TRIMET

Memo

Date: January 24, 2024

To: Board of Directors

From: Sam Desue, Jr.

Subject: **RESOLUTION NO. 24-01-06 OF THE TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON (TRIMET), ACTING AS THE TRIMET CONTRACT REVIEW BOARD (TCRB), AUTHORIZING AN EXEMPTION FROM LOW BID REQUIREMENTS FOR A CONTRACT FOR CONSTRUCTION MANAGER/GENERAL CONTRACTOR (CM/GC) SERVICES FOR THE TRACK REHABILITATION PROGRAM**

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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 low bid process in order to procure Construction Manager/General Contractor (CM/GC) services for the Track Rehabilitation Program (Program).

2. **Type of Agenda Item**
   - ☐ Initial Contract
   - ☐ Contract Modification
   - ☒ Other: Exemption of a Contract from Low Bid Requirements

3. **Reason for Board Action**
   This exemption from the low bid process and authorization for a Request for Proposals (RFP) approach 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 history of successfully utilizing the RFP process to procure the services of a CM/GC for complex construction projects, including the Better Red, the Interstate MAX, and the East and West Segments of the Portland-Milwaukie Light Rail projects. In February of 2017, pursuant to Resolution No. 17-02-10, TriMet awarded a CM/GC contract to Stacy and Witbeck, Inc., for the Maintenance of Way (MOW) department's extensive Track Rehabilitation Program. That CM/GC services contract will expire in June 2024.

Utilizing the existing CM/GC services contract, the Program has conducted track repair and replacement at:

- the Steel Bridge, the 18th Avenue Switches, the Hatfield Terminus, and the Rose Quarter-Holladay crossovers, in 2018;
- the Gresham crossings -- Birdsdale, Eastman, Roberts, Main, Hood, Kelly and Cleveland -- in 2019;
- the Cascade Station emergency repairs, in 2020;
- the Gateway Station crossings, the Banfield 33rd Avenue Curves, and the Banfield 19A/B Crossovers, in 2021;
- the Hollywood Pocket Track and the 43rd Avenue Curves, in 2023; and
- the East Burnside/97th Avenue Curves are scheduled for completion in 2024.

In order to continue successfully implementing this Program, TriMet must issue a new CM/GC services contract. Under the proposed CM/GC services contract, the Program anticipates additional track rehabilitation immediately adjacent to and within the operating envelope of the Banfield portion of TriMet's light rail system. This work is separate from the MAX light rail tie replacement work now underway along the Red Line.

The planned track rehabilitation work will be conducted over the next five years, in a series of discrete locations and/or scopes (Elements), and will be assigned via task orders. The Elements are identified in TriMet's Capital Asset Management and Investment Plan. The goal of the Program is to design one Element, and construct one Element each year.

TriMet expects to issue one task order in 2024, approximately two in 2025, and approximately three in 2026. The work to be performed in 2024 will replace the roadway crossing panels along the Blue Line alignment at Burnside Street in Gresham and procure long lead materials for future projects. The work in 2025 will focus on replacing roadway crossing panels along the Red Line alignment between the Mt. Hood Avenue Station and Cascades Station, as well as at NW Eleventh Mile Avenue in Gresham. The work to be performed in 2026 will replace roadway crossing panels along the Blue Line alignment at Stark Street in Gresham, and replace worn rails at Collins Circle Curves, Central Terminus, and Jackson Terminus Curves.

Because most sections of the light rail alignment are extremely active, serve multiple rail lines, and/or are located in constricted and busy urban environments, construction must be conducted with careful attention to public and worker safety. The CM/GC's involvement in the design process is important to ensure that the optimal construction means and methods are utilized, and to allow advanced planning of the construction sequencing and control of the construction activities. It is critically important that disruption to the public, TriMet customers, and TriMet operations personnel be minimized during construction by working within the shortest possible schedule windows. Therefore, engagement of the services of a CM/GC to advance this Program is most appropriate.

An exemption from low bidding is required to enable TriMet to select a CM/GC services contractor for the Program using a best value process. Under the traditional low bid procurement method, TriMet may consider only price in selecting a contractor. However, a competitive, best value RFP process allows TriMet to select a CM/GC services contractor upon consideration of many factors, including price. Use of the competitive RFP process allows TriMet to consider such factors as experience in similar work, schedule performance, cost control, attention to safety, small business utilization, workforce diversity, quality of workmanship, as well as price, when selecting the CM/GC.

TCRB Rule V(A) and ORS 279C.335(2) provide that the Board, acting in its capacity as the TCRB, may exempt a contract from low 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.

Pursuant to ORS 279C.335(5), TriMet must 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 January 3, 2024. There were no attendees, and no comments were received.

The agency's written Findings in support of the competitive bidding exemption for a CM/GC services contractor for the Track Rehabilitation Program are attached as Exhibit A. These Findings are required by ORS 279C.335.

5. 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 TriMet for the Program, based on the criteria included in the RFP.

6. Diversity

Use of the competitive RFP process will allow TriMet to consider the potential CM/GC contractor's certified small business subcontracting plan, as well as its internal workforce diversity when selecting the most qualified CM/GC contractor.

7. Financial/Budget Impact

The cost of the work is included in the Engineering, Construction, and Planning Division's FY2025 Budget and funding is expected to continue on an annual basis.

8. Impact if Not Approved

If the exemption is not approved, TriMet will be required 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.

RESOLUTION NO. 24-01-06

RESOLUTION NO. 24-01-06 OF THE TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON (TRIMET), ACTING AS THE TRIMET CONTRACT REVIEW BOARD (TCRB), AUTHORIZING AN EXEMPTION FROM LOW BID REQUIREMENTS FOR A CONTRACT FOR CONSTRUCTION MANAGER/GENERAL CONTRACTOR (CM/GC) SERVICES FOR THE TRACK REHABILITATION PROGRAM

WHEREAS, the TriMet Contract Review Board (TCRB) has authority under ORS 279C.335 and TCRB Rule V to exempt a public improvement 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 January 3, 2024 on the Agency's draft written Findings in support of an exemption from competitive bidding requirements for a public improvement contract 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 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, relied on to exempt from competitive bidding requirements the contract for specified construction Program, 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 construction Program, subject to final Board approval of the contract award.

Dated: January 24, 2024

Presiding Officer

Attest:

Recording Secretary

Approved as to Legal Sufficiency:

Legal Department

EXHIBIT A

RESOLUTION NO. 24-01-06

FINDINGS IN SUPPORT OF LOW BID EXEMPTION

Track Rehabilitation Program

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 (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. Public safety;
6. Market conditions
7. Technical complexity; and
8. Funding sources;

B. Summary Description of the Track Rehabilitation Program

There are several locations along the original Banfield Light Rail Alignment, which opened in 1986 and was extended in 1994, where the light rail trackway is in need of repair in order to continue to support the long-term operation of light rail on this alignment. Additionally, there are several locations along the Mall Light Rail Alignment, which expanded the system in 2007, where the light rail trackway built in a tight urban environment is in need of repair in order to continue to support the long-term operation of light rail on this alignment. TriMet performs regular visual inspection of its light rail lines. Every two years, it also measures all aspects of the rail to determine the rate of wear of the rail and analyze various safety conditions.

The Track Rehabilitation Program (Program) performs the needed repairs by replacing special trackwork, road crossing panels, degraded timber crossties with new concrete crossties, and old, worn rail with new rail, in a series of discrete locations and/or scopes (Elements). The locations are identified in TriMet's Capital Asset Management and Investment Plan.

The new track structures will minimize the increasing preventative maintenance work along the Banfield. Additionally, where possible, the Program will take advantage of working concurrently with shutdowns for other work, in order to minimize service disruptions.

C. Critical Factors

Construction within and adjacent to the operating TriMet light rail system must be conducted with extreme attention to public safety. Designs must take into consideration specific construction means and methods in order to allow advanced planning of the construction sequence and limitations on the construction activities. Furthermore, portions of the light rail alignment are extremely active, serve multiple rail lines, and/or are located in tight and busy urban environments. It is critical that disruption to public transit be minimized during construction. Also, construction access and staging alternatives must be developed and evaluated to limit the impacts of construction staging. Construction activity must be completed within the shortest possible schedule windows in order to minimize impacts to customers and TriMet's operations personnel.

Additionally, Elements in certain locations along the alignment may require significant coordination with adjacent agencies and UPRR, as well as any concurrent TriMet work in the area.

Access to neighborhoods, businesses, trails, and transportation facilities must be coordinated and maintained.

D. Findings

1. Operational, budget and financial data

The budget for the Program is fixed and has limited contingency. Because of the complex interactions between the construction work and TriMet's operations and customers, extremely short construction durations, variable existing material conditions, and contractor assumptions about means and methods inherent in the traditional design-bid-build process; an alternative approach is desired 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 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.
Additionally, contractor selection based on experience, resources, and specialized equipment ensures the work can be performed as expeditiously as possible and with maximum return on investment.

2. Public benefits

The public will benefit from the shortest design/permit/construction schedule by avoiding risks of construction schedule delays and associated costs, minimizing changes to scope due to permit requirement uncertainty, and keeping the project on schedule.

The public will benefit directly from a design that considers contractor means and methods, and

involving the contractor early to develop specific staging and access plans for temporary public and construction access. This is especially beneficial for Elements along the 4 mile corridor sandwiched between I-84 and UPRR railroad with very limited access. It is critically important for this Program to maintain temporary transit service 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 and increase 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 Program 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 from the existing conditions to the temporary public access needed during construction through the completion of the Program.

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 design enhances the value engineering opportunities. Options can be considered while the design is being finalized, without the need to issue change orders during construction. Options also may 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 ideas in line with the design schedule. Additionally, the owner realizes 100% of savings initiated during design.

One of the key opportunities for value engineering is reduction of the risk to temporary access. Some Elements will likely require temporary access either from the UPRR or ODOT ROW. Planning and designing temporary access requires insight into the contractor's means and methods.

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 temporarily impacting the existing configuration between UPRR and ODOT for improved construction access is paramount. A negotiated procurement will allow the contractor to weigh in on demolition, turn radii, slopes, materials,

and operating constraints so as to reduce the risk of delay during construction.

4. Specialized expertise required

This Program will require expertise in the high-production, mechanized demolition and construction of crossties, rail, and ballast for an electrified light rail system. The contractor will have to complete the required scope of work with higher productions than we've ever seen on TriMet property. 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 mechanized track replacement and be capable of successfully performing throughout our narrow corridor and under OCS wire.

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. Low bid entails more risk that the necessary special expertise may not be obtained.

5. Reducing risks to the agency

Elements of the Program may be constructed in conjunction with shutdowns for other work to minimize service disruptions.

The planning for the construction of this Program must occur simultaneously with construction planning of other work. TriMet has a substantial interest in the success and cost effectiveness of all capital improvement projects.

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 Program during construction. By extension, avoiding delays to this Program will avoid delays other concurrent work.

6. Public safety

TriMet seeks to reduce the public safety risk as much as possible. The Program site includes close proximity to operating light rail and pedestrian access to and from light rail stations. The Program site may also include traction power and signals wayside materials and equipment. Working safely around these related systems and the public is critical to Program success. TriMet plans to continue its operations during some of the preparatory demolition and finish work, only temporarily shutting down service when necessary. TriMet requires a contractor with a successful performance record for safety and protection of the public and safety critical equipment during this type of work. A non-low bid procurement allows TriMet to evaluate the contractor's operating system experience and record in working safely and effectively near the public, and its 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. A non-low bid approach allows TriMet to consider the best contractor to safely work around our safety critical equipment and minimize damage to this equipment which has both safety and schedule implications.

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 special trackwork, insulated joints, or concrete crossties, have fluctuated recently. 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, and ensure that 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 material procurement schedule certainty.

8. Technical complexity

Electrified light rail track 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 Signals, OCS, and Substations specifically, or the nearest equivalent. Additionally, some Elements may be trackway within a long, constrained site. This requires complex planning and coordination with multiple disciplines of construction contractor and TriMet operations and maintenance personnel.

Finding: The technical complexity involved in the Project requires a contractor who has been successful with construction adjacent to operating rail lines, while minimizing disruption to transit service. Low bid procurement does not allow for evaluation and scoring of bidder's technical qualifications in these areas. Failure to perform the work in accordance with the agreed-upon Program objectives would result in adverse impacts to the public and TriMet operations personnel, as well as adverse cost impacts to TriMet. A non-low bid approach allows TriMet to select a contractor giving due consideration to the contractor's past performance on similar projects.

9. Unlikely to Encourage Favoritism or Substantially Diminish Competition

The steps taken to ensure maximum competition and fair opportunity for this Program will include advertisement in the Daily Journal of Commerce and on TriMet's public procurement system, TriP$, which is available on the TriMet website. Further steps will include scheduling a pre-proposal conference, and appointment of 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.

By allowing contractors to develop their proposed work plan and to incorporate their value engineering and design ideas into the design and construction, the negotiated process will, in fact, encourage competition for this Program among contractors with accomplished performance records and competitive pricing.

A best value procurement process 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 a traditional low-bid procurement.

10. Funding sources

Funding for the Program 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.

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.