

Date: September 25, 2024

To: Board of Directors

From: Sam Desue, Jr.

Subject: RESOLUTION NO. 24-09-56 OF THE TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON (TRIMET), ACTING AS THE TRIMET CONTRACT REVIEW BOARD (TCRB), TO AUTHORIZE A CLASS EXEMPTION FOR ON-CALL CONCRETE & PAVEMENT INSTALLATION, MAINTENANCE AND REPAIR SERVICES

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 rules for certain small public improvement projects to allow a “best value” solicitation.

2. Type of Agenda

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

3. Reason for Board Action

This exemption from competitive bidding 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 with concrete and pavement installations necessary to support pedestrian and vehicular/equipment traffic, parking and storage. There are approximately thirty-three (33) Park & Ride lots, sixteen (16) Transit Centers, and sixteen (16) buildings, including Maintenance and Operations facilities. Along with TriMet’s ongoing need for the maintenance, repair and replacement of existing concrete and pavement installations, there are potential significant needs for the installation of new concrete and pavement installations as TriMet’s operational requirements change.

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 concrete and pavement installations 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.

For this solicitation, TriMet also seeks the Board's authorization to limit the pool of potential proposers to firms certified by Oregon's Certification Office for Business Inclusion and Diversity (COBID). ORS 279A.100 provides that the State Public Contracting Code may not be construed to prohibit TriMet from engaging in public contracting practices designed to promote affirmative action goals, policies or programs. Disadvantaged, Minority-owned, Women-owned, Emerging Small Business, and Veteran Business Enterprises (D/M/W/ESB/VBE), often COBID-certified, face great challenges in competing on the open market with larger, more established contractors to perform work for TriMet.

Enabling COBID-certified firms to act as the prime contractor on these projects will allow those firms to build a relationship with TriMet staff and better understand the administrative requirements of contracting with TriMet. COBID-certified firms that win the resulting contracts will be well situated to utilize their relationship with other COBID-certified firms to increase overall small business participation on the project through subcontracting.

In addition, ORS 279C.390 allows the Board to exempt certain contracts or classes of contracts from bonding requirements. Because these contracts will be open only to COBID-certified firms, TriMet staff is looking for ways to make the contracting processes easier. For many smaller firms, bonding capacity remains a barrier to contracting with public agencies. Removing the requirement for bonding on these contracts will allow for greater participation and allow for greater flexibility for TriMet staff.

The majority of the task orders will be below \$100,000, the established bonding threshold for public improvement contracts in Oregon. Because there will be few task orders above this limit, the risk posed to the Agency by eliminating the bonding requirement is low. TriMet staff will also ensure that other contractual terms and conditions are included to protect TriMet's interests.

TriMet staff anticipate using the following criteria (or similar) to select the contractor: Proposer Experience/Past Performance (10 points); Proposed Project Team (35 points); Draft Project Approach, Work Plan & Schedule (50 points); Draft Contracting Plan and DBE Program (40 points); Project Management (25 points); Price (40 points).

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 September 6, 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 which will limit the pool of competitive proposers for these projects to COBID-certified firms.

7. Diversity

Adoption of this Resolution authorizes an exemption from the low-bid requirement and allows the Agency to limit the pool of competition for this construction contract to COBID-certified firms, using a competitive RFP process. Staff have performed extensive outreach and have identified a qualified pool of COBID-certified contractors who are interested and able to perform the type of work needed.

8. Financial/Budget Impact

The cost of the work is included in the FY2024 Maintenance Budget, and funding for this work will be included in future annual budgets. The estimated costs of the various projects within the proposed class exemption will range from \$5,000 to \$250,000.

9. Impact if Not Approved

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

RESOLUTION NO. 24-09-56

RESOLUTION NO. 24-09-56 OF THE TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON (TRIMET), ACTING AS THE TRIMET CONTRACT REVIEW BOARD (TCRB), TO AUTHORIZE A CLASS EXEMPTION FOR ON-CALL CONCRETE & PAVEMENT INSTALLATION, MAINTENANCE AND REPAIR SERVICES

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 September 6, 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: September 25, 2024



Presiding Officer

Attest:



Recording Secretary

Approved as to Legal Sufficiency:



Legal Department

EXHIBIT A

RESOLUTION NO. 24-09-56

FINDINGS IN SUPPORT OF LOW BID EXEMPTION

On-Call Concrete & Pavement Installation, Maintenance and Repair Services

This Project consists of construction work, including installation, maintenance, repair and replacement of concrete and pavement installations 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 Concrete & Pavement Installation, Maintenance and Repair Services and may include, but not be limited to the following:

- Site preparation;
- If materials are to be removed offsite, environmental testing must be performed
- Removal of debris;
- Excavation
- Concrete and pavement installation;
- Landscaping/Irrigation

The estimated range for the projects under this class exemption shall be from \$5,000 +/- to \$250,000 +/-.

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 concrete and pavement installations 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 procurement process that allows the evaluation of qualitative factors will allow TriMet to select a well-qualified contractor and to better control overall Project costs, while a non-low bid selection process does not allow for an evaluation on this basis. Contractor selection based on experience, resources, and innovative processes ensures the work can be performed as expeditiously as possible and with maximum return on investment.

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.

This contract exemption aligns with this goal and results in a significant public benefit because most of the work resulting from this exemption and the resulting solicitation will be performed by COBID certified firms, whether as the prime contractor or as a subcontractor. This will help the awarded firm increase their capacity and develop strong working relationship with TriMet. It also provides the awarded firm experience working on a TriMet project that they may not have had the opportunity to work on, if this exemption isn't approved.

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. Low bid offers no opportunity to consider a contractor's utilization of COBID certified firms. A non-low bid approach provides the opportunity to identify a contractor who has proven experience in working on these types of projects while achieving substantial COBID goals. A non-low bid approach provides the opportunity to identify a contractor who has proven experience in working on these types of projects.

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 concrete and pavement installations 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.