

**Date:** August 10, 2016

**To:** Board of Directors

**From:** Neil McFarlane 

**Subject:** **RESOLUTION 16-08-54 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 WASHINGTON PARK STATION IMPROVEMENTS PROJECT**

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**1. Purpose of Item**

The attached Resolution exempts from the low bid process a public improvement contract for construction services for TriMet’s Washington Park Station Improvements Project (“Project”), which consists of upgrades to the station platform in order to bring it into a state of good repair. 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 1<sup>st</sup> Reading
- Ordinance 2<sup>nd</sup> Reading
- Other \_\_\_\_\_

**5. Background**

The Washington Park Station was completed in 1998 as part of the Westside light rail line. After nearly 20 years of service, this station is slated for upgrades and rehabilitation to bring it into a state of good repair. Repairs include upgrades to lighting, walls, ceiling, and information displays. Improvement work will occur at a TriMet platform adjacent to the

operating TriMet light rail system. Work may also require adjacent architectural changes, code upgrades, and technological improvements.

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 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 at active station areas.

The agency’s written findings in support of the exemption, which are required by ORS 279C.335, are attached to Resolution 16-08-54 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 July 27, 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 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’ M/W/ESB plans and workforce diversity in awarding the contract.

**8. Financial/Budget Impact**

This work is part of the Washington Park Station Improvements Project, which is included in the TriMet Capital Improvement Program Budget for FY 2015-2017.

**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 16-08-54

### **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 WASHINGTON PARK STATION IMPROVEMENTS 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 Washington Park Station Improvements 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: August 10, 2016

Attest:

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

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

Approved as to Legal Sufficiency:

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

**Resolution 16-08-54**

**Exhibit A**

**FINDINGS IN SUPPORT OF LOW BID EXEMPTION**

**Washington Park Station Improvements 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 Washington Park Station Improvements Project (“Project”)**

The Washington Park Station was completed in 1998 as part of the Westside MAX light rail line. After nearly 20 years of service, this station is slated for upgrades and rehabilitation, including upgrades to lighting, walls, ceiling, and information displays.

**C. Critical Factors**

Work on the Project will occur at a TriMet platform in a tunnel 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, TriMet employees, and the operating light rail alignment.

b. Minimizing Potential Service Disruptions and Public Impact: It is critical that disruptions to TriMet operations be minimized during construction, and that construction access and staging alternatives are carefully developed and evaluated in order to limit impacts. Therefore, designs and cost estimates must take into consideration specific construction means and methods in order to allow advanced planning of the construction sequence and limits of the construction activities.

c. Cost Certainty: Because this is a renovation of an existing facility, there is an increased risk for scope changes and change orders. 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 to select a construction manager/general contractor (“CM/GC”) to construct the Project. TriMet estimates that the order of magnitude of the Project is approximately \$1,500,000.

##### *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 advertisements 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 Project within the construction budget. 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 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 specific staging and access plans for construction within the active light rail alignment. It is critical to minimize disruption to service during construction. TriMet will engage the contractor in developing construction means and methods, as well as staging and access plans during the design work. This will help to ensure realistic solutions to schedule, cost, and transit service during construction, as well as public safety concerns. The community and TriMet will also benefit by the selection of a construction contractor that is sensitive to the public's expectations and will get the work done quickly, safely, and in accordance with construction planning work it has provided and supported.

*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 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 public 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. The RFP procurement method allows the construction contractor to work with the design team and incorporate value engineering ideas in line with the design schedule, thereby maximizing cost saving ideas and methods.

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

This Project will require expertise in construction near active light rail tracks and energized overhead catenary wires, and will require closely coordinated temporary shutdowns of certain areas of an active MAX station. The contractor will have to complete the required scope of work and restore the station to a safe operating condition within pre-defined work windows. Any construction delay will impact TriMet's ability to provide service and may result in additional costs to TriMet for temporary service. The contractor must have expertise in construction of facilities that are in operation in order to minimize service disruptions.

A negotiated procurement process 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*

TriMet seeks to reduce public safety risk as much as possible. The Project site includes close proximity to operating light rail tracks and pedestrian accesses within the light rail station. TriMet plans to continue its operations during most of the 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. An alternate method of procurement offers TriMet the best opportunity to carefully evaluate the contractor's safety performance during construction.

*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 utilizing a negotiated procurement to secure a CM/GC contract for this type of project puts TriMet in the best position to successfully complete a project at a station area while minimizing schedule, cost and safety risk. A negotiated procurement allows TriMet to select a contractor with experience and expertise performing this type of work, 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 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 the 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 technical complexity of the Project is due largely to the fact that construction will occur at an existing station platform and adjacent to an operating light rail line. A negotiated procurement method allows TriMet to evaluate a contractor's technical experience in similar work and its safety record at the time of selection.

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

The Project is a retrofit of the existing Washington Park light rail station platform. TriMet has successfully utilized a negotiated procurement to select a contractor for other similar work retrofitting TriMet platforms, including the Blue Line rehabilitation 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 Washington Park platform will remain open to the public during construction, requiring selection of a contractor with an excellent history of safety performance.

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

Existing conditions require that the Project be constructed in a single phase while closing small sections of the platform and performing work outside of revenue service hours. Staging materials into such a restricted site will require phased delivery. This consideration suggests that allowing contractor input into construction schedule and means and methods will be important. 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, 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.