIZING USE OF CM/GC FORM OF CONTRACTING FOR C3P
CONSTRUCTION PROJECT

II. IN SUPPORT OF AN EXEMPTION FROM COMPETITIVE BIDDING AND DIRECT AWARD FOR A PUBLIC IMPROVEMENT PROJECT

Oregon Revised Statutes 2799C.335(2)(a) allows the Board of Supervisors, acting as the District's local contract review board, to adopt an exemption from competitive bidding provided it adopts written findings that: (1) The exemption is unlikely to encourage favoritism in awarding public improvement contracts or substantially diminish competition for public improvement contracts; and (2) awarding a public improvement contract under the exemption will likely result in substantial cost savings and other substantial benefits to the District or the public.

In approving these findings, the local contract review board shall consider the type, cost and amount of the contract and, to the extent applicable to the particular public improvement contract or class of public improvement contracts, the following:

- Granting the exemption will better enable the contracting agency to address the size and technical complexity of the public improvement, including coordinating multiple interconnected phases of construction. The site location and conditions on the ground are such that we are working on a converted wetland, subject to twice daily tidal flooding without the protective infrastructure, with the site 1.5 miles from Highway 42N and soil conditions beneath the thin dry crust being the equivalent of 400 feet of chocolate pudding. Additionally the proximity of the Coquille River channel and current culvert/tide gates to the construction site as well as the need to maintain operational functionality at all times adds considerable complexity to the cofferdam, shoring, and dewatering. With an average daily high tide level of 6.8 feet and subsoil level of - 6.5 feet under the shallow mat pad foundation there is over 14 feet of differential to deal with. Due to the need to protect the infrastructure during the winter storm seasons and the expense of creating temporary protective infrastructure it is not an option to split the construction over two seasons. Furthermore, the project must comply with regulations to protect the Coho Salmon.
- How many persons are available to bid. Due to the size, scope, and complexity of the project, contractors with the qualifications and experience needed to complete this project are limited. Not only is the project unusual, but the knowledge of the site, the site conditions, and past experience with projects of this type and scale will be key. In addition, the equipment necessary to the project is patented by Nehalem Marine Manufacturing, which is the only company qualified to install it. The District has contracted with Leo Kuntz of Nehalem Marine as a consultant on this project, and is confident that Nehalem Marine is the most qualified to complete the work in the manner and timeline required.
- The construction budget and the projected operating costs for the completed public improvement; granting the exemption will affect the sources of funding for the public improvement. The District has been working since 2009 to bring the resources together to be

RESOLUTION AUTHORIZING USE OF CM/GC FORM OF CONTRACTING FOR C3P
CONSTRUCTION PROJECT

able to replace this infrastructure. The resources available are limited and the best efficiency is critical, making cost control a top priority. It is important the most qualified, experienced and talented people possible be brought on board to complete this project. Furthermore, most of the funding for the project is provided in the form of grants, which are required to be expended within certain time frames or the funding reverts back to the grantor.

- Public benefits that may result from granting the exemption; increases in public safety; reduction of risks. Winter flood events in the Coquille River system are uncontrollable and the District works to protect its infrastructure during these times. The last three winter storm seasons have been rather mild, with few major storm events, so the infrastructure has not yet failed completely. But the risk and potential costs of delaying replacement of this infrastructure is quite high. A failure would result not only in flooding of landowners' properties and loss of production, but in significant extra cost to reestablish the protective berm and necessary temporary culvert/tide gate infrastructure. Additionally, any temporary structures would be outside of the scope of the current permits and would delay the scheduled restoration and infrastructure work within the District.

Exhibit B_NM – Patent Sole Source Opinion

TES Patent Law

Timothy E. Siegel Patent Law, PLLC
777 - 108th Avenue NE • Suite 2240 • Bellevue WA 98004
Phone 425.283.1166 • Fax 877.291.4380
Email: tim@intprolaw.com • website: intprolaw.com

June 22, 2015

Mr. Leo Kuntz
Nehalem Marine Manufacturing
24755 Miami Foley Rd.
Nehalem, OR 97131

via email: Nehalemmarine@gmail.com

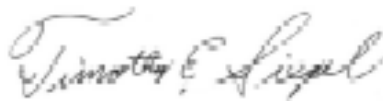
Dear Mr. Kuntz:

This letter is in response to your request for a clarification of your status as sole bidder on contracts for the installation of a muted tidal regulator. Apparently, some governmental bodies that require the installation of a muted tidal regulator question your status as sole bidder.

There is a public policy interest in government contracts being subject to competitive bidding, so that the process is transparent and the public is provided with reassurance that the contract has been granted in a manner that best serves the public interest. In this instance, however, due to your ownership of US Patent 6,988,853 and Canadian Patent CA 2,525,176 you are the only one who has the legal right, in the United States and Canada, to provide muted tidal regulators that fall within the patent scope. Accordingly, as nobody else has the right to supply this type of device, there is nobody who would be entitled to bid against you in a competitive bidding process. As public contracts are typically open to the public for inspection, however, members of the public do have the ability to read any contract entered into by you and a governmental body, in order to make a determination as to whether the public interest has been served.

Public vigilance is the best guarantee of proper fulfillment of fiduciary duties by governmental bodies.

Sincerely,



Timothy E. Siegel
Timothy E. Siegel Patent Law, PLLC