

Date: May 25, 2016

To: Board of Directors

From: Neil McFarlane 

Subject: RESOLUTION 16-05-31 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 FOR CONSTRUCTION MANAGER/GENERAL CONTRACTOR SERVICES FOR THE ELEVATOR END OF LIFE REPLACEMENT/REFURBISHMENT PROJECT

1. Purpose of Item

The attached Resolution exempts from the low bid process a public improvement contract for construction services for TriMet’s Elevator End of Life Replacement/Refurbishment Project (“Project”), which is a five-year project to assess the need, manage the design, and replace or refurbish 19 of TriMet’s oldest elevators at 12 locations, including light rail stations, parking garages, TriMet maintenance facilities, and TriMet offices. Approval of this Resolution will allow TriMet to initiate a competitive Request for Proposals (“RFP”) best value process to select the most highly qualified proposer for award of this contract.

2. Type of Agenda Item

- Initial Contract
- Contract Modification
- Other – Exemption from Low Bid

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

TriMet maintains more than 30 elevators and material lifts that provide access to buildings and transit facilities, as well as the transport of freight for maintenance activities. Some of these are

heavily used, public outdoor elevators that are exposed to the elements and receive heavy use by patrons. Typical life expectancy for most elevators is 25-30 years, but the actual life can vary, and some of TriMet's elevators are at the end of their useful lives. As a result, elevator replacement and refurbishment are needed throughout TriMet's system.

Under Federal Transit Administration ("FTA") rules, TriMet is required to implement an asset management and maintenance program. As part of this program, TriMet performed an assessment of its elevators that included the age, status of life cycle, required level of maintenance, frequency of use, environmental conditions and use of new technology. Based on that assessment, TriMet is beginning to implement this Project.

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, cost control, attention to safety, quality of workmanship, and Minority/Women/Emerging Small Business ("M/W/ESB") and workforce diversity programs.

TriMet has a history of successfully utilizing the RFP process to select contractors for complex construction projects. For example, the Portland-Milwaukie Light Rail Project utilized RFPs to obtain Construction Manager/General Contractors ("CM/GC") for the East and West segments of the Project, as well as the Center Street Building Modifications work. TriMet plans to use the CM/GC contracting process for this Project.

The agency's written findings in support of the exemption, which are required by ORS 279C.335, are attached to Resolution 16-05-31 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, and the hearing was held on May 11, 2016. 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 CM/GC that offers the best value to the agency, based on the criteria included in the RFP. TriMet intends to solicit multiple competitive proposals, evaluate each proposal received, rank and select, and then award one CM/GC Contract to the firm with the highest ranked proposal. In this manner,

the overall ability of the bidder to actually do what is proposed may be assessed. Factors including past performance, price and experience may be considered. The RFP may provide detailed information on the project, but may also allow the proposer to have input into on how the project should be completed.

#### **7. Diversity**

Use of a competitive RFP process allows TriMet to consider proposers' Disadvantaged Business Enterprise ("DBE") plans and workforce diversity as a criterion in awarding the contract. This is an important consideration for reaching the agency's goals related to diversity, transit equity and the inclusion of DBE and small business.

#### **8. Financial/Budget Impact**

This work is part of the Elevator Asset Management/Refurbishment Program, which is included in the TriMet Capital Improvement Program Budget for FY 2017-2021.

#### **9. Impact if Not Approved**

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

## RESOLUTION 16-05-31

### **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 FOR CONSTRUCTION MANAGER/GENERAL CONTRACTOR SERVICES FOR THE ELEVATOR END OF LIFE REPLACEMENT/REFURBISHMENT PROJECT**

**WHEREAS**, the TriMet Contract Review Board (“TCRB”) has authority under ORS 279C.335 and TCRB Rule V to exempt a contract 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 for construction manager/general contractor (“CM/GC”) services for the Elevator End of Life Replacement/Refurbishment 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 for CM/GC services for the Elevator End of Life Replacement/Refurbishment 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 pursuant to the exemption will likely result in substantial cost savings and other substantial benefits to the agency.

2. That the Contract 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 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: May 25, 2016

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

Attest:

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

Approved as to Legal Sufficiency:

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

**RESOLUTION 16-05-31**

**Exhibit A**

**FINDINGS IN SUPPORT OF LOW BID EXEMPTION**

**ELEVATOR END OF LIFE REPLACEMENT/REFURBISHMENT 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 Project**

TriMet maintains more than 30 elevators and material lifts that provide access to buildings and transit facilities, as well as the transport of freight for maintenance activities. Some of these are heavily used, public outdoor elevators that are exposed to the elements and receive heavy use by patrons. Typical life expectancy for most elevators is 25-30 years, but the actual life can vary, and some of TriMet's elevators are at the end of their useful lives. As a result, elevator replacement and refurbishment are needed throughout TriMet's system.

Under Federal Transit Administration ("FTA") rules, TriMet is required to implement an asset management and maintenance program. As part of this program, TriMet performed an assessment of its elevators that included the age, status of life cycle, required level of maintenance, frequency of use, environmental conditions and use of new technology. Based on that assessment, TriMet is beginning to implement a five year project, known as the Elevator End of Life Replacement/Refurbishment Program ("Project"). The Project will assess the need, manage the design, and replace or refurbish 19 of TriMet's oldest elevators at 12 locations, including light rail stations, parking garages, TriMet maintenance facilities, and TriMet offices.

## **C. Critical Factors**

This elevator work will occur within TriMet facilities and at TriMet platforms adjacent to the operating TriMet light rail system. Work may also require adjacent architectural changes, code upgrades, technological improvements and consideration for alternative site services during construction. This presents many challenges, including the following:

a. Public and Worker safety: Construction must be conducted with extreme attention to public and worker safety, due to the proximity of construction to the public and TriMet Employees and to the operating light rail alignment in some cases.

b. Service Disruptions: Since the construction work will be done on complicated existing facilities, in some cases impacting ADA access to stations, the contractor's input during design on construction and construction methods will be critical in order to minimize cost related to operational and service disruptions.



c. Planning of the Construction Approach and Schedule: Development of a sound construction approach and schedule is critical to minimize disruption to TriMet operations and service during construction. Construction schedules, access, phasing and staging alternatives must be carefully developed and evaluated in detail to limit impacts to the public and to TriMet's system, and early contractor involvement in this process is essential.

e. Cost certainty: Budget confidence is important and it is critical for TriMet to obtain cost certainty early in the construction process, and to avoid any significant scope changes once the contract is awarded. The contractor can offer constructability and pricing feedback on design options, and can help identify risks during the design process.

TriMet believes the selection of a contractor with experience and expertise in this type of work will help meet these challenges. The only way to ensure 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 ("RFP") to select a construction manager/general contractor ("CM/CG") to complete the Project. TriMet estimates that the order of magnitude of the project will be approximately \$22,500,000.

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

TriMet believes there is a sufficient market for this work, 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; scheduling a pre-proposal conference; and appointing an 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 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 and including its participation in the design phase as well as in development of the Construction Approach, TriMet will minimize the risk of delays, cost increases, and other costly impacts to the public, thereby increasing the likelihood of completing the Project within the estimated budget. In TriMet's experience, the low bid contracting method for work of this nature would be more likely to result in more contractor initiated change orders, which often cause the overall cost of the project to increase beyond the initial contract price.

The operating costs for the Project should 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 public will benefit from involving the contractor early to develop a detailed construction approach including specific schedules, staging and access plans for construction at each elevator. This early involvement is critical to minimize disruption to service during construction because it will substantially increase the predictability of the schedule for TriMet operations staff, allowing them to communicate such information to TriMet's customers well in advance. Elevators are critical to operations and TriMet will engage the contractor in firmly establishing the construction means and methods that will be used during the design phase, well before the start of construction. This will ensure that construction is thoroughly planned in detail and in collaboration with TriMet prior to the start of physical 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 the final design used for the construction procurement. Although low bid allows for value engineering during the construction phase, it can be less likely to occur and is often more difficult to implement because of additional effort required, industry expectations about flexibility, construction schedule pressures, the cost and cost responsibility of evaluation and/or redesign efforts, and the time required for additional public and approval processes if affected by the proposal.

Construction contractor input during final design enhances the value engineering opportunities. Options can be considered while the design is being finalized, and can be considered in terms of their implications to operations, constructability, and construction approach.

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

This Project will require construction near active light rail tracks and energized overhead catenary wires, and will require closely coordinated temporary shutdowns of certain elevators at active light rail stations. The construction approach will define details of the space and time the contractor will have to complete the required scope of work and restore

the stations to a safe operating condition within pre-defined schedule work windows. Any construction delay will impact TriMet's ability to provide access and service and may result in additional costs to TriMet for temporary service. The contractor must have specialized expertise in construction of facilities that are in operation in order to minimize service disruptions.

A negotiated procurement is the best method for TriMet to select a contractor with the specialized expertise required, 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*

TriMet seeks to reduce public safety risk as much as possible. Many of the Project sites include close proximity to operating light rail tracks and pedestrian accesses to and from light rail stations. TriMet plans to continue its operations during some of the preparatory demolition and finish work, only temporarily shutting down service when absolutely necessary. Therefore, TriMet requires a contractor with a successful performance record for safety and protection of the public, and with experience performing 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.

*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 contract for this type of project puts TriMet in the best position to successfully complete the Project while minimizing schedule, cost and safety risk, instead of selecting a contractor based only on price.

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

The funding for the Project comes from the TriMet general fund. Granting the exemption will not affect the sources of funding, but will increase TriMet's ability to control budget.

*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 potentially require the contractor to share some of the risks of price escalation.

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

The technical complexity of the Project is due largely to the fact that construction will occur adjacent to an operating light rail line at many diverse locations throughout TriMet's system where elevators are a critical access feature. Through a negotiated procurement, the contractor can offer constructability and pricing feedback during the design phase, and can identify risks based on the contractor's preferred means and methods. The contractor, collaborating with TriMet's operations staff, can also assist minimizing the duration that elevators not available for access and with mitigations for times that they are.

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

This public improvement is a remodel of elevators in existing structures. TriMet maintains more than 30 elevators and material lifts that provide access to buildings and transit facilities as well as transport of freight for TriMet maintenance activities.

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

This public improvement involves work on existing facilities that will be occupied during construction. Elevators are critical to service and operations and as such TriMet facilities and station platforms will largely remain open to the public and employees during construction, requiring selection of a contractor with an excellent history of work on projects where the public improvement is occupied.

*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 Project will require several phases of construction to address Project conditions, including the fact that the elevators vary and will be worked on at several TriMet facilities and different light rail platforms over a large geographic area. Phasing is necessary to limit impacts to operations during construction and to work within a budget that is available over multiple years. This consideration suggests that allowing contractor input into construction schedule and means and methods is critical. Such input is only possible through a negotiated procurement.

*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 Portland-Milwaukie Light Rail Project, the Portland Mall and I-205 Light Rail Projects, the Tilikum Crossing Bridge, the

Park Avenue and Clackamas Town Center Park and Ride structures, and the Sunset Transit Center Platform Paving Replacement project. TriMet has a Procurement Department, a Legal Department, and a Capital Projects division with the needed professionals who have substantial experience at procuring, negotiating, administering, and enforcing public improvement contracts, and will be working on the Elevator End of Life Replacement/Refurbishment 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.