

Date: September 16, 2015
 To: Board of Directors
 From: Neil McFarlane *Neil McFarlane*

Subject: RESOLUTION 15-09-57 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 PORTLAND-MILWAUKIE LIGHT RAIL DEFERRED SHELTER INSTALLATION PROJECT

1. Purpose of Item

The attached Resolution exempts from the low bid process a public improvement contract for construction services for TriMet’s Portland-Milwaukie Light Rail Deferred Shelter Installation Project (“Project”), which consists of installation of 14 passenger shelters on 10 light rail platforms. Approval of this Resolution will allow TriMet to initiate a competitive Request for Proposals (“RFP”) best value 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 is currently nearing completion of construction of the PMLR Project, which runs from the terminus of the Green Line at Portland State University in downtown Portland over the new Tilikum Crossing Bridge, then through southeast Portland and Milwaukie to a

terminus at Park Avenue in north Clackamas County. As originally planned, the PMLR Project included an additional 14 passenger shelters at its stations. However, due to funding limitations early in the project, these shelters were removed from the scope of work. Subsequently, because the PMLR Project was on schedule and under budget, TriMet requested that the Federal Transit Administration (“FTA”) allow it to use some of the cost savings from the project to restore the 14 passenger shelters. The FTA has agreed to this request, and the additional shelters will be installed as part of the PMLR Project.

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 Disadvantaged Business Enterprise (“DBE”) and workforce diversity programs.

TriMet has a history of successfully utilizing the RFP process to select contractors for complex construction projects. The PMLR Project utilized RFPs to obtain Construction Manager/General Contractor (“CM/GC”) and Design Build (“D/B”) contractors, as did the South Corridor Project and the Interstate MAX Project. In addition, TriMet’s last two major parking garage projects, the Park Avenue Park and Ride and the Clackamas Town Center Garage, were successfully completed through D/B contracts procured via an RFP process.

The CM/GC contracting method for the Project was chosen because the Project will involve construction immediately adjacent to and within the operating envelope of the PMLR portion of TriMet’s light rail system. Therefore, construction must be conducted with the utmost attention to public and worker safety. In addition, because installation will occur at many platforms over a period of approximately two years, contractor involvement in the design process is important to ensure that the construction means and methods are properly balanced between construction efficiency and minimizing the impact to TriMet operations and customers. This careful planning will minimize disruption to TriMet Operations during the construction period by ensuring the contractor works within the shortest possible schedule windows to reduce impacts to TriMet’s customers and operations personnel.

The agency’s written findings in support of the exemption, which are required by ORS 279C.335, are attached to Resolution 15-09-57 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 September 9, 2015. 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' DBE plans and workforce diversity as a criterion in awarding the contract.

8. Financial/Budget Impact

This work is part of the PMLR Project, and will be paid for with PMLR Project funds.

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 15-09-57

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 PORTLAND-MILWAUKIE LIGHT RAIL DEFERRED SHELTER INSTALLATION 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 Deferred Shelter Installation project (“Contract”); 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 Deferred Shelter Installation 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 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: September 16, 2105

Attest:

Presiding Officer

Recording Secretary

Approved as to Legal Sufficiency:



Legal Department

**RESOLUTION NO. 15-09-57
EXHIBIT A**

FINDINGS IN SUPPORT OF LOW BID EXEMPTION

Portland-Milwaukie Light Rail Deferred Shelter Installation 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 Portland-Milwaukie Light Rail Deferred Shelter Installation Project

As part of the original design for the Portland-Milwaukie Light Rail project (“PMLR Project”), 14 passenger shelters were removed from the scope of the Project as a cost-saving measure. The infrastructure for these elements was constructed to allow for future installation, to be performed as funding allowed. Recently, the Federal Transit Administration (“FTA”) approved a TriMet request to add these shelters back into the scope of the PMLR Project. Due to the timing of this approval, installation of the shelters will occur after the PMLR Project opens for revenue service. The PMLR Deferred Shelter Installation Project (“Shelter Project”) will involve a complex sequence of activities to install these shelters at 10 active stations on the light rail alignment.

C. Critical Factors

The shelters will be installed within and adjacent to the operating TriMet light rail system. This presents many challenges, including the following:

- a. Construction must be conducted with extreme attention to public safety, due to the proximity to the public and to the operating light rail alignment.
- b. It is critical that disruption to 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. This Shelter Project is funded in part by a grant from the Federal Transit Administration, so 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 this type of construction 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 to construct the Shelter Project. TriMet estimates that the order of magnitude of the project is approximately \$5,000,000.

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 Shelter 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 Shelter 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 shelters 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 active MAX stations. The contractor will have to complete the required scope of work and restore the stations 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 to and from light rail stations. TriMet plans to continue its operations during some of the preparatory demolition and finish 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 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 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 Shelter Project comes from several sources. Use of federal funding from the Federal Transit Administration brings with it certain requirements and tight budget control. Granting the exemption will not affect the sources of funding, but will increase TriMet's ability to control budget and comply with FTA requirements.

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 Shelter Project is due largely to the fact that construction will occur 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 Shelter Project is for the installation of additional shelters on the PMLR Project alignment. TriMet has successfully utilized a negotiated procurement to select a contractor for other similar work at TriMet shelters, including the Blue Line rehabilitation project and the efare 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

TriMet platforms will largely 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

The Shelter Project will require several phases of construction to address project conditions, including the fact that the shelters will be installed at many different light rail platforms over a large geographic area. 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 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 Shelter 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.