

Date: December 13, 2017

To: Board of Directors

From: Neil McFarlane *Neil McFarlane*

Subject: **RESOLUTION 17-12-85 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 GIDEON PEDESTRIAN OVERCROSSING PROJECT**

1. Purpose of Item

The attached Resolution exempts from the low bid process a public improvement contract for construction services for TriMet’s Gideon Pedestrian Overcrossing Project (Project), which is part of the Portland-Milwaukie Light Rail Transit Project (PMLR Project) and consists of construction of a pedestrian overcrossing over the Union Pacific Railroad tracks at SE 14th Ave, SE 13th Place, and SE Gideon St. Approval of this Resolution will allow TriMet to initiate a competitive Request for Proposals (RFP) 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 1st Reading
- Ordinance 2nd Reading
- Other _____

5. Background

TriMet’s construction of the PMLR Project required the removal of a pedestrian bridge that spanned the Union Pacific Railroad tracks near SE 16th Ave and SE Gideon St. This Project will re-establish a safe pedestrian and bicycle route over the railroad and light rail tracks by building a new pedestrian bridge nearby. The new bridge will be a twelve-foot wide clear span

over the trackways with stairs and elevators on both ends. The Project will improve safety, provide an accessible route for mobility impaired people, and improve connectivity between residential and commercial neighborhoods in the area. This work was originally included in the PMLR Project's scope of work. However, prior to final design of the PMLR Project, the Federal Transit Administration (FTA) informed TriMet that the federal funding share of the PMLR Project would be reduced from 60 percent to 50 percent. As a result, TriMet engaged in a process called "recalibration," which included increasing the local funding share of the PMLR Project and also reducing costs by eliminating and deferring various elements with the understanding that if the PMLR Project were completed under budget, with FTA's approval some of these items might be added back. The Gideon Pedestrian Crossing was among the things deferred from the PMLR Project. However, after it became apparent that the PMLR Project would be completed under budget, TriMet received FTA approval to add back several safety-related elements to the PMLR Project, including this pedestrian bridge.

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 factors 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. This Project will be built adjacent to and over active freight rail, which will require specialized safety knowledge as well as extensive coordination of construction activities with the Union Pacific Railroad.

TriMet plans to use the Construction Manager/General Contractor method (CM/GC) for this Project. 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 an 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, involve work around existing TriMet 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 17-12-85 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 November 21, 2017. There was one attendee who represented a contractor

and wanted to be sure the Project would be competitively procured. He was told that it would be, through the competitive RFP process described above.

6. Procurement Process

Upon approval of this exemption, a competitive RFP process will be used to select the contractor that presents 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 is included in the PMLR Project budget.

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 17-12-85

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 GIDEON PEDESTRIAN OVERCROSSING 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 Gideon Pedestrian Overcrossing 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 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: December 13, 2017

Presiding Officer

Attest:

Recording Secretary

Approved as to Legal Sufficiency:



Legal Department

EXHIBIT A

RESOLUTION NO. 17-12-85

FINDINGS IN SUPPORT OF LOW BID EXEMPTION

Portland-Milwaukie Light Rail Project Gideon Pedestrian Overcrossing

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 Gideon Street Overcrossing Project

TriMet's construction of the Portland-Milwaukie Light Rail Transit Project ("PMLR Project") required the removal of a pedestrian bridge that spanned the Union Pacific Railroad Tracks near SE 16th Ave and SE Gideon St. The Gideon Street Pedestrian Overcrossing Project ("GPX Project") will re-establish a safe pedestrian and bicycle route over the railroad and light rail tracks in existing public right-of-way at SE 14th Ave, SE 13th Place, and SE Gideon St.

The GPX Project will include the construction of a 12' wide clear span over the trackways with stairs and elevators on both ends. The project will improve safety, provide an accessible route for mobility impaired people, and improve connectivity between residential and commercial neighborhoods around the project site.

The work will be performed over a six to eight month period.

C. Critical Factors

The GPX Project is a major construction Project at a constrained site under significant schedule pressure, and presents many challenges, including the following:

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

- b. Construction at the site is constrained by local streets, including Gideon Street, SE 13th Place, and SE 14th Ave; a freight rail (Union Pacific) line; and a light rail line (TriMet's MAX). Construction access is further constrained because SE Gideon and SE 13th Place must remain passable at all times for Portland Fire & Rescue, which has a critical operations facility adjacent to those two streets.

c. Funding from the FTA is available until June 2019, which creates a very tight Project schedule. In order to complete the GPX Project by the funding deadline, TriMet must gain as much schedule efficiency as possible. Any reduction in the duration for design, permitting, and construction of the GPX Project will help ensure the Project's funding by the FTA.

d. Additionally, since this Project is funded by a grant from the Federal Transit Administration, cost certainty is important. Therefore, it is critical for TriMet to obtain cost certainty early in the process, and to avoid any significant scope changes once the contract is awarded.

TriMet believes that selection of a contractor with experience and expertise in the design and construction of facilities 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 to select a construction manager/general contractor ("CM/CG") to assist during design development and construction of the GPX Project. TriMet estimates that the order of magnitude of the project is approximately \$8,000,000 to \$10,000,000.

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 GPX 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 GPX 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 GPX Project will provide a needed overcrossing to allow pedestrians and bicyclists to safely cross over the Railroad and light rail tracks away from vehicular traffic. Completing the GPX Project on the shortest possible schedule will directly benefit the public by reducing costs and allowing the use of the overcrossing as soon as possible. In addition is the need to minimize impacts to and coordinate closures of light rail during construction; to minimize disruption to the public, and to minimize disruption to businesses, including the Union Pacific Railroad. TriMet believes that in order to develop and ensure realistic solutions to minimize impacts to schedule, cost, traffic, noise, and public safety concerns, a negotiated procurement will maximize opportunities for success. Involving a Contractor early also provides for alternative thinking in performing the work to increase efficiencies while balancing disruptions to the public and transit operations.

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 only to change it later. 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 GPX Project will require expertise in specific design and construction methods, such as bridge construction with integral exterior custom elevators. Specialized expertise is also required to sequence activities around existing light rail and railroad operations. Construction delay could impact TriMet's ability to provide service to the public.

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 on a site constrained by local streets, a freight railroad (Union Pacific), and light rail (TriMet MAX). Access to the site is limited to public streets. Access must be well managed to ensure public safety and access, while keeping disruptions to the adjacent existing uses to a minimum. Also, the GPX Project will be under construction while the adjacent light rail and railroad are operational. 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, revenue service impacts, cost, and safety risk. Because of the complex nature of the GPX 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 a 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. To complete the GPX Project as soon as possible 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 expertise of the GPX Project is due to the anticipated type of structure, constraints of the site, the adjacent active light rail and railroad, access limitations, and schedule constraints. 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 GPX Project is for new construction of a pedestrian overcrossing. This overcrossing is to replace a previously demolished pedestrian overcrossing in the same area. TriMet has successfully utilized a negotiated procurement to select a CM/GC contractor for other projects and structures, including the Lafayette

Pedestrian Overcrossing, the Banfield Light Rail Track Rehabilitation Project, the East and West Segments of the Portland-Milwaukie Light Rail Project, the Portland Mall Light Rail Project, and the Interstate MAX Light Rail 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 GPX Project is new construction that will not be used until completed; therefore this consideration is not applicable.

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 GPX Project is new construction of a single overcrossing structure that will be done 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.