


Date: October 25, 2023

To: Board of Directors

From: Sam Desue, Jr. 

Subject: **RESOLUTION NO. 23-10-55 OF THE TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON (TRIMET), ACTING AS THE TRIMET CONTRACT REVIEW BOARD (TCRB), AUTHORIZING AN EXEMPTION FROM COMPETITIVE BIDDING REQUIREMENTS TO PROCURE CONSTRUCTION MANAGER/GENERAL CONTRACTOR SERVICES FOR THE CROSS MALL TURN BACK PROJECT**

1. Purpose of Item

This Resolution requests that the TriMet Board of Directors (Board), acting as the TriMet Contract Review Board (TCRB), authorize an exemption from the competitive bid process in order to procure Construction Manager/General Contractor (CM/GC) services for the Cross Mall Turn Back Project (Project).

2. Type of Agenda Item

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

3. Reason for Board Action

An exemption from competitive bidding for a public improvement project 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

During its September 2023 meeting, the Board approved Resolution No. 23-09-48, authorizing a contract award of \$2,550,000 to David Evans and Associates, Inc. for design services for the Cross Mall Turn Back Project (Project). The Project proposes to install a MAX train “turnback” on SW 1st Avenue between SW Yamhill Street and SW Morrison Street, including switches, track circuits, train signals, train control, and overhead catenary equipment.

The completed Project will minimize the impact and duration of MAX system service delays by allowing eastbound trains on Yamhill Street to readily turn back onto the westbound Morrison Street tracks whenever planned or unplanned service disruptions

occur on the MAX system on the east side of the Willamette river, thus allowing the MAX system to continue functioning efficiently on the west side of the river. In addition, the Project will facilitate MAX service during construction of the Earthquake Ready Burnside Bridge project, decrease the impact and duration of service disruptions when the Steel Bridge is out of service, and allow for future scheduled MAX circulator service to address potential capacity issues on the west side of the river.

The Project is currently at a stage where TriMet is ready to procure the services of a construction manager/general contractor (CM/GC). The CM/GC will assist with the completion of project design, contribute to cost certainty, and establish needed coordination to ensure a successful construction process.

ORS 279C.335(2) and TCRB Rule V(A) provide that the Board, acting in its capacity as the TCRB, may exempt a contract 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 its contractors using a competitive best value solicitation process. Under the traditional low bid procurement method, TriMet may consider only price in selecting a contractor. The competitive Request For Proposals (RFP) process allows TriMet to select contractors upon consideration of many factors, including price. Such additional factors include experience in similar work, schedule performance, cost control, attention to safety, quality of workmanship, small business utilization, workforce diversity and state Certification Office for Business Inclusion and Diversity (COBID) certification, along with price.

This Project is complex and will require the selected contractor to manage tight timelines, coordinate with other contractors working on site, and work within a strict budget. Consideration of factors other than price will allow TriMet to select a CM/GC services contractor with the skill and experience to handle these complexities. TriMet has successfully utilized the RFP process to select CM/GC contractors for other complex construction projects, e.g., the Division Transit Project and the Hollywood Transit Center.

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 the draft Findings was published in the Daily Journal of Commerce, and the hearing was held on October 10, 2023. There were no attendees, and no comments 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 CM/GC contractor that presents the best value to the Agency, based on the criteria described in the RFP.

7. **Diversity**

Use of the RFP process will allow TriMet to consider the bidder's workforce diversity and its proposed utilization of small business and COBID-certified subcontractors when selecting the CM/GC Contractor.

8. **Financial/Budget Impact**

The cost for these services is reflected in TriMet's approved FY2024 budget and included in TriMet's five-year Capital Improvement Plan (CIP) forecast.

9. **Impact if Not Approved**

If this exemption is not approved, TriMet would have to procure this Project via the traditional low-bid procurement method. This is not the preferred option for the reasons outlined above and presented in the Findings.

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RESOLUTION NO. 23-10-55 OF THE TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON (TRIMET), ACTING AS THE TRIMET CONTRACT REVIEW BOARD (TCRB), AUTHORIZING AN EXEMPTION FROM COMPETITIVE BIDDING REQUIREMENTS TO PROCURE CONSTRUCTION MANAGER/GENERAL CONTRACTOR SERVICES FOR THE CROSS MALL TURN BACK PROJECT

WHEREAS, the TriMet Contract Review Board (TCRB) has authority under ORS 279C.335 and TCRB Rule V to exempt a public improvement contract (Contract) for Construction Manager/General Contractor (CM/GC) services for the Cross Mall Turn Back Project (Project) 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 the public improvement Contract, 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 public improvement Contract; 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 the specified Project, 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 Project, subject to final Board approval of the contract award.

Dated: October 25, 2023

Presiding Officer

Attest:

Recording Secretary

Approved as to Legal Sufficiency:



Legal Department

EXHIBIT A

RESOLUTION NO. 23-10-55

FINDINGS IN SUPPORT OF LOW BID EXEMPTION CROSS MALL TURN BACK PROJECT

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 (2) the award of the contract under the exemption will likely result in substantial cost savings to the agency 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, but are not limited to, the following:

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

B. Summary Description of the Cross Mall Turn Back Project

The Cross Mall Turn Back Project (Project) proposes to install a new turnback curve at SW 1st Avenue, and associated switches, track circuits, train signals, train control, and overhead catenary, to allow for trains to turn from the eastbound track on SW Yamhill Street onto the westbound track on SW Morrison Street, with the objective of minimizing service delays and improving reliability.

C. Critical Factors

This is a complex project that requires the management of interdependencies between phases of multiple parts of this project, reducing impacts to adjacent uses, and minimizing disruption to public transit all while maintaining an aggressive schedule to reach substantial completion before the start of Multnomah County's Earthquake Ready Burnside Bridge Project begins.

D. Findings

1. Operational, budget and financial data

The budget for the Project is fixed and has limited contingency. Because of the complex interactions between the construction work and TriMet's operations and customers, as well as

the need to consider the construction timeline of the Multnomah County Earthquake Ready Burnside Bridge project, TriMet seeks to minimize the cost impact of design changes, construction delays, and contractor assumptions about means and methods inherent in the traditional design-bid-build process in order to control and predict the Project budget. Involving the construction contractor during design is a proven approach for containing costs through implementation of more constructible designs that are reflective of realistic construction means and methods. Early construction contractor involvement also allows the owner to obtain market-based pricing that assists in decision-making and budget adherence during final design. Delays in or inefficient performance of this work would lead to increased operational costs to TriMet due to service disruptions.

Finding: For the reasons stated above, a procurement process that allows involvement of the construction contractor during final design will allow TriMet to better control costs and protect operations requirements. Low bid provides insufficient opportunity to involve the construction contractor during design, while a non-low bid selection process enables this interaction.

2. Public benefits

The public will benefit directly from a final design that considers contractor means and methods, and from involving the contractor early to assist in complex utility relocation, phasing and staging of an aggressive construction schedule that will require construction means and methods to be incorporated into the design considerations in order to reduce risk of extended service disruptions and construction impacts to pedestrian and vehicles in Downtown Portland. It is critical for this Project to maintain transit service when possible, during construction and minimize disruption to service while doing so. TriMet will engage the contractor to advise on means and methods options and implications, as well as staging and access plans during the design work. This will help to ensure owner input and control over solutions increasing the predictability of schedule, cost, and transit service during construction. The community and TriMet will also benefit from a selection process that includes the opportunity to evaluate contractor experience and track record with minimizing public impacts through thorough advanced construction planning work.

Finding: Low bid offers no opportunity for the construction contractor to work with TriMet and its designer during design, and no opportunity to work with the contractor to develop and select staging and access alternatives that are minimally disruptive to transit service and the public in balance with established Project budgets. A non-low bid approach provides the opportunity to identify a contractor who has proven experience in working with all the affected stakeholders to create the least disruptive design and construction plans. This will result in fewer and shorter disruptions to service, and smoother transitions between the existing conditions to temporary public access during construction and finally to the completed Project.

3. Value Engineering

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 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.

Construction contractor input during final design enhances the value engineering opportunities during 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 constructability, temporary facilities, and construction access. A non-low bid procurement method allows the construction contractor to work with the design team and incorporate value engineering and construction schedule saving ideas in line with the design schedule.

One of the key opportunities for value engineering includes (but is not limited to) enhanced collaboration on work zone impacts, siting of staging areas, scheduling of the Max shutdown timeframe and reducing schedule and cost-risk of long-lead, specialized materials to be incorporated into the Project. By bringing the Contractor on board near the 60% design milestone, the team will be able to collaborate on both Contractor-procured and TriMet-procured long-lead items for trackwork which will increase cost and schedule certainty where design-bid-build could not. Accurate and timely material procurement will be critical to keeping the Project timeline and costs in line.

Finding: A non-low bid procurement method allows the use of a value engineering approach supported by the participation of the contractor that will construct the Project prior to completion of final design, thereby maximizing potential savings.

Specifically, reducing the risk associated with staging, temporary works and early material procurement of long-lead items is paramount. A negotiated procurement will allow the contractor to weigh in on these items so as to reduce the risk of delay during construction.

4. Specialized expertise required

This Project will require expertise in the construction of overhead catenary, switches, track circuits, train signals and train control for light rail in a constrained urban environment with complex 3rd party utility relocations to coordinate. The contractor will have to complete the required scope of work with the shortest possible interruption of power to the MAX light rail. Any construction delay will impact TriMet's ability to provide reliable transit service and may result in additional costs to TriMet for temporary service. The contractor must have expertise in construction of new and modifications to existing complex high voltage facilities that need to come online rapidly with minimal delay.

Finding: A non-low bid procurement process employs 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. It puts the owner in the best position to select a construction contractor who is a proven performer for the specific, specialized work required.

5. Reducing risks to the agency

This Project is being constructed in advance of the Burnside Bridge project in order to alleviate some of the impacts the bridge project will have on TriMet's service during construction. Any delays to the completion of the Cross Mall Turnback will cause significant impacts to the service and reliability of the TriMet Max network. TriMet has a substantial interest in ensuring this Project is completed in advance of the Burnside Bridge project to avoid unnecessary impacts for the Agency.

Another potential risk is that without proper preparation and coordination, there could be a need for an unplanned shutdown during construction that would have a significant impact on TriMet's service and add additional cost to the Project.

Finding: A negotiated procurement will allow the contractor to weigh in on any issues that they anticipate may arise during construction, heading off costly delays to this Project during construction. By extension, avoiding delays to this Project will avoid additional impacts during the Burnside Bridge project.

6. Public safety

The Project site is in a dense urban area with high vehicle and pedestrian activity within the heart of Downtown Portland. The Project also involves the construction and maintenance of pedestrian access routes along the adjacent to the Project and curb ramps within the intersection. TriMet requires a contractor with a successful performance record for safety and protection of the public during this type of work. A non-low bid procurement allows TriMet to evaluate the contractor's experience and record in working safely and effectively near the public and its operating system, and allows TriMet to evaluate the contractor's safety record on past projects

Finding: A non-low bid approach 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. A non-low bid approach provides the best opportunity to develop and evaluate public safety plans for all phases of construction with the construction contractor prior to implementation.

7. Market conditions

Construction market conditions continue to be highly volatile. Workforce shortages, high demand for construction services and rapidly changing commodity prices have continued to cause significant swings in escalation rates and pricing. Lead times for procurement of some specialized materials, such as specialized track work, electrical components, overhead catenary system poles, and materials necessary for 3rd party utility relocation have increased rapidly. A non-low bid procurement will increase cost and schedule certainty for portions of the work. A non-low bid approach will allow TriMet to mitigate market risk by allowing proposers and TriMet to discuss and apportion this risk, as well as to ensure materials are secured with enough lead time to avoid construction delays.

Finding: A non-low bid procurement will provide a benefit for fiscal planning and opportunity to increase cost certainty.

8. Technical complexity

Embedded light rail track work construction is complex and specialized. It requires understanding at a detailed and highly technical level how the trains are safely powered, and ideally familiarity with the design of TriMet infrastructure, or the nearest equivalent. The construction of new track work and overhead catenary systems will occur within a densely populated urban space, which will require complex planning and coordination with multiple disciplines of construction contractors, 3rd party utility companies, PBOT and TriMet operations personnel.

Finding: A non-low bid approach allows TriMet to select a contractor with due consideration given to the contractor's past performance on similar projects.

9. Funding sources

Funding for the Project is through the TriMet general fund. General funds are limited due to agency budget pressures.

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

10. Unlikely to Encourage Favoritism or Substantially Diminish Competition

The steps taken to ensure maximum competition and fair opportunity for this Project will include advertisement in the Daily Journal of Commerce and TriMet's public procurement system (TriP\$), as well as scheduling a pre-proposal conference and appointing an unbiased evaluation committee.

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.

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, a non-low bid procurement process generally encourages significant competition between contractors with reasonable performance records.

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

**E. 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 contract under the exemption will likely result in cost savings and other substantial benefits to the Agency.