

**Date:** January 24, 2018

**To:** Board of Directors

**From:** Neil McFarlane



**Subject:** RESOLUTION 18-01-04 OF THE TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON (TRIMET) BOARD OF DIRECTORS, ACTING IN ITS CAPACITY AS THE TRIMET CONTRACT REVIEW BOARD, EXEMPTING FROM COMPETITIVE BIDDING REQUIREMENTS A CONTRACT(S) FOR CONSTRUCTION MANAGER/GENERAL CONTRACTOR SERVICES FOR THE DIVISION TRANSIT PROJECT

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**1. Purpose of Item**

The attached Resolution exempts from the low bid process one or two public improvement contracts for construction services for TriMet's Division Transit Project (Project), which is a 15 mile bus rapid transit project that will travel between downtown Portland and the Cleveland Avenue Park & Ride in Gresham. Approval of this Resolution will allow TriMet to initiate a competitive Request for Proposals (RFP) process to select the most highly qualified proposer or proposers for award of the contract(s).

**2. Type of Agenda Item**

- Initial Contract
- Contract Modification
- Other \_\_\_\_\_

**3. Reason for Board Action**

This exemption from competitive bidding must be approved by the TriMet Contract Review Board (TCRB) in accordance with state law and the TCRB Rules.

**4. Type of Action**

- Resolution
- Ordinance 1<sup>st</sup> Reading
- Ordinance 2<sup>nd</sup> Reading
- Other \_\_\_\_\_

**5. Background**

The Project will provide high-capacity transit service with 60 foot long articulated buses over the 15-mile Division corridor between downtown Portland and Gresham. It will be composed of about 42 stations with 83 platforms and upgraded rider amenities. The Project will utilize transit signal priority at signalized intersections to create more reliable and faster service than

currently possible on the existing bus line. In addition, consolidated stops and three-door boarding and fare payment will significantly reduce dwell times, speeding up the entire ride.

Since January 2017, TriMet has been leading this Federal Transit Administration (FTA) Small Starts project, and will continue to oversee activities through design, construction and operation of the new transit service. The Project is currently at 30 percent design, and at this time TriMet is ready to procure the services of a construction manager/general contractor (CM/GC) to assist with completion of the Project design, contribute to cost certainty, and establish needed coordination to ensure a successful construction process. TriMet is currently considering whether to select one contractor for the entire alignment, or to separate the Project into two segments and select two contractors. This exemption would allow either option.

TCRB Rule V(A) and ORS 279C.335(2) provide that the TriMet Board of Directors (Board), acting in its capacity as the TCRB, may exempt a contract from competitive sealed bidding requirements upon approval of the following written findings submitted by the public contracting agency:

- (a) The exemption is unlikely to encourage favoritism in awarding public improvement contracts or substantially diminish competition for public improvement contracts; and
- (b) Awarding a public improvement contract under the exemption will likely result in substantial cost savings and other substantial benefits to the contracting agency.

An exemption from low bidding is required to enable TriMet to select its contractor using a best value process. Under the traditional low bid procurement method, TriMet may consider only price in selecting a contractor. The competitive RFP process allows TriMet to select a contractor upon consideration of many factors, including price. In addition to price, use of the RFP process allows TriMet to consider things such as experience in similar work, schedule performance and work phasing plans, cost control, attention to safety, quality of workmanship, and Disadvantaged Business Enterprise (DBE) and workforce diversity programs. The Project is a major construction project along a constrained travel corridor with significant commercial, retail, and residential uses that will be constructed under budget and schedule pressure, so consideration of these other factors is important.

TriMet has a history of successfully utilizing the RFP process to select CM/GC contractors for complex construction projects. For example, the Portland-Milwaukie Light Rail Project utilized RFPs to obtain CM/GCs for the East and West segments of that project, as well as the Center Street building modifications work. TriMet also used a RFP process to select a CM/GC for the Blue Line Station Rehabilitation project and the eFare Installation project, both of which, like this one, involved work around existing facilities that must remain operational during the construction period. The agency's written findings in support of the exemption, which are required by ORS 279C.335, are attached to Resolution 18-01-04 as Exhibit A.

Pursuant to ORS 279C.335(5), TriMet is required to hold a public hearing to allow comment on draft findings used to grant an exemption for a public improvement. Notification of the public hearing on the draft findings was published in the Daily Journal of Commerce on December 26, 2017, and the hearing was held on January 9, 2017. There were no attendees, and no comments were received.

**6. Procurement Process**

Upon approval of this exemption, a competitive RFP process will be used to select the contractor or contractors that present the best value to the agency, based on the criteria included in the RFP, including price.

**7. Diversity**

Use of a competitive RFP process allows TriMet to consider proposers' DBE plans and workforce diversity in awarding the contract.

**8. Financial/Budget Impact**

The Project will be funded in part by a federal Small Starts grant from the FTA. Currently, Project work is being paid for by committed Metropolitan Transportation Improvement Plan (MTIP) regional funds that will serve as local match to the federal grant funds. Construction under the contract(s) will not begin until a Letter of No Prejudice is received from FTA, or the federal grant agreement is in place.

**9. Impact if Not Approved**

If this exemption is not approved, TriMet could procure this public improvement contract(s) via the traditional low bid procurement method. This option is not preferred for the reasons outlined above and discussed in the findings.

## **RESOLUTION 18-01-04**

### **RESOLUTION OF THE TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON (TRIMET) BOARD OF DIRECTORS ACTING IN ITS CAPACITY AS THE TRIMET CONTRACT REVIEW BOARD, EXEMPTING FROM COMPETITIVE BIDDING REQUIREMENTS A CONTRACT(S) FOR CONSTRUCTION MANAGER/GENERAL CONTRACTOR SERVICES FOR THE DIVISION TRANSIT PROJECT**

**WHEREAS**, the TriMet Contract Review Board (TCRB) has authority under ORS 279C.335 and TCRB Rule V to exempt a contract or contracts from the competitive bidding requirements of ORS Chapter 279C upon approval of written findings submitted by the agency showing compliance with ORS 279C.335; and

**WHEREAS**, a public hearing was held on the agency's draft written findings in support of an exemption from competitive bidding requirements for a public improvement contract(s) for construction manager/general contractor (CM/GC) services for the Division Transit Project (Project); and

**WHEREAS**, TriMet has submitted to the TCRB its written findings that are required by ORS 279C.335 in support of an exemption from competitive bidding requirements for the Project; and

**WHEREAS**, ORS 279C.335(4) and TCRB Rule V(B) provide that in granting exemptions from competitive bidding requirements, the TCRB shall, where appropriate, direct the use of alternate contracting methods that take account of market realities and modern practices and are consistent with the public policy of encouraging competition.

#### **NOW, THEREFORE, BE IT RESOLVED:**

1. That the findings stated at (a) and (b) below, and the Findings In Support of Low Bid Exemption attached as Exhibit A submitted in support of (a) and (b) below, to exempt from competitive bidding requirements the contract(s) for CM/GC services for the Project (Contract), are hereby approved and adopted.

(a) It is unlikely that the exemption will encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts; and

(b) The awarding of a public improvement contract(s) pursuant to the exemption will likely result in substantial cost savings and other substantial benefits to the agency.

2. That the Contract(s) is exempt from the competitive bidding requirements of ORS Chapter 279C.

3. That TriMet is authorized to initiate a Request for Proposal process and negotiate a contract or contracts for the specified work subject to final Board approval of the contract award.

4. That TriMet shall conduct the CM/GC services procurement in accordance with Model Rules adopted by the Attorney General under ORS 279A.065(3).

Dated: January 24, 2018

\_\_\_\_\_  
Presiding Officer

Attest:

\_\_\_\_\_  
Recording Secretary

Approved as to Legal Sufficiency:

  
\_\_\_\_\_  
Legal Department

# **EXHIBIT A**

## **RESOLUTION NO. 18-01-04**

### **FINDINGS IN SUPPORT OF LOW BID EXEMPTION**

#### **CM/GC Services for Division Transit Project**

##### **A. Competitive Bid Exemption under Oregon Statute**

Oregon law requires all local contracting agency public improvement contracts to be procured by competitive low bid unless an exemption is granted by the agency's contract review board or the contract is otherwise exempt from competitive bidding requirements. For a contract review board exemption, ORS 279C.335(2) requires the agency to develop findings that (1) the alternative procurement process is unlikely to encourage favoritism or substantially diminish competition, and (2) that the award of the contract under the exemption will likely result in substantial cost savings and other substantial benefits to the agency.

In making these findings, the agency must consider the type, cost and amount of the contract and, to the extent applicable to the particular public improvement contract, certain factors defined by ORS 279C.335(2)(b). These include the following:

- (A) How many persons are available to bid;
- (B) The construction budget and the projected operating costs for the completed public improvement;
- (C) Public benefits that may result from granting the exemption;
- (D) Whether value engineering techniques may decrease the cost of the public improvement;
- (E) The cost and availability of specialized expertise that is necessary for the public improvement;
- (F) Any likely increases in public safety;
- (G) Whether granting the exemption may reduce risks to the contracting agency, the state agency or the public that are related to the public improvement;
- (H) Whether granting the exemption will affect the sources of funding for the public improvement;
- (I) Whether granting the exemption will better enable the contracting agency to control the impact that market conditions may have on the cost of and time necessary to complete the public improvement;
- (J) Whether granting the exemption will better enable the contracting agency to address the size and technical complexity of the public improvement;

- (K) Whether the public improvement involves new construction or renovates or remodels an existing structure;
- (L) Whether the public improvement will be occupied or unoccupied during construction;
- (M) Whether the public improvement will require a single phase of construction work or multiple phases of construction work to address specific project conditions; and
- (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.

## **B. Summary Description of the Division Transit Project**

The Division Transit Project (Project or DTP Project) is a 15 mile bus rapid transit project that will travel between downtown Portland and the Cleveland Avenue Park & Ride in Gresham. The Project will provide high-capacity transit service with 60 foot long articulated buses. It will be composed of 42 stations with 83 platforms and upgraded rider amenities. The project will utilize transit signal priority at signalized intersections to create more reliable and faster service than currently possible on the existing bus line. In addition, consolidated stops and three-door boarding/fare payment will significantly reduce dwell times, speeding up the entire ride. In conjunction with the in-street work on Division Street, the DTP Project will also include a portion of the reconstruction and expansion of TriMet's Powell Garage facility, in order to accommodate and maintain the articulated bus fleet. The CM/GC services work will not include Powell Garage, which will be performed under a separate contract.

Construction on the DTP Project will be performed over a two-year period, and will need to maintain traffic and standard bus operations along this busy corridor during the entire Project.

## **C. Critical Factors**

The DTP Project is a major construction project along a constrained travel corridor that has significant commercial, retail, and residential uses. The Project will be constructed under significant budget and schedule pressure. The following are among the challenges this Project presents:

- a. Making informed decisions during final design development for the best design outcomes and construction methods is critical to the success of the Project.

b. Construction along this active corridor will need to be sequenced in such a way as to avoid adverse long-term impacts to individual businesses, residents, and the overall transportation network. In addition, advanced coordination will help in synching up with work related to utility relocation and other active projects.

c. Cost certainty is needed to address the financial constraints of this Project, and a federal budget that is limited by warrants. Market volatility in the construction industry is a risk that requires management and mitigation early in the project.

d. The various segments of the Project have specific needs that must be defined and paired with the contractor's skills and abilities. Advanced coordination will help ensure desired outcomes.

TriMet believes that selection of a contractor with experience and expertise in the design and construction of similarly complex projects will help meet these challenges. The only way to ensure the selection of such a contractor is through the use of an alternative selection process.

#### **D. Considerations**

##### *1. Type, cost and amount of contract*

TriMet is planning to utilize a request for proposal process to select either one or two construction manager/general contractor(s) ("CM/CG") to assist during design development and construction of the DTP Project. TriMet estimates that the total order of magnitude of the contract(s) is approximately \$55,000,000 to \$60,000,000.

##### *2. How many persons are available to bid?*

TriMet believes there is a sufficient market for this type of project and will take steps to ensure maximum competition and fair opportunity for the Project. These steps will include advertisement in the Daily Journal of Commerce and TriMet's internet procurement system, Ebid, as well as scheduling a pre-proposal conference and appointing of an unbiased evaluation committee.

By marketing this opportunity and attempting to notify all known potential respondents, TriMet will implement a process that maximizes the number of available proposers. TriMet has found that by allowing contractors to develop their proposed work plan and to incorporate their value engineering and design ideas into the design and construction of the project, the negotiated procurement process generally encourages significant competition between contractors with accomplished performance records.

A negotiated procurement will also allow TriMet to evaluate the contractor's program for utilizing opportunities for participation by minority and women-owned businesses, which would not be possible in traditional low bid procurement.



*3. The construction budget and the projected operating costs for the completed public improvement*

A negotiated procurement will allow TriMet to select a contractor based upon performance criteria in addition to price competition. It will allow the selection of a contractor whose proven experience matches the nature of the required work. By selecting the most qualified contractor, TriMet will minimize the risk of delays, cost increases, and other costly impacts to the public, thereby increasing the likelihood of completing the DTP Project within the construction budget. Involving a contractor in the design process also provides for more constructible designs that are reflective of realistic construction means and methods, and allows the owner to obtain market-based pricing that assists in decision-making and budget adherence during final design. In TriMet's experience, the low bid contracting method for work of this nature is more likely to result in contractor-initiated change orders, which often cause the overall cost of the project to increase well beyond the initial contract price.

The operating costs of the DTP Project would be the same regardless of whether the project is procured via low bid or a negotiated procurement.

*4. Public benefits that may result from granting the exemption*

The extensive nature of the DTP Project will result in improving transit performance and reliability for many people across the 15-mile corridor. Executing the contract(s) in a well-coordinated/well designed approach will help to improve efficiencies and minimize a broad range of impacts during the course of construction.

*5. Whether value engineering techniques may decrease the cost of the public improvement*

TriMet's experience is that the greatest savings through value engineering are achieved during the design phase, before design decisions are finalized and before money is spent to develop a design that then requires change later in the process. Although low bid allows for value engineering during construction, it is often more difficult to implement because of construction schedule pressures, the cost of the redesign effort, and time required for additional public process.

Construction contractor input during final design enhances the value engineering opportunities during design. Design options can be considered while the design is being finalized, without issuance of change orders during construction. Options can also be considered in terms of their implications to operational impacts, constructability, temporary facilities, staging and construction access. The CM/GC contracting method allows the construction contractor to work with the design team to incorporate value engineering ideas in line with operational constraints and the design schedule, thereby maximizing cost saving ideas and methods.

*6. Cost and availability of specialized expertise that is necessary for the public improvement*

Construction costs are highly dependent upon the design, staging, access and construction methods - each of which varies considerably among designers and contractors. The DTP Project will require expertise in specific design and construction approaches that will result in cost-effective outcomes that can be implemented efficiently, and with long-lasting quality results. There are many cost pressures on this Project, and mitigating them earlier through contractor involvement will help to ensure the best outcome for the defined budget.

A negotiated procurement is the best method for TriMet to identify a contractor with the special expertise required, by employing a best value selection methodology which allows TriMet to evaluate and rank the expertise of each contractor in addition to the contractor's proposed price.

*7. Any likely increases in public safety*

This construction will occur within an active street right-of-way, and in close proximity to pedestrians, bicyclists, and motorists. Access must be well managed to ensure public safety and convenient access, while keeping disruptions to the adjacent uses to a minimum. TriMet desires a contractor with a successful performance record for this type of work.

A negotiated procurement allows TriMet to evaluate the contractor's safety record and previous project success at the time of selection. The contractor's actual safety performance on similar projects in similar urban environments is crucial to the success of this work. An alternate method of procurement offers TriMet the best opportunity to carefully evaluate the contractor's safety performance during construction and not assume risk for the contractor's work plan as a result of TriMet controlled design specifications.

*8. Whether granting the exemption may reduce risks to the contracting agency or the public that are related to the public improvement*

TriMet's experience is that a utilizing a negotiated procurement to secure a CM/GC contract for this type of project puts TriMet in the best position to successfully complete the project while minimizing schedule, cost, and safety risks. Because of the complex nature of the DTP Project, TriMet seeks to minimize risks of design changes, construction and operational delays, and contractor misunderstandings inherent in the traditional design-bid-build process, in order to control project budget and scheduling. Involving the construction contractor during design is a proven approach for containing costs and affirming schedules through implementation of more constructible designs and through the development of construction and communication plans that are realistic and reflective of operational constraints and public needs. A negotiated procurement allows TriMet to select a contractor with

experience and expertise performing this type of work that can collaborate on final designs and schedule requirements, instead of requiring the selection of a contractor based only on price.

*9. Whether granting the exemption will affect the sources of funding for the public improvement*

The use of federal funding from the Federal Transit Administration brings with it certain requirements related to schedule, as well as tight budget control. Completing the DTP Project within these constraints will require the selection of an experienced and efficient contractor, which can only be guaranteed through the use of a negotiated procurement process.

*10. Whether granting the exemption will better enable the contracting agency to control the impact that market conditions may have on the cost of and time necessary to complete the public improvement*

A negotiated procurement will allow TriMet to mitigate market risk by allowing proposers and TriMet to discuss and apportion this risk. Further, the construction market is currently busy, and use of a negotiated procurement will allow the contractor and TriMet to engage in a dialog about current market forces and construction schedule and require the contractor to assume some of the risks of price escalation and delay.

*11. Whether granting the exemption will better enable the contracting agency to address the size and technical complexity of the public improvement*

The special requirements of the DTP Project are due to the scale and high level of coordination that is needed to address cost constraints and the various complexities of integrating this Project into the urban environment. A negotiated procurement method allows TriMet to evaluate a contractor's technical experience in similar work at the time of selection.

*12. Whether the public improvement involves new construction or renovates or remodels an existing structure*

The DTP Project is for new construction of a 15 mile, 42 station bus rapid transit project within an active right-of-way that is shared with transit, automobiles, trucking, bicycles, and pedestrians. TriMet has successfully utilized a negotiated procurement to select a CM/GC contractor for other projects that have challenges similar to this corridor project. Based on its prior experience, TriMet believes that utilizing this procurement and construction method mitigates risk and increases efficiency.

*13. Whether the public improvement will be occupied or unoccupied during construction*

The DTP Project is new construction that must occur within a right-of-way that will simultaneously be occupied by a range of other transportation uses.

*14. Whether the public improvement will require a single phase of construction work or multiple phases of construction work to address specific project conditions*

The DTP Project is new construction that while heavily sequenced, will be completed in one phase. This consideration does not affect the Findings.

*15. Whether the contracting agency has, or has retained under contract, and will use contracting 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 will use to award the public improvement contract and to help negotiate, administer and enforce the terms of the public improvement contract.*

TriMet has exempted projects from low bid and utilized alternative procurement methods to select contractors many times in the past, including for the PMLR Project, the Portland Mall and I-205 Light Rail Projects, the Tilikum Crossing Bridge, and the Park Avenue and Clackamas Town Center Park and Ride structures. TriMet has a Procurement Department, a Legal Department, and a Capital Projects division that all contain many professionals who have substantial experience at procuring, negotiating, administering, and enforcing public improvement contracts, and will be working on the Project.

**E. Findings**

For the reasons stated above, an exemption from low bid is unlikely to encourage favoritism or substantially diminish competition, and the award of the contract under the exemption will likely result in substantial cost savings and other substantial benefits to the Agency.