


Date: January 24, 2024

To: Board of Directors

From: Sam Desue, Jr. 

Subject: **RESOLUTION NO. 24-01-05 OF THE TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON (TRIMET), ACTING AS THE TRIMET CONTRACT REVIEW BOARD (TCRB), TO AUTHORIZE A CLASS EXEMPTION FROM LOW BID REQUIREMENTS FOR ON-CALL SERVICES FOR INSTALLATION, MAINTENANCE, REPAIR AND REPLACEMENT OF FENCING**

1. Purpose of Item

This Resolution requests that the TriMet Board of Directors (Board), acting as the TriMet Contract Review Board (TCRB), authorize a class exemption from low bid contracting requirements for certain small public improvement projects to allow a “best value” solicitation.

2. Type of Agenda Item

- Initial Contract
- Contract Modification
- Other: Exemption of Class of Contracts from Low Bid Requirements

3. Reason for Board Action

This exemption from competitive low bid process must be approved by the 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 has a service area of approximately 533 square miles with numerous buildings, structures, and assets that are protected with fencing for safety and security purposes. There are approximately thirty-three (33) Park & Ride lots, sixteen (16) Transit Centers, and sixteen (16) buildings. Maintenance and Operations buildings, as well as several of the employee parking lots associated with those buildings, are fenced. Along with TriMet’s need for the maintenance, repair and replacement of existing fences, there is a significant need for installation of new permanent fencing in areas that previously were unfenced.

With this Resolution, TriMet seeks the Board’s authorization, in its role as the TCRB, for a class exemption from the low bid requirements of ORS Chapter 279C, so that TriMet may obtain on-call services for installation, maintenance, repair, and replacement of fencing at various TriMet-owned or leased facilities. Approval of this Resolution will allow TriMet to conduct a best-value solicitation for the on-call services

and award multiple contracts.

TCRB Rule V(A) and ORS 279C.335(2) provide that the Board, acting in its capacity as the TCRB, may exempt a class of contracts from competitive sealed bidding requirements upon approval of written Findings made by the Agency that support the following:

- (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 contractors using a best value process. Under the traditional low bid procurement method, TriMet may consider only price in selecting a contractor. However, under the competitive, best value Request For Proposals (RFP) process, TriMet may select contractors upon consideration of many factors, including price. Use of the RFP process allows TriMet to consider things such as experience in similar work, schedule performance, cost control, attention to safety, and quality of workmanship, along with price.

The nature of this work is of an ad-hoc, on-call basis. Using an RFP process will allow TriMet to retain the services of multiple, well-qualified contractors, allowing a more expedient response to fencing needs that arise. Further, while the tasks awarded under these contracts will fall into the Public Improvement category, TriMet staff does not believe they would generate sufficient competition if solicited individually. Locking in pricing for contractors, including contractually established increases over the contract term, will allow TriMet to better control costs. Low bidding each of the tasks would leave TriMet susceptible to large pricing fluctuations in the market.

Additionally, the RFP process will allow TriMet staff to more fully evaluate diversity criteria, including each bidder's status and subcontracting plan in regard to Oregon's Certification Office for Business Inclusion and Diversity (COBID).

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 class of public improvement projects. Notification of the public hearing on TriMet's draft Findings was published in the Daily Journal of Commerce, and the hearing was held on January 3, 2024. There were no attendees, and no comments on the Findings were received. The Agency's written Findings in support of the exemption, which are required by ORS 279C.335, are attached as Exhibit A to this Resolution.

6. Description of Procurement Process

Upon approval of this exemption, a competitive RFP process will be used to select the contractors that present the best value to the Agency, based on the RFP criteria.

7. Diversity

Use of the RFP process when selecting contractors will allow TriMet to consider each proposer's workforce diversity and proposed utilization of small business and COBID-certified subcontractors. TriMet staff believe there is a large pool of small business and COBID-certified firms likely to participate in the solicitation. Staff will conduct extensive outreach prior to releasing the RFP to ensure maximum participation of these firms.

8. Financial/Budget Impact

The cost of the work is included in the FY2024 Budget for Maintenance Operations, and

funding for this work will be included in future annual budgets. The estimated range of costs for projects within the proposed class exemption will be from \$5,000 to \$300,000.

9. Impact if Not Approved

If this exemption is not approved, TriMet will need to procure every new fence installation via the traditional low bid procurement method. This would delay work and conflict with the purpose of the program. It is not the preferred option for the reasons outlined above and presented in the Findings.

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WHEREAS, the TriMet Contract Review Board (TCRB) has authority under ORS 279C.335 and TCRB Rule V to exempt a class of 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 January 3, 2024 on the Agency's draft written Findings in support of an exemption from competitive bidding requirements for a class of public improvement contracts for construction services, and no objections were heard; and

WHEREAS, TriMet has submitted to the TCRB the written Findings required by ORS 279C.335, attached hereto as Exhibit A, in support of an exemption from competitive bidding requirements for the class of public improvement contracts; 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 and submitted in support of (a) and (b) below, to exempt from competitive bidding requirements the class of contracts for construction projects, are hereby approved and adopted.

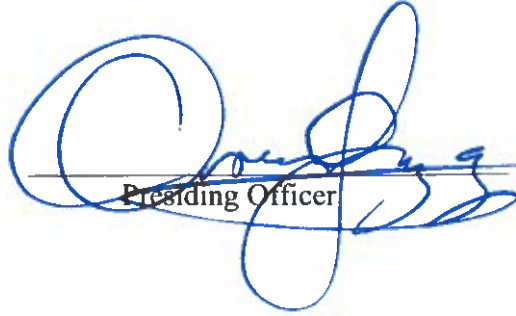
(a) It is unlikely that the exemption will encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts; and

(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 Contracts are exempt from the competitive bidding requirements of ORS Chapter 279C.

3. That TriMet is authorized to initiate a Request for Proposal process and negotiate Contracts within the specified class for particular construction projects.

Dated: January 24, 2024



Presiding Officer

Attest:



Recording Secretary

Approved as to Legal Sufficiency:



Legal Department

EXHIBIT A

RESOLUTION NO. 24-01-05

FINDINGS IN SUPPORT OF EXEMPTION FROM LOW BID

On-Call Fencing Installation, Maintenance, Repair and Replacement Services

This Project consists of construction work, including installation, maintenance, repair and replacement of fencing at TriMet-owned or leased facilities.

A. Competitive Bid Exemption under Oregon Statute

Oregon law requires all local contracting Agency public improvement contracts to be procured by competitive 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 that (2) the award of the contract under the exemption will likely result in substantial cost savings to the Agency and other substantial benefits.

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, but are not limited to, the following:

1. Operational, budget and financial data;
2. Public benefits;
3. Value engineering;
4. Specialized expertise required;
5. Public safety;
6. Market conditions;
7. Technical complexity; and
8. Funding sources.

B. Summary Description of the Projects

The work will be for on-call fencing installation, maintenance, and repair services and may include, but not be limited to the following:

- Site preparation;
- Removal of debris;
- Excavation
- Fence installation;
- Landscaping

The estimated range for the projects under this class exemption shall be from \$5,000 to \$300,000.

C. Findings

1. Operational, budget, and financial data

The budget for the projects contemplated under this class exemption will be determined on a case by case basis. Because fencing can impact the safety and security of customers and TriMet employees, TriMet seeks to minimize construction delays inherent in the traditional low bid process relied upon to control project budgets. This exemption seeks to award a pool of 2-3 general contractors to complete the selected projects. Projects will be allocated primarily on a competitive quote process amongst the selected vendors, but may be allocated based on capacity. There may be times when TriMet staff will want to engage one of the contractors for a project during project design to provide some constructability advice or to obtain market-based pricing to assist in decision- making for budgetary purposes.

Finding: For the reasons stated above, a best value procurement process that allows for multiple awards and allows the involvement of a construction contractor during design will allow TriMet to better control costs and protect operations requirements. Low bid does not allow for multiple awards nor does it allow for multiple construction projects to be executed under one solicitation.

The class exemption and proposed procurement process would allow for both and allow TriMet to engage with a contractor earlier than normal to assist with budget, schedule and, in some instances, design of the project.

2. Public benefits

TriMet has a core goal and objective to increase opportunities for COBID-certified firms. This class exemption aligns with this goal and results in a significant public benefit because market research indicates that there are a significant number of COBID-certified firms able to perform this work. While the class is not limited to COBID-certified firms, use of the RFP process presents a better opportunity to evaluate firms more fully. While many COBID-certified firms may not be able to compete on price alone, evaluating other qualitative factors will ensure a more robust competition.

The public will also benefit directly from this approach by having a more expeditious manner in which to execute projects than with the low-bid procurement method. As stated above, the objective is to award multiple contracts to contractors so that projects can be completed in a more timely fashion. It is also expected to be a benefit for TriMet staff to engage with the contractors awarded these contracts on topics such as market-based pricing, schedule, constructability, and project budgeting. This will help to ensure realistic solutions to schedule, cost, and transit service during construction, as well as public safety concerns.

Finding: Low bid offers no opportunity for multiple awards nor for the ability to execute multiple projects resulting from one solicitation. This class exemption allows for that and will also allow for the opportunity of awarded contractors to be engaged and help project execution in a way that is not possible from a low- bid.

3. Value engineering

Staff do not foresee a lot of opportunity for value engineering on the projects covered under this exemption. However, there may be instances when early involvement by the contractor will be helpful. The procurement and project delivery approach proposed by this exemption is flexible and allows for early engagement. Although low bid allows for value engineering during construction, it is less likely to occur and is often more difficult to implement because of construction schedule pressures, the cost of evaluation or redesign efforts, and the time required for additional stakeholder processes.

Finding: The task order based contracts awarded as a result of this exemption will allow for a more collaborative process between TriMet staff and contractors and is expected to result in less change orders on projects because of the way the pricing will be established and the process in which projects are executed.

4. Specialized expertise required

We are piloting this approach on a small subset of public improvement projects that TriMet has forecast for the future. The projects completed under this exemption will not require specialized expertise.

Finding: The procurement process proposed will employ a best value selection methodology, which allows TriMet to evaluate and rank the expertise of contractors in addition to their proposed pricing. It puts the owner in the best position to select construction contractors who will be able to complete the projects.

5. Public safety

TriMet seeks to reduce public safety risk as much as practical. A best value procurement that results in multiple awards allows TriMet to evaluate the contractors' operating methods and their experience and record in working safely and effectively near the public, in order to select the most qualified. Additionally, since fencing directly impacts the safety of TriMet staff and customers, it is imperative that the agency contract with well qualified firms that are quickly able to respond to TriMet's needs.

Finding: An RFP procurement offers TriMet the best opportunity to carefully evaluate the contractor's prior safety performance and mitigate safety risk in a collaborative way through the contractor's work plans. Having contractors on-call will also allow TriMet to respond to safety issues in a timely and expeditious manner.

6. Market conditions

Construction market conditions continue to be highly volatile. Workforce shortages and rapidly changing commodity prices have continued to cause significant swings in escalation rates and pricing. This exemption will allow TriMet to award multiple contracts and work with those contractors to mitigate these risks for the projects more effectively than the low bid approach.

Finding: The proposed procurement and project delivery approach will provide a benefit for fiscal and resource planning because TriMet staff will have the ability to communicate to the

awarded contractors about market conditions. Also, the awarded contractors will have the potential to work on projects for the five year term, so they may be able to mitigate some market conditions knowing that if they continue to perform well, they will continue to receive work for the term of the contract. A low bid does not allow for this.

7. Technical complexity

The projects contemplated under this exemption are not complex in nature. However, budget and schedule certainty will be critical to minimizing the disruption to TriMet operations.

Finding: A best value procurement allows TriMet to select contractors with due consideration given to their past technical performance in similar work.

8. Funding sources

Funding for the projects is ongoing and provided through TriMet's Maintenance Operations Budget.

Finding: Early and continued budget certainty is highly desired. A best value procurement is a better method than low bid to achieve earlier budget certainty.

9. Unlikely to encourage favoritism or substantially diminish competition

TriMet staff is confident that there is a robust pool of contractors able to perform the work. Additionally, allowing a best value process will likely encourage more participation from firms that have not traditionally been able to compete on price alone. The list of interested firms continues to grow and staff will continue to conduct outreach to ensure that interested contractors are comfortable responding to the solicitation and administering the contract, if awarded.

Finding: By marketing this opportunity and attempting to notify all known potential respondents, TriMet will implement a process that does not encourage favoritism or substantially diminish competition.

10. Cost savings

The alternative procurement and contracting methodology being proposed is a form of task order based contracting. This delivery method would result in contracts with multiple contractors. The solicitation will be a best value Request for Proposals, where experience and qualifications will be evaluated in addition to pricing. Once contracts are awarded, the Maintenance Operations Team will use them to complete routine projects without having to go through a solicitation and contract for every project. This model is transparent, auditable and encourages high quality of work and collaboration between TriMet staff and the awarded contractors. A benefit to the contractors is that, as long as they perform quality work, they can reasonably expect to continue to perform work throughout the life of the contract. Being able to plan ahead and forecast work through this model will allow the contractors to develop relationships with TriMet, understand the intricacies of administering a TriMet contract, provide opportunities to forecast resource planning, and increase their capacity throughout the life of the contract.

Finding: Consolidation of a number of smaller projects in this approach will increase the interest of contractors and reduce bidding premiums likely with solicitations too small to attract competitive interest if this exemption is not approved.

D. Class Exemption from Low-Bid Contracting and Preferred Construction Procurement

Method: Request for Proposal Process

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